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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

State of Arizona, et al.,

Plaintiffs,

v.

United States Department of Homeland Security, et al.,

Defendants.

No. 2:21-cv-00186-SRB

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

"The federal power to determine immigration policy is well settled." *Arizona v. United States*, 567 U.S. 387, 395 (2012); *see* U.S. Const. art. I, § 8, cl. 4. Congress vested the Secretary of Homeland Security with broad statutory authority to establish "national immigration enforcement priorities," 6 U.S.C. § 202(5), and to "issue such instructions" and "perform such other acts as he deems necessary for carrying out his authority." 8 U.S.C. § 1103(a)(3). At "each stage" of the removal process—"commencing proceedings, adjudicating cases, and executing removal orders"—"the Executive has discretion to abandon the endeavor"—whether "for humanitarian reasons or simply for its own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) (*AADC*) (alterations and citation omitted).

In this action, Arizona and Montana challenge the manner in which the Executive has exercised its inherent and statutory discretion to set immigration enforcement priorities. On January 20, 2021, the then–Acting Secretary of Homeland Security issued a Memorandum reallocating limited resources to focus on challenges at the southwest border and to focus on maintaining precautions in light of the ongoing COVID-19 pandemic. As relevant here, the Memorandum paused execution of certain removal orders for 100 days while the Department of Homeland Security (DHS) conducted a more complete review of its enforcement policies.

The States seek to displace the Executive's longstanding authority to set enforcement priorities; they wish to dictate to the Executive which noncitizens must be removed, and when. Their efforts, invoking the Administrative Procedure Act (APA), fail first because they lack standing. Their alleged injuries are wholly speculative and caused, if at all, by the independent acts of third parties. The States' claims also fail to clear four threshold obstacles to an APA action: (i) enforcement prioritization is committed to agency discretion by law; (ii) Congress has precluded judicial review of decisions related to removal orders; (iii) the States are outside of the zone of interests of the relevant statute; and (iv) the Memorandum is not final agency action. Moreover, each of the APA claims fails on the merits. Finally, the equities and public interest overwhelmingly favor denying an injunction—especially because the policy the States seek to enjoin is already enjoined nationwide. The Court should deny the States' Motion and

dismiss the Amended Complaint. *See Munaf v. Geren*, 553 U.S. 674, 691-92 (2008).

BACKGROUND

Statutory and Regulatory Background

The Immigration and Nationality Act ("INA") establishes the framework for arresting, detaining, and removing noncitizens who are illegally present in the United States. "[A] principal feature of th[is] removal system is the broad discretion exercised by immigration officials." *Arizona*, 567 U.S. at 396.[1]

For noncitizens apprehended by DHS, removability is determined by an immigration judge or officer in a removal proceeding. *See* 8 U.S.C. § 1229a; *see also, e.g.*, 8 U.S.C. § 1225(b)(1) (expedited administrative proceedings). DHS exercises its discretion to initiate a removal proceeding by filing a Notice to Appear with the immigration court. *See, e.g.*, 8 U.S.C. § 1229(a); 8 C.F.R. §§ 1003.13, 1003.14. The immigration judge then determines whether the noncitizen is removable and, if so, whether to enter an order of removal or to grant relief or protection from removal. 8 U.S.C. § 1229a(a); 8 C.F.R. § 1240.12. The noncitizen may appeal the removal order to the Board of Immigration Appeals (BIA). 8 C.F.R. § 1003.1(b). If the BIA dismisses the appeal, the noncitizen may petition for review of the decision by a court of appeals, and may request a stay of removal pending judicial review of the order. 8 U.S.C. § 1252(a)(5).

Once a noncitizen has an administratively final order of removal, *see* 8 U.S.C. § 1101(a)(47)(B), not subject to a judicial stay, *see* 8 U.S.C. § 1231(a)(1)(B)(ii), DHS may exercise additional discretion on how to proceed. *See, e.g.*, 8 C.F.R. § 241.6 (discretion regarding administrative stays of removal). Section 1231 sets a "removal period" of 90 days that begins when the removal order becomes "administratively final" or when certain other criteria are satisfied. 8 U.S.C. § 1231(a)(1). But § 1231 also authorizes supervision after that 90-day period, "[i]f the alien does not leave or is not removed within the removal period." *Id.* § 1231(a)(3).

Each removal effort requires an individualized combination of resources: the process varies depending on the destination country, and removals require considerable coordination and effort. DHS must ensure the noncitizen has appropriate paperwork required by the

[1] Internal quotation marks and citations are omitted throughout, unless otherwise stated.

destination country and must coordinate the logistics of removal. The process for executing removal orders has been further complicated by the ongoing COVID-19 pandemic.

Factual and Procedural Background

On January 20, 2021, the then–Acting Secretary of Homeland Security issued a Memorandum that ordered a review of enforcement policies and redirected resources to new priorities in the interim. *See* Am. Compl. (FAC) Ex. A, ECF. No. 12-1 (Memorandum). The Memorandum has three substantive parts. In Section A, the Acting Secretary ordered DHS components to review current policies. Section B set interim priorities for immigration enforcement. And Section C temporarily suspended, for 100 days, the execution of certain removal orders so that "DHS's limited resources" could be shifted to "provide sufficient staff and resources to enhance border security" and other operations at the southwest border and to "protect the health and safety of DHS personnel" and the public in light of the ongoing COVID-19 pandemic. *Id.* at 3-4. During this period DHS would continue to execute final orders of removal for the highest priorities, including national security risks and recent arrivals.

On January 26, the District Court for the Southern District of Texas entered a temporary restraining order enjoining the Government, on a nationwide basis, from implementing Section C; the same court later entered a nationwide preliminary injunction to the same effect. *See Texas v. United States*, 2021 WL 723856 (S.D. Tex. Feb. 23, 2021). Section C's 100-day pause is set to expire on April 30, 2021.

