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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' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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INTRODUCTION

Congress has vested the Secretary of Homeland Security with broad statutory authority to establish "national immigration enforcement polices and 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). Arizona and Montana challenge the manner in which the Executive has exercised its inherent and statutory discretion to set priorities for immigration enforcement. On January 20, 2021, the then–Acting Secretary of Homeland Security issued a Memorandum directing the Department to conduct a review of policies and practices concerning immigration enforcement and setting interim policies during the course of that review. The Acting Director of Immigration and Customs Enforcement (ICE) later issued interim guidance in support of the civil immigration enforcement and removal priorities.

The States seek to displace the Executive's enforcement discretion by effectively dictating which noncitizens must be removed, in what order, and when. Their efforts, invoking the Administrative Procedure Act (APA), must fail from the start 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 Memoranda are not final agency action. Last, this Court lacks jurisdiction to adjudicate claims related to purported "agreements" between DHS and the States, which "agreements" are void and unenforceable in any event. The Court should dismiss the States' Amended Complaint.

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, or otherwise deportable from, the United States. "A principal feature of th[is] removal system is the broad discretion

exercised by immigration officials." *Arizona v. United States*, 567 U.S. 387, 396 (2012).[1] Congress thus granted the Secretary of Homeland Security authority to "establish[] national immigration policies and priorities." 6 U.S.C. § 202(5).

Removability is determined by an immigration judge or immigration officer in an immigration proceeding. *See* 8 U.S.C. § 1229a; *see also, e.g.*, 8 U.S.C. § 1225(b)(1) (expedited removal 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 country of removal, and removals require considerable coordination and effort. DHS must ensure the noncitizen has appropriate paperwork required by the country of removal 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

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

Memorandum that ordered a review of enforcement policies and set new priorities in the interim. *See* Am. Compl. (FAC) Ex. A, ECF. No. 12-1 (DHS Memo). The DHS Memo noted DHS's inherent resource limitations and the "significant operational challenges" it faces due to the COVID-19 pandemic, and, in light of these considerations, called upon DHS "components to conduct a review of policies and practices concerning immigration enforcement" and "set[] interim policies during the course of that review." *Id.* at 1. The DHS Memo has three substantive parts. In Section A, the Acting Secretary instructed DHS components to develop recommendations concerning, among other things, "policies for prioritizing the use of enforcement personnel, detention space, and removal assets" and "policies governing the exercise of prosecutorial discretion." *Id.* at 2.

The DHS Memo also adopted two interim measures in sections B and C. Because DHS has "limited resources" and "cannot respond to all immigration violations," Section B identified three broad "priority" groups of noncitizens that DHS components should focus on when rendering "a broad range" of "discretionary enforcement decisions." *Id.* The DHS Memo clarifies, however, that "nothing" therein "prohibits the apprehension or detention of" other noncitizens "who are *not* identified as priorities." *Id.* at 3 (emphasis added). It also calls on the Acting Director of U.S. Immigration and Customs Enforcement (ICE) to "issue operational guidance on the implementation" of this priority framework. *Id.*

Section C then set out a temporary, 100-day suspension of 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 certain identified priorities, including national security risks and recent arrivals. The policy set out in Section C was enjoined shortly after its adoption, *see Texas v. United States*, 2021 WL 723856 (S.D. Tex. Feb. 23, 2021); the government did not appeal that preliminary injunction. This Court denied the States' motion for a second injunction against the same policy, *see* ECF No. 42, and the policy expired by its own terms on April 30, 2021.

On February 18, 2021, the Acting Director of ICE issued the operational guidance contemplated by Section B, noting also that the Secretary had approved the incorporated revisions to the interim priorities. *See* FAC Ex. G, ECF No. 12-1 at 40 (ICE Memo). The ICE Memo confirms that "ICE operates in an environment of limited resources," and "necessarily must prioritize" certain "enforcement and removal actions over others" in order to "most effectively achieve [its] mission" of "national security, border security, and public safety." *Id.* at 2-3. The ICE Memo catalogues the three presumed priority groups identified in the DHS Memo, and notes that DHS revised the presumed priorities to include "qualifying members of criminal gangs and transnational criminal organizations." *Id.* at 1, 4-5.