More than six weeks after the Memorandum issued, Plaintiffs Arizona and Montana sought their own injunction of Section C of the Memorandum.[2] ECF No. 17. The States bring

[2] The States also reference a subsequent February 18, 2021 "Guidance" memorandum issued by the Acting Director of Immigration and Customs Enforcement. *See* FAC Ex. G, ECF No. 12-1 at 40-46 (Guidance). That Guidance implements Section B of the January 20 Memorandum; it "does not implement or take into account" Section C of the January 20 Memorandum. *Id.* at 2. Because the Guidance does not implicate or "embod[y]" the policy that the States object to (the 100-day pause in Section C), the Court need not address it. *See, e.g.*, Mot. for Prelim. Inj. at 3, ECF No. 17 (Mot.); FAC ¶¶ 2-4, 8-9, 35, 43-46, 73; Pls.' Proposed Order ¶ 4, ECF 13-2; *see also* Amicus Br. of Immigration Reform Law Institute (IRLI Br.) at 6-7, ECF No. 23 (recognizing Plaintiffs' focus on the pause). To the extent that the Court believes this action does implicate the February 18 Guidance, Plaintiffs' challenges

claims under the APA, contending that Section C is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedures required by law." *See* FAC ¶¶ 79-80, 87, 91, 93, ECF No. 12. One of the States' APA claims relies on two purported "agreements" between each state and DHS that a subordinate official in DHS signed in the weeks prior to President Biden's inauguration. *See* FAC Ex. C, ECF No. 12-1 at 28; FAC Ex. H, ECF No. 12-1 at 55. Those documents—which DHS has terminated, FAC Ex. F, ECF No. 12-1—purport to permit a single state or locality to halt nationwide immigration policy for 180 days by requiring DHS to "[c]onsult with" the States "before taking *any action* or making *any decision* that could reduce immigration enforcement, increase the number of illegal aliens in the United States, or increase immigration benefits or eligibility for benefits for removable or inadmissible aliens." FAC Ex. C, ECF No. 12-1 at 22-23.

ARGUMENT

To obtain preliminary injunctive relief, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm absent preliminary relief; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *see Hall v. USDA*, 984 F.3d 825, 835 (9th Cir. 2020). "A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012).

I. The States Cannot Establish Standing, Much Less Irreparable Harm.

To establish standing to "seek injunctive relief, a plaintiff must show that" it "is under threat of suffering" an "actual and imminent" injury caused by "the challenged action," and that "a favorable judicial decision will prevent" that injury. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). The "threatened injury must be certainly impending"; allegations of "possible future injury do not satisfy" Article III. *Whitmore v. Arkansas*, 495 U.S. 149, 158

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are barred for substantially the same reasons as set out in this briefing, and as elaborated in Defendants' recently filed briefing in the Middle District of Florida. *See* Resp. to Pl.'s Mot. for PI, *Florida v. United States*, ECF No. 23, No. 8:21-cv-00541-CEH-SPF (M.D. Fl. Mar. 23, 2021).

(1990).

The States' case fails at the outset because they cannot demonstrate any "certainly impending" injury, much less irreparable harm, that they will suffer "imminent[ly]" because of the policy they challenge. Indeed, the States sue to enjoin a policy that has already been enjoined nationwide. The government has not sought a stay of that injunction and the challenged policy will expire at the end of 100 days, on April 30, 2021.

The States' entire theory of injury thus rests on the speculative factual assumption—insufficient for standing or irreparable harm—that the government would first seek and then *obtain* appellate relief before April 30. That possibility is not "sufficiently imminent" to support injunctive relief against a government policy that is not currently operative. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). Where the challenged action has already been enjoined and there is no demonstrated likelihood of it being reinstated, courts have recognized that a redundant preliminary injunction would be a misuse of judicial resources. *See, e.g.*, *Nat'l Urb. League v. DeJoy*, 2020 WL 6363959, at *8 (D. Md. Oct. 29, 2020). The equitable power to enter an injunction should be reserved for those circumstances necessary to avert irreparable harm. Where the challenged action could not be expected to occur, a second injunction would serve no functional purpose and a motion inviting one should be denied.

But irrespective of the preliminary injunction entered over one month ago (itself an extension of a TRO entered two months ago), the States have not demonstrated how the challenged policy, were it now to go into effect, would cause them any injury, let alone irreparable injury.[3] To start, the States appear to fundamentally miscomprehend the scope and effect of the policy they challenge. The States contend that "a blanket moratorium on removals

[3] Following the States' lead, Defendants focus on the alleged injury to Arizona. Montana asserts an injury to its citizens from an increase in drugs trafficked from Mexico. *See* Mot. at 19-20. Montana makes no effort to show how the challenged policy—whose very purpose is to shift enforcement resources to the southwest border and to removal of recent arrivals—would increase drug trafficking. In any event, such an injury is not to Montana itself; Montana cannot invoke an injury to its citizenry—a *parens patriae* argument—in a suit against the federal government. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011); *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 610 n.16, (1982); *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923).

will encourage additional unauthorized immigration to Arizona" and thereby increase the costs attendant to an increased population. Mot. at 16-17. But the Memorandum does not institute a "blanket" moratorium; it expressly continues removals for noncitizens arriving after November 1, 2020. It therefore does not encourage additional immigration, *id.* at 18-20, because new arrivals would remain subject to removal even during the 100-day pause.

Nor could the States rely for standing on any increase in population in any event. As one district court explained in rejecting a similar challenge from the then-Maricopa County Sheriff, "a state official has not suffered an injury in fact to a legally cognizable interest" when "a federal government program is anticipated to produce an increase in that state's population and a concomitant increase in the need for the state's resources." *Arpaio v. Obama*, 27 F. Supp. 3d 185, 202 (D.D.C. 2014), *aff'd*, 797 F.3d 11 (D.C. Cir. 2015). Such an injury is a generalized grievance; to accept it "would permit nearly all state officials to challenge a host of Federal laws simply because they disagree with how many—or how few—Federal resources are brought to bear on local interests." *Id.* The States' purported injuries here are similarly a generalized complaint that federal policy will have downstream effects on state spending.[4]

When, as here, "the plaintiff is not himself the object of the government action or inaction he challenges, standing is . . . substantially more difficult to establish." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992). The States cite three cases that they contend support standing in this context. Mot. at 22-23. But each is readily distinguishable. In *Washington v. DeVos*, the state challenged a regulation that *directly* constrained how the state could distribute money it received under a federal grant program. *See* 466 F. Supp. 3d 1151, 1160-61 (E.D. Wash. 2020). In *East Bay Sanctuary Covenant v. Trump*, the plaintiffs—organizations—demonstrated that the rule would directly alter the services they provided. 950 F.3d 1242, 1266 (9th Cir. 2020), *revised*, Mar. 24, 2021. And in *California v. Azar*, the plaintiff states demonstrated that private entities would respond to the rule in a predictable way that would require the states

[4] This Court previously presumed that Arizona had standing to challenge federal immigration policy *in toto*. *See United States v. Arizona*, 2011 WL 13137062, at *2 (D. Ariz. Oct. 21, 2011). Here, however, the States challenge a specific policy; any alleged injuries must be fairly traceable to that policy.

to spend money. 911 F.3d 558, 572 (9th Cir. 2018).

The States' theories of standing here are of another kind entirely. Take first the assertion that the States will incur more medical expenses caring for noncitizens. Even crediting that this is true—and the States have not shown that a policy focusing on border security and recent arrivals will, on net, increase the noncitizen populations in their states, *cf. Arpaio*, 797 F.3d at 15—such expenses, if they occur, would be the result of a series of events wholly unrelated to the challenged action, including noncitizens needing medical care, noncitizens not paying for that care, healthcare providers requesting the States to pay, and the States in fact paying without federal Medicare or Medicaid reimbursement. *See, e.g.*, *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 43 (1976). Consider next the suggestion that there will be in an increase in crime by noncitizens. This allegation, too, would be the result of "unfettered choices made by independent actors," *Lujan*, 504 U.S. at 562; the policy does not encourage or cause any noncitizen to perform an illegal act. *Compare Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (finding standing based on "the predictable effect of Government action on the decisions of third parties"). Nothing about the challenged policy would affect or influence noncitizens' decisions to seek medical care or to commit crimes; the States therefore cannot demonstrate standing. *See Levine v. Vilsack*, 587 F.3d 986, 992 (9th Cir. 2009) (when injury turns on third parties' actions, a plaintiff must show that the challenged conduct has a "determinative or coercive effect upon the action of someone else").

The States also cannot rely on the purported agreements to establish standing. *See* Mot. at 14, 16. Even if those agreements were valid and enforceable, which they are not, *see infra* section II.B.3.ii, injury is a jurisdictional requirement and must be established as a matter of fact; standing cannot be manufactured via agreement. *See United States v. Johnson*, 319 U.S. 302, 304-05 (1943); *cf. Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Nor can the States rely on the "procedural" nature of some of their claims to establish standing or to evade the requirements for preliminary relief, *contra* IRLI Br. at 4. *See Lujan*, 504 U.S. at 578 (holding that a plaintiff asserting "procedural injury" could not establish injury-in-fact absent a distinct "concrete injury").

II. The States' APA Claims Lack Merit.

A. The States cannot clear four threshold obstacles to their APA claims.

The States bring their claims under the APA, 5 U.S.C. § 706, but "[t]o invoke these provisions," the States "must first get past the threshold obstacle[s]" set out in the APA. *Shaltry v. United States*, 87 F.3d 1322 (9th Cir. 1995); *see City of Oakland v. Lynch*, 798 F.3d 1159, 1165 (9th Cir. 2015). The States cannot meet four, independent requirements to bring this action.

1. The challenged action is "committed to agency discretion by law."

"[T]he APA does not apply to permit judicial review or permit a reviewing court to compel agency action where 'agency action is committed to agency discretion by law.'" *United States v. Arizona*, 2011 WL 13137062, at *9 (D. Ariz. Oct. 21, 2011) (quoting 5 U.S.C. § 701(a)(2)). As this Court recognized in an earlier action by Arizona challenging what Arizona thought inadequate enforcement of immigration laws, "enforcement decisions, including the decisions to prioritize agency resources and act on agency determined priorities, are committed to the discretion of" the Executive. *Id.* at 9 n.6; *see California v. United States*, 104 F.3d 1086, 1094 (9th Cir. 1997); *see also Morales de Soto v. Lynch*, 824 F.3d 822, 827 (9th Cir. 2016).

This longstanding doctrine bars Arizona's substantive challenges here: The Acting Secretary exercised his inherent and statutory authority to defer, for a brief period, execution of certain final orders of removal so that resources could be shifted to other more pressing priorities. *See Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 967 (9th Cir. 2017). This type of discretion is especially important in immigration enforcement. "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). A "principal feature of the removal system," therefore, "is the broad discretion exercised by immigration officials." *Arizona*, 567 U.S. at 396. The Executive must consider a host of issues not present even in ordinary enforcement decisions, such as the "dynamic nature of relations with other countries" and the need for enforcement policies to be "consistent with this Nation's foreign policy with respect to these and other realities." *Id.* at 397.

Many weighty priorities in a nationwide immigration system compete for limited resources. The brief pause on some removals was thus undertaken to shift resources to DHS's

other statutory responsibilities like border security, while continuing to remove higher priority noncitizens—including recent arrivals. Although the States attempt to brand the pause as an "abdicat[ion]" of statutory duty, FAC ¶ 4, that contention ignores the basic executive prerogative to choose to shift scarce enforcement resources to noncitizens newly entering the country instead of those already here. Whether to enforce a law in a particular instance or set of instances "involves 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" and "whether the particular enforcement action requested best fits the agency's overall policies." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

In an effort to evade the clear unreviewability of this discretion, the States suggest that Congress limited the Secretary's discretion by providing that "the [Secretary] shall remove" a noncitizen subject to a final order of removal "within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A); *see* Mot. 3-4, 13-14. But the INA equally has provisions governing when a noncitizen "is not removed within the removal period" of 90 days. 8 U.S.C. § 1231(a)(3). Thus, as the Supreme Court observed in *Zadvydas v. Davis*, it is doubtful that Congress "believed that all reasonably foreseeable removals could be accomplished in that time." 533 U.S. 678, 701 (2001); *see also Arizona Dream Act Coal.*, 855 F.3d at 976-77. "[W]hen used in a statute prospectively affecting government action," "'shall' is sometimes the equivalent of 'may.'" *Richbourg Motor Co. v. United States*, 281 U.S. 528, 534 (1930).