The ICE Memo reiterates that the policies do not "prohibit the arrest, detention, or removal of any noncitizen," and that enforcement actions against non-presumed priority persons may still be permissible and justified based on "all relevant facts and circumstances," including the nature of any prior criminal convictions. *Id.* at 3. To ensure that resources are spent pursuing priority cases, though, the ICE Memo puts in place certain internal pre-approval procedures ICE officials must follow when taking enforcement action in non-presumed priority cases. *See id.* at 6. The ICE Memo also includes a general catch-all provision allowing agents to submit "requests to exercise . . . individualized discretion" in certain cases, if it is "in the interest[] of law and justice." *Id.*

Plaintiffs Arizona and Montana bring claims under the APA, contending that Section C and the ICE Memo are "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, 98-99, 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. These so-called MOUs—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

The States challenge two distinct policies—Section C's pause on removals, and the ICE Memo's implementation of Section B's interim enforcement priorities. The challenge to the Section C pause is plainly moot: that policy expired on April 30, 2021. The ICE Memo implements Section B of the January 20 Memorandum; it "does not implement or take into account" Section C of the January 20 Memorandum. ICE Memo at 2. Still, Plaintiffs challenge the ICE Memo's priorities on the same principal basis as they challenge Section C: that it is inconsistent with 8 U.S.C. § 1231(a)(1).

Plaintiffs' challenge is anomalous, for the ICE Memo shares no relevant similarities with the aspects of Section C that the States claim violate that statute. Regardless, the Court lacks jurisdiction to adjudicate the States' claims for five independent reasons: (1) the States lack standing; (2) the challenged actions are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2); (3) other "statutes preclude judicial review," *id.* § 701(a)(1); (4) the States are not within the zone of interests "within the meaning of a relevant statute," *id.* § 702; and (5) the challenged actions are not "final agency action," *id.* § 704. In addition, jurisdiction over any claim related to the purported agreements lies exclusively in the Court of Federal Claims.

I. Any Challenge to the Section C "Pause" on Removals Is Now Moot.

The States' challenge to the 100-day pause set out in Section C of the January 20 Memorandum is moot, and this Court therefore lacks jurisdiction to adjudicate those claims. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). That policy was inherently time-limited: by its terms, it expired 100 days after it began. On April 30, 2021, the policy expired, and Plaintiffs' related claims became moot.

No exception to mootness applies. The exception for voluntary cessation does not apply when a challenged policy is time-limited on its face and it has "expired by its own terms." *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 353 (2017); *Burke v. Barnes*, 479 U.S. 361, 363 (1987) (challenge to validity of bill became moot when "that bill expired by its own terms");

Spell v. Edwards, 962 F.3d 175, 179 (5th Cir. 2020) (similar). Such is the case here—from the start, the policy set out in Section C was scheduled to expire 100 days after implementation. That period has now run and the policy is no longer in effect. Because it was "the planned termination of a temporary project that mooted this case," the "voluntary cessation doctrine does not apply." *Ctr. for Env't Sci. v. Cowin*, 2016 WL 1267572, at *2 (E.D. Cal. Mar. 31, 2016).

Nor does the exception for claims that are "capable of repetition yet evading review" apply. "That exception applies only in exceptional situations," where two conditions are met. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016). Neither requirement is met here. First, the claims the States raise would not "*always* evade judicial review." *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 836 (9th Cir. 2014). Thus, "even if a particular controversy evades review, there is no risk that future repetitions of the controversy will necessarily evade review as well." *Id.* at 837; *cf. Texas,* 2021 WL 723856 (reviewing Section C). To be sure, in this *specific* case the policy was limited to 100 days, but the States' claims do not turn on the duration of the policy and there is no reason that any future policy to which the States could raise similar claims would necessarily be of so limited a duration.

Second, the States "must establish a reasonable expectation that [they] will be subjected to the same action or injury again" before they can invoke the Court's exceptional jurisdiction over a non-live controversy. *Wolfson v. Brammer*, 616 F.3d 1045, 1054 (9th Cir. 2010). The States cannot meet that burden: there is no indication that DHS will reinstate a suspension on enforcing certain removal orders for noncitizens. Quite the contrary, DHS has expressly stated it has no intent to reinstate the policy. *See* https://go.usa.gov/xHwkr (DHS Statement).

Regardless, any new policy will necessarily raise *new and distinct* claims—not the same claims. The States bring their claims under the APA, but any future APA challenge will be to a new policy, not the old one. Under the APA, the Court reviews only final agency action, and its review is confined to "the whole record." 5 U.S.C. § 706(2). Any agency action in the future necessarily "would be the result of a new proceeding on a new record," and thus any challenge to the now-expired policy is moot. *S. Cal. All. of Publicly Owned Treatment Works v. EPA*, 2015 WL 2358620, at *2 (E.D. Cal. May 15, 2015). Where, as here, the speculated "renewed" action

would raise "an entirely new claim," but not "reawaken[]" old ones, the initial claim is moot. *J.E.C.M. ex rel. Saravia v. Lloyd*, 352 F. Supp. 3d 559, 577 & n.8 (E.D. Va. 2018).

II. The States Cannot Establish Standing.

The States' case fails at the outset because they cannot demonstrate any actual or imminent injury caused by the challenged policies. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To start, the States' current budgets were "set well in advance" and have not yet been "adjust[ed] . . . to account for the impact." Pls.' Disc. Resp. (Ex. 1) at 12. As to future spending, the States can only speculate what effect the challenged policies may have, because the budget process "requires a budget bill to be passed by the legislature and signed by the governor." *Id.* at 13. Put otherwise, the States cannot provide any evidence that they have spent, or will spend, even a single penny more than they otherwise planned to.

Regardless, no injury the States allege, even if it did occur, would be fairly traceable to challenged policies or redressable by an order of the Court. The States allege injuries in two categories. *First*, the States allege that the challenged policies—the 100-day pause and the ICE Memo—will lead to an increase in unauthorized immigration. The States allege that increased immigration will increase various harms from drug trafficking to Montana's citizens, *see* FAC ¶ 55–59; Pls.' Disc. Resp. at 8-9, and will increase Arizona's expenses related to noncitizen interdiction and recovery operations and emergency medical care, FAC ¶¶ 30, 35. *See also* PI Mot. at 19-20, ECF No. 17 (Montana's alleged injury); *id.* at 16-17 (Arizona's alleged injury). To start, Montana's asserted injury is *legally* insufficient to establish standing because a state 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).

Moreover, neither States' injuries in this category, even assuming they occur, can be fairly traced to the memoranda. Both the 100-day pause and the ICE Memo expressly continue—and prioritize—removal operations for noncitizens arriving after November 1, 2020. DHS Memo at 3; ICE Memo at 4. The policies thus cannot be the cause of any additional immigration. *See Arpaio v. Obama*, 797 F.3d 11, 20 (D.C. Cir. 2015) (increased immigration not caused by policy that did not apply to "entrants arriving now or in the future").

Second, the States allege that a reduction in removals will mean a comparative increase in their States' noncitizen populations, and that the States will expend more resources related to noncitizens than they otherwise would. FAC ¶¶ 53-54 (Montana's "education, healthcare, public assistance, and general government services" costs); *id.* ¶¶ 28-29 (Arizona's incarceration costs); *id.* ¶¶ 31-35 (Arizona's medical costs); *see* Pls.' Disc. Resp. at 9-10. These injuries are not cognizable; a state "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. 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.[2]

Regardless, any such costs are not fairly traceable to the challenged policies. 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*, 504 U.S. at 562. The States principally rely on *California v. Azar*, 911 F.3d 558 (9th Cir. 2018) and *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), as supporting standing in this context. PI Mot. at 22-23; PI Reply at 16, ECF No. 35. But each is readily distinguishable.

Those cases recognize that standing is not precluded when the third parties' actions are not "independent" of the challenged action. But to establish standing when the claimed injury turns on a third party's actions, a plaintiff must show that the challenged conduct has a "determinative or coercive effect upon the action of someone else." *See Levine v. Vilsack*, 587 F.3d 986, 992 (9th Cir. 2009). Thus, in *Department of Commerce*, the plaintiffs established standing

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[2] This Court previously presumed Arizona's standing to challenge federal immigration policy *in toto*. *See United States v. Arizona*, 2011 WL 13137062, at *2 (D. Ariz. Oct. 21, 2011). But here the States challenge specific policies; any injury must be caused by those policies. *See, e.g.*, *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017).

based on "the predictable effect of Government action *on the decisions* of third parties." 139 S. Ct. at 2566 (emphasis added). The government's own information indicated that including a citizenship question would lead some individuals not to answer the census. *Id.* So too, in *Azar*, the plaintiff states demonstrated that private entities would respond to the challenged rule in a predictable way that would require the states to spend money. 911 F.3d at 572. The rule authorized private entities to limit insurance coverage for certain services, and the agency itself predicted that some entities would do so. *Id.*

The States' theories of standing here are of another kind entirely: their injuries, assuming they occur, would be the result of "unfettered choices made by independent actors," *Lujan*, 504 U.S. at 562. Take first the assertion that the States will incur more medical expenses caring for noncitizens. Such expenses, if they occur, would be the result of a series of events wholly unrelated to the challenged policies, 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 reimbursement. *Cf. Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 43 (1976). Consider next the suggestion that, because of an increase in the number of noncitizens living in the States, there will be in an increase in the number of crimes committed by noncitizens. Any such acts would be the independent decision of the individuals committing them; the challenged policies do not encourage or cause any noncitizen to perform an illegal act. The States therefore cannot demonstrate standing.