The Supreme Court has thus admonished that a statute directing enforcement—even one using the word "shall"—does not, standing alone, displace the Executive's inherent authority to exercise enforcement discretion. Congress displaces the presumption of unreviewability only if it "limit[s] an agency's exercise of enforcement power . . . either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Chaney*, 470 U.S. at 833. But a provision that merely directs that the enforcement authority "shall" enforce a law offers no such limitations. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005) (the "deep-rooted nature of law-enforcement discretion" persists "even in the presence of seemingly mandatory commands").

In *Castle Rock*, a statute provided that law enforcement "shall arrest . . . or . . . seek a warrant" for the arrest of any violator of a restraining order, but the Supreme Court rejected the notion this imposed a mandatory duty; to be "a true mandate of police action would require some stronger indication" of legislative intent than the bare "shall." *Id.*

Such is the case here. And the statutory and practical context here clarify beyond doubt that Congress set 90 days only as a "target," and not as a mandate. H.R. Rep. 104-469, pt. 1, at 160 (1996); *see Bhd. of Ry. Carmen Div. v. Pena*, 64 F.3d 702, 704 (D.C. Cir. 1995) ("absent a clear indication that Congress intended otherwise, we will deem a statutory deadline to be directory" rather than "mandatory"). The meaning of "shall" in a statute—"must," "'should,' 'will,' or even 'may'"—depends on context. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995). The most important context here is the statute's subject matter: Executive enforcement of immigration law. The Court should not lightly infer from a naked "shall" an intent to displace such a core Executive function as discretion. *See Chaney*, 470 U.S. at 832; *Castle Rock*, 545 U.S. at 761; *cf. Sierra Club v. Whitman*, 268 F.3d 898, 903-05 (9th Cir. 2001) (non-enforcement unreviewable under "shall" statute in Clean Water Act).

Congress vested the Secretary with broad discretion to set immigration enforcement priorities. 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a)(3). This Court lacks jurisdiction to review the Acting Secretary's decision temporarily not to execute certain removal orders.

2. Congress has precluded judicial review of these types of decisions.

An action also cannot proceed under the APA when another statute precludes review. 5 U.S.C. § 701(a)(1). Whether a particular statute precludes review "is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). A detailed mechanism for review of some claims by some plaintiffs is "strong evidence that Congress intended to preclude [other plaintiffs] from obtaining judicial review." *United States v. Fausto*, 484 U.S. 439, 448 (1988).

Congress was explicit that only *noncitizens* could obtain judicial review of the type the States seek. Section 1252(a)(5) provides that "[*n*]*otwithstanding any other provision of law*," "a

petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of an order of removal." And § 1252(b)(9) states that "[j]udicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section."

Section 1252(b)(9) thus channels judicial review of all "decisions and actions leading up to or consequent upon final orders of deportation" into one proceeding exclusively before a court of appeals. *AADC*, 525 U.S. at 483, 485. (A separate—and even more limited—scheme governs judicial review of expedited removal orders. *See* 8 U.S.C. § 1252(a)(2)(A); *id.* § 1252(e).) This provision circumscribes district court jurisdiction over "*any* issue—whether legal or factual—arising from *any* removal-related activity," which "can be reviewed *only* through the [statutorily defined] process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029-31 (9th Cir. 2016); *see Aguilar v. ICE*, 510 F.3d 1, 9 (1st Cir. 2007) (similar). That includes "policies-and-practices challenges," *J.E.F.M.*, 837 F.3d at 1035, arising from any "action taken or proceeding brought to remove an alien," 8 U.S.C. § 1252(b)(9), whether or not the challenge is to an actual final order of removal or whether there even is a final order at all. *J.E.F.M.*, 837 F.3d at 1032.

Because the States here seek to compel the execution of removal orders, their claims "arise[] from" "action[s] taken or proceeding[s] brought to remove" noncitizens in the first instance. 8 U.S.C. § 1252(b)(9). The challenged action here is unmistakably confined to briefly deferring enforcement of a removal order, and nothing more. Section 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 485, and for all "challenges inextricably linked with actions taken to remove migrants from the country," *E. Bay Sanctuary Covenant*, 950 F.3d at 1269. Because only § 1252 provides judicial review, and because the States cannot invoke that provision, their claims necessarily fail.

Underscoring that the statute precludes review of the sort the States seek—whether DHS is complying with § 1231—Congress expressly barred review of any claim, by *any* party, invoking § 1231 against the government. 8 U.S.C. § 1231(h). That provision "limit[s] the

circumstances in which judicial review . . . is available," *Zadvydas*, 533 U.S. at 688. *See also infra* section II.A.3 (discussing § 1231(h) in terms of zone of interests).

These multiple statutory provisions *expressly* preclude review in district court, and over the substantive and procedural issues raised here. *See* 5 U.S.C. § 701(a)(1). But even in their absence, judicial review would still be precluded. *See Block*, 467 U.S. at 345 (judicial review may be precluded by statutory structure and other context). The detailed scheme Congress has established carefully restricts judicial interference with Executive discretion in immigration enforcement. Thus, even as Congress set a 90-day removal period, it enacted numerous provisions "aimed at protecting the Executive's discretion from the courts." *AADC*, 525 U.S. at 486-87. *See, e.g.*, 8 U.S.C. §§ 1226(e); 1226a(b)(1); 1229c(f); 1231(h); 1252(a)(2)(A), (a)(2)(B), (a)(2)(C), (b)(4)(D), (b)(9), (d), (f), (g).

The States may object that this statutory review scheme does not offer a means for a *state* to challenge any decision related to removal. *Cf. Ayuda, Inc. v. Reno*, 7 F.3d 246, 250 (D.C. Cir. 1993) (holding that organizational plaintiff could not challenge INS policies "that bear on an alien's right to legalization"). But that is precisely the point: the detailed mechanism for review of *some* claims by *some* parties, is "strong evidence that Congress intended to preclude [other plaintiffs] from obtaining judicial review." *Fausto*, 484 U.S. at 448. Thus, in *Fausto*, the Supreme Court concluded that the "deliberate exclusion" of certain types of employees from administrative and judicial review provisions related to federal employment prevented those employees from seeking relief *at all*. *Id.* at 455. Similarly, in *Block*, Congress provided a specific review scheme for "dairy handlers" but not for "consumers." 467 U.S. at 346-47. This did not mean that milk consumers could resort to the APA to challenge the agency action; it meant they could not challenge the action at all. *Id.* at 347. Just so here.

3. The States fall outside the "zone of interests" of the relevant statute.

Among the threshold obstacles that an APA plaintiff must clear is to show that it is "aggrieved . . . within the meaning of a relevant statute." 5 U.S.C. § 702. The Supreme Court has long "held that this language establishes a regime under which a plaintiff may not sue unless he falls within the zone of interests sought to be protected by the statutory provision

whose violation forms the legal basis for his complaint." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177 (2011). A plaintiff "suing under the APA must satisfy" the zone-of-interests test. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). If the plaintiff is outside the zone of interests, then all his APA claims—including claims that the challenged action is arbitrary or capricious or failed to follow required procedures—fail as a matter of law. *See, e.g.*, *Mendoza v. Perez*, 754 F.3d 1002, 1016 (D.C. Cir. 2014).

Congress could scarcely have been clearer in its intent to preclude the States' claims in this case. The focus of the zone-of-interests inquiry is "whether [the plaintiff] falls within the class of plaintiffs whom Congress has authorized to sue" under the applicable statute—a question answered "using traditional tools of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). Section 1231, the "statute that [the States] say[] was violated," *Patchak*, 567 U.S. at 224, expressly provides that "[n]othing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by *any party* against the United States or its agencies or officers or any other person," 8 U.S.C. § 1231(h) (emphasis added). Congress was unmistakable that it wanted no party to judicially enforce § 1231. *See Arizona*, 2011 WL 13137062, at *11 n.8 ("[I]t is not clear that Arizona has any rights under 8 U.S.C. § 1231 that it can seek to vindicate.").[5]

The Tenth Circuit thus interpreted an almost identical statutory provision to bar a claim seeking injunctive relief against the government. *Hernandez-Avalos v. INS*, 50 F.3d 842, 844 (10th Cir. 1995). The plaintiff had invoked a statute directing that "the Attorney General shall begin any deportation proceedings as expeditiously as possible," 8 U.S.C. § 1252(i) (since amended), but a separate provision stated, just like § 1231(h), that "nothing" in that section "shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against" the government. *Hernandez-Avalos*, 50 F.3d at 844. The court applied the "zone of interests" test applicable to APA actions and readily concluded that the

[5] The district court in *Texas v. United States* concluded otherwise by interpreting the term "any party" in § 1231(h) to mean only "any alien." 2021 WL 723856, at *24-27. That narrow interpretation is contrary to the statutory text and Congress's broader purpose to shield Executive discretion from judicial interference.

statute "means that no one can satisfy the zone of interests test," and that "no would-be plaintiff" could bring suit, either directly or indirectly. *Id.*; *accord Campos v. INS*, 62 F.3d 311, 314 (9th Cir. 1995) (favorably citing legislative history stating that the same statutory language "clarifies that . . . the requirement in current law of speedy deportation for criminal aliens do[es] not create enforcement rights against the United States").

This is unsurprising: § 1231 concerns the manner in which the Executive enforces immigration laws set by Congress. As evidenced in a series of statutory provisions, Congress "aimed at protecting the Executive's discretion from the courts," *AADC*, 525 U.S. at 486-87. Faithful to this purpose and the attendant statutory text, courts have consistently recognized the limitations on enforcing § 1231 with respect to noncitizens and sovereign entities alike. Under § 1231(h), a party may not "sue directly under § 1231, or indirectly" under other provisions, to compel that "the [Secretary] [] remove [an] alien from the United States within a period of 90 days." *Ncube v. I.N.S. Dist. Directors & Agents*, 1998 WL 842349, at *12 (S.D.N.Y. Dec. 2, 1998); *see also Channer v. Hall*, 112 F.3d 214, 216 (5th Cir. 1997).[6]

4. The challenged action is not "final agency action."

For yet another independent reason, the States' APA claims all fail. The APA allows challenges only to "final agency action." 5 U.S.C. § 704. Agency action is "final" under the APA only if it both is "the consummation of the agency's decisionmaking process" and also determines "rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). The States challenge a policy of deferring enforcement for a brief period; that policy does not determine or alter any individual's legal rights or obligations, or whether any individual will ultimately be removed, and so is not "final" under the APA.

The Memorandum does not change any person's legal status, determine any legal benefits, or reverse any final order of removal. Quite the opposite: noncitizens subject to a final order of removal have no more legal right to remain in the United States after the Memorandum than they did before. That point is underscored by the Memorandum's plain

[6] It is no answer that the Supreme Court did not view § 1231(h) as an obstacle to *habeas* review in *Zadvydas*. For one, the petitioners did not seek to enforce § 1231 "against" the United States. For another, there is no "zone of interests" analogue in a habeas action.

text indicating that it does not "create any right or benefit." Memorandum at 4. The Memorandum is therefore simply a temporary shift in priorities. Such a policy is not "final agency action" because the agency's discretionary decision not to enforce a law against a private party in particular circumstances does not make that party's underlying conduct lawful.

B. The States' APA claims fail on the merits.

As just explained, four doctrines preclude the States from pursuing their claims under the APA.[7] But even if the States could pursue those claims, they would fail on the merits.

1. The Memorandum is not "contrary to law."

As explained above, § 1231(a)(1) does not require the Secretary to remove every noncitizen subject to a final order of removal within 90 days. *See supra* section II.A.1. Rather, he retains the discretion to prioritize among competing cases that is implied in any statute directing enforcement. The Acting Secretary's decision to temporarily defer the execution of some removal orders—while pursuing others, including for noncitizens who arrived after November 1, 2020—is a lawful exercise of Executive enforcement discretion.

The States lean almost exclusively on a decision from the Southern District of Texas that reached a contrary conclusion. *See* Mot. at 13 (quoting *Texas*, 2021 WL 723856). Respectfully, Defendants believe that this non-binding decision is incorrect. The court in that case crafted an "exception" to the doctrine set out in cases like *Castle Rock* that is not only absent from precedent but is in fact directly contradicted by *Castle Rock* itself. The *Texas* district court correctly recognized that precedent required "some stronger indication" than a naked "shall" for a statute to displace an executive's enforcement discretion. 2021 WL 723856, at *34. It erred, though, in concluding that such an indication existed when "the statute's manifest purpose is to protect the public or private interests of innocent third parties." *Id.* at *35.