The States also cannot rely on the purported agreements to establish standing for an APA claim. Even if those documents were valid and enforceable, which they are not, *see* Defs.' PI Opp'n at 20-23, injury is a jurisdictional requirement and must be established as a matter of fact; standing cannot be manufactured by 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 evade the requirement to show an injury caused by the challenged action. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). All that is "relaxed" is the need to show that the "substantive result" of the agency proceedings "would have been different had he received proper procedure." *Azar*, 911 F.3d at 571.

III. 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," they "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). As Defendants previously explained in reference to the States' challenge to Section C, the States cannot meet four, independent requirements to bring this action. Those same requirements bar the States' claims related to the ICE Memo.

A. 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)). Setting enforcement priorities "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). Thus, 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. *Arizona*, 2011 WL 13137062, 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: Together, the DHS Memo and the ICE Memo reflect the Executive's prerogative to set enforcement priorities and to act on those priorities. In Section B of the DHS Memo, the Acting Secretary set out the agency's top priorities for enforcement: threats to national security, to border security, and to public safety. The ICE Memo instructs personnel how to proceed with enforcement actions to ensure that ICE is devoting its resources toward the most important cases, while authorizing enforcement actions on non-presumed priority cases with appropriate justification and pre-approval. The now-defunct Section C also set out enforcement priorities

with regard to removal, albeit with different exceptions. Such prioritization is well within the Executive's discretion. *See Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 967 (9th Cir. 2017).

The discretion to set and follow priorities is especially important in immigration enforcement. 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." *Arizona*, 567 U.S. at 397. A "principal feature of the removal system," therefore, "is the broad discretion exercised by immigration officials." *Id.* at 396.

The guidance ensures that DHS's limited resources are committed to DHS's priorities in light of these many considerations. The States' attempt to brand the pause as an "abdicat[ion]" of statutory duty, FAC ¶ 4, ignores the basic prerogative to structure enforcement in light of scarce enforcement resources and for "humanitarian reasons or simply for its own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) (*AADC*). And the ICE Memo does not prohibit any enforcement activity, but instead focuses agency resources on the most pressing matters.

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* PI Mot. 3-4, 13-14. That argument does not apply to the ICE Memo, which does not prohibit the removal of any noncitizen, but rather prioritizes some over others. But the argument is ill-founded in any event. 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 Ariz. Dream Act Coal.*, 855 F.3d at 976-77. Congress accordingly included provisions for when a noncitizen "is not removed within the removal period." 8 U.S.C. § 1231(a)(3).

Indeed, the States' argument ignores a basic and longstanding principle of law: the word "shall," standing alone, does not displace the Executive's inherent and unreviewable 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. Rather, the "deep-rooted nature of law-enforcement discretion" persists "even in the presence of seemingly mandatory commands." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005)). 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 because to be "a true mandate of police action would require some stronger indication" of legislative intent than the bare "shall." *Id.*

So too here. Nothing provides the "stronger indication" necessary to displace enforcement discretion. Quite the opposite: 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 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. *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).

The States have leaned almost exclusively on a decision from the Southern District of Texas that reached a contrary conclusion. *See* PI Mot. at 13 (quoting *Texas*, 2021 WL 723856 at *3). Defendants believe that this non-binding decision is incorrect. The court in that case crafted an "exception" to this established doctrine 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*: the statute there 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.

B. 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 issues "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.

The States' claims "arise[] from" "action[s] taken or proceeding[s] brought to remove" noncitizens. 8 U.S.C. § 1252(b)(9). The States contend that DHS's decisions not to remove every noncitizen with a final order of removal within 90 days violates § 1231, but § 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 v. Trump*, 950 F.3d 1241, 1269 (9th Cir. 2020). Because only § 1252 provides judicial review of these issues, and because the States cannot invoke that provision, their claims necessarily fail. Moreover, Congress has 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 687.

These provisions *expressly* preclude review of the States' claims in district court. *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 precluded by statutory structure and other context). The detailed scheme Congress has established contains 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–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.

C. 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); *see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). If a plaintiff is not within the zone of interests, then all his APA claims—including claims that the agency 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, 127-28 (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.").[3]

[3] The district court in *Texas* interpreted the term "any party" in § 1231(h) to mean only "any alien." 2021 WL 723856, at *24-27. That implausible interpretation would mean that everyone *except* the actual people in removal proceedings could challenge removal policies, notwithstanding the statute's text and Congress's evident intent to shield Executive discretion.