It is impossible to reconcile this analysis with *Castle Rock* itself: the statute there

[7] The threshold obstacles set up by § 701(a)(1) (statute precludes review), § 702 (zone of interests), and § 704 (final agency action) preclude all APA claims. Section 701(a)(2) (agency discretion) precludes the substantive claims, but does not itself preclude the States' notice-and-comment claim. As a practical matter, and as shown below, action committed to agency discretion by law will usually be exempt from notice-and-comment for other reasons.

concerned enforcement of *restraining orders* entered to benefit a "protected person." 545 U.S. at 758-59. It is difficult to conceive a statute whose purpose is more manifestly the protection of "innocent third parties." Yet the statute still preserved enforcement discretion. *Id.* at 761. Shorn of this misunderstanding of the doctrine described in *Castle Rock*, it is apparent that § 1231(a)(1) is similarly not mandatory. Indeed, § 1231 itself expressly provides for detention and removal *after* the 90-day period, *e.g.*, 8 U.S.C. § 1231(a)(3), confirming that § 1231(a)(1) is not mandatory. This Court should apply the longstanding Supreme Court precedent that recognizes that law enforcement discretion persists even in the face of a statute using the word "shall," and should reject the States' contention that the Memorandum is contrary to law.

2. The Memorandum is a reasonable effort to set enforcement priorities.

The States likewise cannot establish that the Memorandum is arbitrary and capricious. "Review under the arbitrary and capricious standard is deferential." *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 920 (9th Cir. 2018). The judiciary's "role is simply to ensure that the [agency] made no clear error of judgment that would render its action arbitrary and capricious," and courts "require only a rational connection between facts found and conclusions made." *Id.*; *see Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974) (court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned"). Here, the Acting Secretary engaged in reasoned decisionmaking.

At the outset, the Memorandum identifies two primary goals: "conduct[ing] a review of policies and practices concerning immigration enforcement," and "surg[ing] resources to the border" given the "unique circumstances" of "the most serious global public health crisis in a century." Memorandum at 1. To accomplish those goals, the Memorandum "sets interim policies" "to enable focusing the Department's resources where they are most needed." *Id.* One of those interim policies—the one challenged here—is the 100-day pause of certain removals. *Id.* at 1, 3. The Memorandum reiterates that the pause is warranted to prioritize DHS's resources, reassign staff and resources to the border, comply with COVID-19 protocols, and reassess enforcement priorities. *Id.* at 3. As the Memorandum explains, a pause will allow DHS to temporarily shift the resources that removal operations consume to instead

address the agency's new priorities, including increased border control. *See Quantum Entm't Ltd. v. U.S. Dep't of the Interior, Bureau of Indian Affairs*, 597 F. Supp. 2d 146, 152 (D.D.C. 2009) ("Nothing more than a 'brief statement' is necessary [under the APA], as long as the agency explains 'why it chose to do what it did.'").

The States' suggestion that the Memorandum's explanation is inadequate because it is missing "any evidence that DHS considered resource constraints" when adopting the Memorandum, Mot. at 9, is doubly mistaken. There is no serious dispute that DHS is charged with accomplishing numerous statutory missions with finite resources. The Memorandum is clear in its reasoning: in the Acting Secretary's judgment, it was necessary and appropriate to shift resources from one activity—removals of some noncitizens—to other activities—border control, COVID-19 protocols, and removals of higher priority noncitizens.[8] The Acting Secretary explained that "DHS's limited resources must be prioritized" to "provide sufficient staff and resources to enhance border security" and other operations at the southwest border and to "to protect the health and safety of DHS personnel and those members of the public with whom DHS personnel interact" while ensuring "that our removal resources are directed to the Department's highest enforcement priorities." Memorandum at 3. The Acting Secretary continued: "Accordingly, and pending the completion of the [more complete review of agency priorities described elsewhere in the memo], I am directing an immediate pause on removals of any noncitizen with a final order of removal (except as noted below) for 100 days." *Id.* The Acting Secretary's reasoning is apparent on the face of the Memorandum itself.

It is legally insignificant that the States want a more fulsome explanation, as "[e]ven when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may be reasonably discerned." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014). Thus, the Acting Secretary's Memorandum—an internal memorandum directing subordinates in how the Department will exercise its discretion—was not required to spell out its reasoning in any

[8] As explained above, the February 18 Guidance has nothing to do with the Memorandum's pause on removals; Defendants do not rely on the Guidance to defend the policy the States challenge. And the States offer nothing to support their assertion of "pretext."

specific level of detail. The "arbitrary or capricious standard is a deferential standard of review under which the agency's action carries a presumption of regularity." *Id.*

The States also argue that Defendants failed to acknowledge that the Memorandum constituted a change in policy, and failed to consider alternatives. But DHS "display[ed] awareness that it *is* changing position." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The Memorandum is titled "Review of and Interim *Revision* to" enforcement priorities. Additionally, an agency need not "consider all policy alternatives in reaching decision," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983); it need only "consider the alternative[s] that are within the ambit of the existing [policy]." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020); *see Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013) ("an agency must consider . . . reasonably obvious alternative[s]" that are "significant and viable"). Here, the States fail to identify a single policy alternative that is "within the ambit of existing policy" or otherwise "obvious," "significant and viable" that Defendants failed to consider. That alone dooms their claim. *Cf. N. Am.'s Bldg. Trades Unions v. Occupational Safety & Health Admin.*, 878 F.3d 271, 305-06 (D.C. Cir. 2017) ("[T]he force of the evidence and argument that [the agency] must offer to defend its choice will vary with the force of the proponent's evidence and argument."). An agency enjoys great deference when, as here, a discretionary decision "requires a complicated balancing of a number of factors which are peculiarly within its expertise." *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993). Accordingly, the Memorandum is not arbitrary and capricious.

3. The Memorandum complied with procedures required by law.

i. Notice-and-comment procedures are not required to set enforcement guidelines.