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 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"); *Ncube v. I.N.S. Dist. Directors & Agents*, 1998 WL 842349, at *12 (S.D.N.Y. Dec. 2, 1998).[4]

D. The challenged action is not final agency action.

The States' APA claims fail for still another reason: 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 memoranda structure how DHS will take distinct final agency actions; they are not themselves "final" under the APA.

Neither Section C of the DHS Memo nor the ICE Memo changes any person's legal status, determines any legal benefits, or reverses any final order of removal. To the contrary: noncitizens subject to a final order of removal have no more legal right to remain in the United States after either memoranda than they did before. The memoranda simply shift agency priorities. Such policies are 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

[4] 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" inquiry in a habeas action.

that party's underlying conduct lawful. There is only final agency action in this context when a noncitizen's legal status is changed or when the agency completes a removal action; those actions must be challenged, if at all, in distinct proceedings after they occur.

IV. The Court Lacks Jurisdiction to Resolve Claims Predicated on the MOUs.

Arizona also suggests that Section C and the ICE Memo are "without observance of procedure required by law," FAC ¶ 80 (quoting 5 U.S.C. § 706(2)(D)), and thus invalid under the APA, because they were not promulgated under the procedures set out in the purported "agreements" between DHS and the States. The Court lacks jurisdiction over these claims for all the reasons set out above. But the Court lacks jurisdiction over the MOU-related claims for yet another reason: the United States has not waived sovereign immunity for such claims.

APA claims are barred when they "seek relief expressly or impliedly forbid[den] by another statute." *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 646 (9th Cir. 1998). The Tucker Act, 28 USC § 1491, and the Little Tucker Act, *id.* § 1346, provide the relief—the only relief—for claims based in contract: money damages. *See Sanders v. United States*, 252 F.3d 1329, 1334 (Fed. Cir. 2001) ("[D]amages are always the default remedy for breach of contract."). Those statutes therefore "impliedly forbid[] declaratory and injunctive relief and preclude[] a § 702 waiver of sovereign immunity." *Tuscon Airport*, 136 F.3d at 646 (quoting *North Side Lumber Co. v. Block,* 753 F.2d 1482, 1485 (9th Cir. 1985)).

The States' MOU-related claims "do not exist independent of" the MOUs; the States are asking the Court to "decide what [their] contract rights are" and then to enforce those rights by setting aside actions that, they contend, violate their claimed right to consultation. *Id.* at 647. But any duty to consult the States, "if it exists, derives from the contract[s]." *Id.* Thus, to the extent the agreements are enforceable at all, Congress has limited the States' remedies to monetary damages and, for the amount the States claim is at issue, jurisdiction would be proper only in the Court of Federal Claims.

CONCLUSION

For the reasons above, the Court should dismiss the States' Amended Complaint.

RESPECTFULLY SUBMITTED this 6th day of May, 2021.

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Exhibit 1

Plaintiffs' Responses and Objections to Defendants' First Set of Discovery Requests

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

State of Arizona; State of Montana; and Mark Brnovich, in his official capacity as Attorney General of Arizona,

Plaintiffs,

v.

United States Department of Homeland Security et al.,

Defendants.

No. 2:21-cv-00186-SRB

PLAINTIFFS' RESPONSES AND OBJECTIONS TO DEFENDANTS' FIRST SET OF DISCOVERY REQUESTS

PROPOUNDING PARTY: **DEFENDANTS**

RESPONDING PARTY: **PLAINTIFFS**

SET NUMBER: **ONE**

Plaintiffs the State of Arizona, State of Montana and Mark Brnovich, in his official capacity as Attorney General of Arizona ("Plaintiffs"), pursuant to the Federal Rules of Civil Procedure and the Court's Order of April 13, 2021, (Doc. 26), provide the following responses and objections to the First Set of Discovery Requests propounded by Defendants United States Department of Homeland Security, et al. ("Defendants") on April 19, 2021.

RESERVATION OF RIGHTS

These responses are made in accordance with the Federal Rules of Civil Procedure and are based upon information currently available to Plaintiffs. These responses are made without prejudice to Plaintiff's rights to amend and/or supplement its responses and to use or rely upon subsequently discovered information in any future proceedings.

Plaintiffs reserve the right to later object to the admissibility into evidence of any of this information on any permissible grounds, including grounds not identified below.

GENERAL OBJECTIONS

All of Plaintiffs' specific responses are subject to and without waiver of the following general objections:

1. Plaintiffs object to each request to the extent that it seeks to impose any obligations or burdens upon Plaintiffs different from or in addition to what is required by the Arizona Rules of Civil Procedure, the Local Rules of this Court, or any governing case law.