Section C of the Acting Secretary's Memorandum is exempt from the APA's notice and comment requirements; it is a "general statement of policy" under the APA. 5 U.S.C. § 553(b)(A). Agency actions setting enforcement priorities, such as the Memorandum, are not subject to notice-and-comment rulemaking for the reasons similar to those that shield them from substantive review. An agency is not required to use notice-and-comment procedures when changing its general enforcement policies because to do so would hamper the exercise

of the agency's discretion. *See* 1 Richard J. Pierce, Jr., Administrative Law Treatise § 6.3, at 424-25 (5th ed. 2010) (Pierce). Such policies must remain subject to ready amendment, in response to changing circumstances, funding, and priorities, and without the time-consuming process of notice and comment. Thus, and as Plaintiffs correctly identify, general statements of policy "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Vigil*, 508 U.S. at 197; *see also Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1012-13 (9th Cir. 1987). That is precisely what the Memorandum does: it advises how DHS will exercise its discretion to prioritize which among millions of cases it will pursue for enforcement.

The temporary pause does not create any rights or obligations or bind the agency in any manner. *See, supra*, section II.A.4. DHS retains discretion to abandon the policy entirely or on an ad hoc basis. *See Mada-Luna*, 813 F.2d at 1016 (enforcement guidance was exempt from notice and comment when it preserved agency's decisionmaking discretion). Noncitizens subject to a final order of removal are still subject to final orders of removal, absent an independent change in status. Nor does the Memorandum itself provide any benefit to any person or entity; it expressly states that it is "not intended to, do[es] 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." Memorandum at 4.

Regardless, the APA also exempts procedural rules—such as one providing for internal agency procedures and processes—from notice and comment. *See, e.g., Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 (D.C. Cir. 1986) (holding that enforcement guidelines were internal procedural rule exempt from notice and comment). Thus, even if this Court views the pause on removals as "binding" in some sense, the pause is still exempt from notice and comment because it would then be a procedural rule that applies to agency officials. "'[P]rocedural' rules, those that are legitimate means of structuring the agency's enforcement authority, are exempt from the APA notice and comment requirement." *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 14 F.3d 429, 447 (9th Cir. 1993).

To be sure, the Memorandum does restrict subordinate officials tasked with carrying

out individual enforcement actions. But Congress assigned the power to set enforcement priorities to the *Secretary*, not to line officers. 6 U.S.C. § 202(5). A policy that restricts line officers' discretion is all the more clearly a "general" statement of policy because it advises the public of the manner in which the entire agency will exercise its discretion. Prohibiting senior officials from announcing instructions that bind rank-and-file agents, without first following notice-and-comment procedures, also "would create horrible incentives." Pierce, Administrative Law Treatise § 6.3, at 424 ("If agencies are allowed to establish policies that limit the discretion of their employees only through use of the expensive and time-consuming notice and comment procedure, they rarely will choose to limit the discretion of their employees charged with enforcement and prosecutorial responsibilities."). Congress therefore authorized the Secretary not only to set enforcement priorities, 6 U.S.C. § 202(5), but also to "control, direct[], and supervis[e]" his subordinates. 8 U.S.C. § 1103(a)(2).

ii. The purported agreements are void and unenforceable.

Arizona also suggests that the Memorandum is "without observance of procedure required by law," FAC ¶ 80 (quoting 5 U.S.C. § 706(2)(D)), and thus invalid under the APA, because it was not promulgated under the procedures set out in the purported "agreements" between DHS and the States.[9] It is highly doubtful that the "procedure required by law" under the APA includes procedures set out in private agreements between an agency and a non-federal entity. But, regardless, the purported agreements are void *ab initio* and unenforceable.

For one, there was no legal authority to enter into such "agreements." It has long been a principle of federal government contract law that an individual entering a contract on behalf of the federal government must have statutory authority to do so: "Our statute books are filled with acts authorizing the making of contracts with the government through its various officers and departments, but, in every instance, the person entering into such a contract must look to

[9] The States raise the agreements only in support of an APA claim; they do not raise separate claims related to the purported agreements. *See* FAC ¶¶ 76-81 (Count 1). To the extent they attempt to do so now, "[i]t is axiomatic that the complaint may not be amended by the briefs." *Candor v. United States*, 1 F. Supp. 3d 1076, 1082 (S.D. Cal. 2014). In any event, such a claim would fail for the reasons set out in the text.

the statute under which it is made, and see for himself that his contract comes within the terms of the law." *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 679-80 (1868); *see also CACI, Inc. v. Stone*, 990 F.2d 1233, 1237 (Fed. Cir. 1993) ("[T]here cannot be a contract when the government agent lacks actual authority to create one.").

None of the statutory authorities cited in the agreements provides the authority for the agreement that the States purportedly entered with DHS. For example, the Homeland Security Act of 2002, 116 Stat. 2135, 6 U.S.C. § 101 *et seq.*, does not provide the authority the agreements suggest. While the Homeland Security Act vests the Secretary with responsibility for all functions of the Department, he generally may delegate those functions only to "any officer, employee, or organizational unit of the Department." 6 U.S.C. § 112(b)(1). Delegations of functions to a State, to include determinations as to whether or when DHS may change its policies related to enforcement of federal immigration law, violate this statutory limitation.

Not only were the purported agreements executed without statutory authority, they run afoul of the subdelegation doctrine. *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004) ("[F]ederal agency officials . . . may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so."). Had Congress intended to authorize such extraordinary agreements, it certainly would have done so expressly. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *cf.* 8 U.S.C. § 1103(a)(11) (expressly authorizing agreements with states in specific circumstances). The agreements are therefore unauthorized by statute. Thus, even if they did meet all the other elements of a binding contract, such an agreement is void and the "government is not bound by its agents acting beyond their authority and contrary to regulation." *Total Med. Mgmt., Inc. v. United States*, 104 F.3d 1314, 1321 (Fed. Cir. 1997).