2. Plaintiffs' discovery and investigation in connection with this case are continuing. As a result, Plaintiffs' responses concern information obtained and reviewed to date and are given without prejudice to Plaintiffs' right to amend or supplement its responses after considering information obtained or reviewed through further discovery.

3. Plaintiffs object to any request to the extent it seeks information that is protected by the attorney-client privilege, work-product doctrine, or other common law or statutory privilege or protection, including common interest or joint defense privileges or protections, or seeks other information that is otherwise immune from discovery.

Nothing contained in this response is intended to be nor should be considered a waiver of any attorney-client communication privilege, common interest privilege or protection, work-product privilege or protection, or any other applicable privilege or doctrine, and to the extent that any request may be construed as calling for disclosure of information, documents, and/or things protected by such privileges or doctrines, a continuing objection to each and every such request is hereby asserted.

4. Plaintiffs object to the extent that the response to any request may be derived or ascertained from publicly-available documents or documents and things to be produced by the parties, where the burden of deriving or ascertaining the responsive information from those documents is substantially the same for Defendants as it is for Plaintiffs.

5. Plaintiffs object to any request that is overly broad, unduly burdensome, and/or calling for information that is neither relevant to any parties claim or defense in this litigation nor proportional to the needs of the case.

6. Plaintiffs object to any request that, by failing to define one or more terms adequately, is vague, ambiguous, or confusing.

7. Plaintiffs object to any request to the extent it seeks information outside of Plaintiffs' possession, custody, or control, or calls for Plaintiffs to prepare documents and/or things that do not already exist.

8. Plaintiffs object to these requests to the extent they call for legal conclusions or present questions of pure law.

9. Plaintiffs object to these requests to the extent they seek confidential information.

10. Plaintiffs object to these requests to the extent multiple subparts are asserted as a single request.

11. Plaintiffs object to these requests to the extent that they seek to impose an obligation to identify or search for information or documents at any location other than where they would be expected to be stored in the ordinary course of business.

12. Plaintiffs' responses to these requests shall not be construed in any way as an admission that any definition provided by Defendants is either factually correct or legally binding upon Plaintiffs, or as a waiver of any of Plaintiffs' objections, including but not limited to objections regarding discoverability of documents or other evidence.

13. By identifying or producing any documents or things in response to any request, Plaintiffs do not stipulate, and expressly reserves all objections, to the authenticity, relevance, materiality, and admissibility of any such documents or things.

14. Plaintiffs reserve the right to assert additional objections to these requests as appropriate.

RESPONSES TO INTERROGATORIES

Interrogatory No. 1: Describe in detail each and every injury that you have suffered or will suffer because of the Interim Guidance.

Response to Interrogatory No. 1: Plaintiffs object to this request as unduly burdensome and not proportional to the needs of the case. It is impossible for Plaintiffs to describe "each and every injury" as requested in the interrogatory. Plaintiffs' investigation is ongoing. In addition, Plaintiffs' respective agencies and all of its subdivisions do not track information relating to the immigration status of every recipient of every state benefit or who causes the state to incur a cost. Subject to and without waving its objections, Plaintiffs respond as follows.

To establish standing, Plaintiffs are "not required to demonstrate some threshold magnitude of their injuries." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 664 (9th Cir. 2021) ("[P]laintiffs who suffer concrete, redressable harms that amount to pennies are still entitled to relief.") For standing, Plaintiffs "need not plead damages from a particular individual when it pleads and has proof that it is being damaged by the entire program." *Texas v. United States*, 328 F. Supp. 3d 662, 702 (S.D. Tex. 2018). The scope of any injury is also irrelevant relating to the irreparable injury prong of the

requirements for a preliminary (or permanent) injunction, because the inquiry focuses on the availability of an adequate legal remedy, not its magnitude. *E. Bay Sanctuary*, 993 F.3d at 677. "[W]here parties cannot typically recovery monetary damages flowing from their injury—as is often the case in APA cases—economic harm can be considered irreparable." *Id.* "Intangible injuries may also qualify as irreparable harm." *Id.*

Here, Plaintiffs have suffered procedural harm that is tied to monetary damages that cannot be recovered from their APA claims against Defendants. Plaintiffs initially incorporate the admissions by Defendants contained in the MOUs that were identified in their prior preliminary injunction briefing. The MOUs signed between DHS and Plaintiffs directly acknowledge that Plaintiffs will suffer "concrete injuries" should DHS undertake any of a number of actions related to the Interim Guidance, including but not limited to "a decrease of any immigration enforcement priorities" and "a decrease or pause on returns or removals of removable or inadmissible aliens." Dkt. 12-1, Ex. C, at 21; Dkt. 12-1 Ex. H at 49.

Similarly, Plaintiffs have been deprived on the opportunity to provide input through the required notice and comment rulemaking for the substantive change in Defendants policy. Plaintiffs have also been deprived of the protections enacted by Congress in 8 U.S.C. § 1231 to remove aliens with final orders of removal within 90 days.

Plaintiffs also suffer monetary harm because they are required to spend money that is not reimbursed by the federal government on law enforcement activities, suffer the monetary cost of crime itself, and are required to provide education and health care services to unauthorized aliens in their respective states. Plaintiffs incorporate their Preliminary injunction briefing and exhibits thereto as if fully set forth herein. *See* Dkt. 17at 14-23; Dkt. 38 at 15-17. Plaintiffs also provide further factual development on these costs as follows.

With respect to law-enforcement costs, Plaintiffs are suffering and will suffer increased costs of incarceration and other law enforcement services due to the decrease in removals resulting from the Interim Guidance. Significantly, the Interim Guidance has directly resulted in ICE lifting detainers on criminals who have completed their sentences. Instead of being removed, these individuals are released on the street and into communities. Some of these individuals are released on supervision programs that the State of Arizona administers, providing a direct expense to the state in conducting the necessary supervision. *See* Decl. of Jennifer Abbotts, AZMT007439.

Also, Arizona prisons have a large population of foreign nationals. Reports submitted by Arizona Department of Corrections contain suffix codes. Suffix code 3 represents foreign-born criminal alien here illegally with an ICE detainer. Suffix code 5 represents foreign-born legal permanent resident with no ICE detainer. Suffix code 6 represents foreign-born legal permanent resident with an ICE detainer. See AZMT007862-AZMT008123. In 2019 alone, Arizona reported costs of $19,019,255.68 related to the incarceration of certain alien criminals under the federal SCAAP program. Of this, only $1,333,702 was reimbursed, leaving a deficit of nearly $17.7 million. The cost to provide those services will increase due to the Interim Guidance. The Interim Guidance will increase the number of unauthorized aliens in Arizona, meaning that Arizona will have to spend more money to provide services to that larger population, including incarceration of individuals who would have otherwise been removed but instead commit additional crimes. Generally, among released prisoners, 68% are re-arrested within 3 years, 79% within 6 years, and 83% within 9 years. *See* National Institute of Justice, Measuring Recidivism (Feb. 20, 2008), https://nij.ojp.gov/topics/articles/measuring-recidivism#statistics. Similarly, Congress considered evidence "that, after criminal aliens were identified as deportable, 77% were

arrested at least once more and 45%—nearly half—were arrested multiple times before their deportation proceedings even began." *Demore v. Kim*, 538 U.S. 510, 518 (2003).

In addition to incarceration, Plaintiffs also suffer harm and irreparable injury due to an increase in criminal activity related to the Interim Guidance, which emboldens individuals entering the country illegally and allows for alien criminals who would otherwise be removed to remain. ICE ERO statistics report that the percentage of aliens that ICE removed from the interior in 2020 who have prior criminal convictions is 92%. U.S. Immigration and Customs Enforcement, *ERO FY 2020 Achievements*, available at https://www.ice.gov/features/ERO-2020. In 2019, ICE removed 13,436 with criminal convictions from the Phoenix Area of Responsibility alone. *See* ERO FY2020 Local Statistics at p.7, https://www.ice.gov/doclib/news/library/reports/annual-report/ero-fy20-localstatistics.pdf. State and local law enforcement must spend resources combatting this crime, both as criminals and traffickers comes across the border and as those who make it into the communities continue their criminal activity. For instance, on May 1, 2021, authorities in Maricopa County, AZ, apprehended an individual illegally present in the United States who was, with a group of four others, in possession of at least 120 pounds of methamphetamine, with an estimated street value of $250,000. *See* Valdivia-Reyes Form 4, AZMT007828. The group was traversing the Barry Goldwater Bombing Range and three of the others managed to flee into the nearby mountains while the fourth, a juvenile, was also apprehended. *Id.*.

At a minimum, Montana spends money on law enforcement as a result of illegal drugs coming over the southern border and facilitated by illegal aliens. The increased costs of enforcing drug laws and combating drug-related crime have taxed Montana's already limited resources. For example, some aliens illegally crossing the southern border and illegally present in the country facilitate the trafficking of dangerous drugs like methamphetamine and heroin. By pausing their removal for any amount of time, the

federal government will likely increase the infusion of drugs into Montana, increase drug-related violent and property crimes, and harm the State's efforts to promote public safety and health. Additionally, the federal government's enforcement pause will encourage other aliens who transport and traffic illegal drugs to enter the country illegally and remain indefinitely, which will likely contribute to the increase the drug-related public safety problems in Montana. Montana suffers additional harm from crime including the following.