Further, such an agreement would be beyond the power of the federal government to enter in any event. A promise to abstain from taking a wide range of immigration-related actions until a State has exercised a 180-day comment power lies beyond the power of contract. An outgoing administration cannot contract away the federal government's plenary power over the enforcement of immigration law. *See Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1172

(10th Cir. 2004) ("The executive branch does not have authority to contract away the enumerated constitutional powers of Congress or its own successors…."); *see also U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 (1977) ("[T]he Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty"). Thus, a long line of authority establishes that "[t]he Government cannot make a binding contract that it will not exercise a sovereign power." *Amino Brothers Co. v. United States*, 178 Ct. Cl. 515, 525, 372 F.2d 485, 491, *cert. denied*, 389 U.S. 846 (1967). The States nonetheless assert that DHS contracted away the sovereign's right to alter federal immigration policy by imposing a 180-day stay on federal action, pending the States' responses. DHS could not and did not do so.

The States' claim for injunctive relief based on the purported agreements also fails because the United States has not waived sovereign immunity for such claims. A waiver of sovereign immunity must be enacted by statute, must be strictly construed in the Government's favor and must unambiguously extend to the type of relief sought. *Lane v. Pena*, 518 U.S. 187, 192 (1996). Circuit courts have consistently recognized that the United States has not waived sovereign immunity for contract claims seeking specific performance—which is what the States necessarily seek by asking this Court to enforce the agreements' terms and enjoin the Memorandum on that basis. *See generally Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. DHS*, 490 F.3d 940, 945 (Fed. Cir. 2007); *Ala. Rural Fire Ins. Co. v. Naylor,* 530 F.2d 1221, 1229-30 (5th Cir. 1976); *see also United States v. Jones*, 131 U.S. 1, 18 (1889) (Tucker Act did not authorize specific performance against the federal government).

The States cannot rely on the APA to circumvent this basic principle. For agency action to be subject to APA review, there must be "no other adequate remedy in a court." 5 U.S.C. § 704. Here, to the extent the agreements are enforceable at all for the amount the States claim is at issue, the Tucker Act would be the proper remedy—in the Court of Federal Claims. *See Suburban Mortg. Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1128 (Fed. Cir. 2007). At most, if there were a valid contract, the States might possess a contract claim for money damages. Such a claim is consistent with federal case law that "damages are always the default remedy for breach of contract." *Sanders v. United States*, 252 F.3d 1329, 1334 (Fed. Cir.

2001) (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 885 (1996) (plurality opinion)); *accord Holmes v. United States*, 657 F.3d 1303, 1314 (Fed. Cir. 2011). Any question about the monetary cost of any purported breach can be addressed in that forum.

III. An Injunction Restraining Core Article II Authority Outweighs Any Harm to the States and Undermines the Public Interest.

The States cannot establish that any injury to them outweighs the harm to the Defendants and serves the public interest. *See Winter*, 555 U.S. at 24-26. As explained above, the States cannot demonstrate any injury at all. *See supra* section I. But even if they could establish some fiscal injury actually caused by the Memorandum, any such injury would border on negligible. At most, only a small subset of those individuals who would have otherwise been removed before April 30, when the temporary pause on removals expires, would have to rely on the States' services.

Weighed against this highly uncertain monetary harm is the severe burden on core Article II authority. As the Supreme Court emphasized in *AADC*, challenges to immigration enforcement discretion "invade a special province of the Executive." 525 U.S. at 489. An injunction that requires the Executive to continue a set of removals that it does not wish to undertake at this time would interfere with a core constitutional power conferred on the Executive, which is irreparable harm *per se*. Even if credited, the States' injuries do not outweigh the harm that would be imposed by "injunctive relief [that] deeply intrudes into the core concerns of the executive branch." *Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978); *cf. United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011) ("[A]n alleged constitutional infringement will often alone constitute irreparable harm.") (subsequent history omitted).

But the injury to the United States is not just a constitutional injury in the abstract—although that injury is substantial. Removal operations are resource intensive even in ordinary times. As the Memorandum explains, the purpose of the pause is, in part, to allow DHS to shift resources to those efforts it deems a higher priority: operations at the southwest border and safe administration of COVID-19 protocols. Memorandum at 3.

As to the public interest, the Executive administers immigration enforcement *on behalf*

of the public. *See Nken v. Holder*, 556 U.S. 418, 436 (2009); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir. 1981). The public interest here thus favors the Executive's exercise of its core authority over removal, including the discretion to determine whether particular removals are ultimately in the public interest. *See Arizona*, 567 U.S. at 395 (noting how "[i]mmigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws"); *id.* at 396 (and "human concerns."). In the Memorandum, the Acting Secretary exercised his authority to concentrate DHS removal resources on removing recent arrivals and terrorist threats, while devoting additional energies to reinforcing the southwest border and implementing proper COVID-19 protocols. It was the Acting Secretary's judgment that such prioritization was wise and appropriate in light of current circumstances. The injunction the States seek would displace the Executive's judgment on how best to prioritize limited resources.

It may be that the States disagree with DHS's current priorities. But that underscores the constitutional harm: the Executive—not the States, and not the Judiciary—is charged with enforcing immigration laws, and in its assessment, resources must be shifted from removal operations to border control and COVID-19 response. An injunction that interferes with that assessment is unwarranted in any circumstance. But it is especially unwarranted when the only countervailing harm the States can assert is an at most, small and speculative fiscal harm—one that will not even begin to occur so long as the extant injunction remains in place.

If the Court issues any relief, it should be limited to Arizona and Montana. Nationwide relief that would affect those who are not parties to this case would exceed this Court's authority under Article III and violate longstanding equitable doctrines. *See DHS v. New York*, No. 19A785, 2020 WL 413786, at *1 (U.S. Jan. 27, 2020) (Gorsuch, J., concurring); *Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring). Further, nationwide relief is unnecessary to address the States' alleged harms, all of which are limited to their jurisdictions.

CONCLUSION

The States' motion should be denied and judgment entered for Defendants.

RESPECTFULLY SUBMITTED this 26th day of March, 2021.

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

State of Arizona, et al.,

Plaintiffs,

v.

United States Department of Homeland Security, et al.,

Defendants.

No. 2:21-cv-00186-SRB

[PROPOSED] ORDER

Upon consideration of Plaintiffs' Motion for Preliminary Injunction, all related briefing, as well as all exhibits and the entire record in this case, the Court DENIES the motion.

IT IS FURTHER ORDERED that Plaintiffs' Amended Complaint, ECF No. 12, is DISMISSED.