The influx of illicit drugs, as well as the gangs and cartels that traffic it across the southern border, have led to a sharp increase in drug use and drug-related crime in Montana. Drug trafficking and drug activity are a threat to public safety and negatively affect communities across the State.

Nearly all the methamphetamine available in Montana originates in Mexico from drug cartels. The supply of methamphetamine in Montana has become so abundant and widely available that that prices have steadily dropped over the last few years. The majority of heroin that is brought into Montana also originates in Mexico.

Transnational Criminal Organizations (TCOs) work with regional and local Drug Trafficking Organizations (DTOs) to traffic narcotics in Montana. Mexican nationals affiliated with TCOs such as the Sinaloa and Jalisco cartels deliver narcotics to Montana residents who then distribute the drugs locally. The financial costs of enforcing drug laws and combatting drug related crime have increased overall for Montana's DCI Narcotics Bureau. Reasons for these cost increases include extra hours and resources required to conduct drug investigations which involve tracing drugs with out-of-state origins, a rise in the number of DTOs operating in Montana, a lack of grant funding matches, and increases in quantities purchased during drug investigations. In DCI Region 1, DCI reported costs related to operations and personnel have increased over the last three years when accounting for the hours and resources needed to conduct narcotics

investigations. DCI Agents often conduct high level investigations involving drugs with out-of-state origins, and the resources required to identify those origins taxes already limited resources. In DCI Region 4, DCI reported that costs associated with drug enforcement has increased dramatically over time, to the point the local task force is spending approximately $40,000 more annually than what the Region receives in grants and matching funds from other law enforcement partners.

There is a strong correlation between drug activity and violent crime. Violent crimes across the state of Montana have increased 48% from 2013 to 2019, according to the FBI. In the State's largest city, Billings, violent crime, frequently meth-driven, has increased by 88% percent from 2013 to 2019, according to the FBI. The methamphetamine originating in Mexico from the cartels is also more dangerous for users than the methamphetamine produced locally because the purity level is so high. The increased availability of heroin has resulted in an increase in overdose deaths in the State. From 2016 to 2019, the number of heroin overdose death cases handled by the Montana State Crime Lab more than doubled. Increased drug activity results in a greater amount of property crimes as those suffering from drug addiction steal to support their addictions. Property crimes also negatively affect public safety. They have direct economic costs in the form of property loss and/or damage, but also indirect and intangible costs for communities such as reduction in property values, fear, pain and suffering, and reduction of quality of life.

As the Supreme Court mandated in *Plyler v. Doe*, states provides public education to school-age unauthorized aliens. 457 U.S. 202, 230 (1982). . In Fiscal Year 2019, Arizona spent an average of $10,928 per pupil, $8,905 of which went to instruction and other operational costs. Arizona Auditor General, *Arizona School District Spending: Fiscal Year 2019* at 8 (March 2020), available at https://www.azauditor.gov/sites/default/files/20-201_Report_No_Pages.pdf. Similarly,

Montana spent $11,666 per student in the 2019-2020 school year. Montana Office of Public Instruction, *2019-20 State Report Card*, available at https://nativereportsgems.opi.mt.gov/ReportServer_GEMSNative/Pages/ReportViewer.aspx?/ESSA+Report+Card/ESSA_Report_Card_State. These represent the direct costs to Plaintiff States, which are and will continue to be realized, of continuing to provide educational services to removable individuals who are not removed due to the priorities set out in the Interim Guidance.

Additionally, Emergency Medicaid is a federally required program jointly funded by the federal government and the states. Plaintiffs are required by federal law to include unauthorized aliens in their Emergency Medicaid Programs. *See* 42 C.F.R. § 440.255(c). The program provides Medicaid coverage, limited to emergency medical conditions including childbirth and labor, to undocumented immigrants living in the United States. As an example, one Arizona hospital, Yuma Regional Medical Center ("YRMC"), has provided care to at least 111 patients in ICE custody, alone, in February, March, and April 2021. *See* Trenschel Decl. at Ex. A, AZMT008126. This does not include care provided to unlawful aliens who are not in ICE custody, and YRMC has not completely tabulated its full April numbers, so these statistics are likely under-inclusive. *Id.* at ¶ 4. February and March 2021 represent the first and fourth-highest amount of charges incurred by this population in the past twelve months: $591,610 for February alone, which is $152,014 more than the next-highest month. *Id.* at Ex. A. On average over the past twelve months, YRMC experiences $861 in unreimbursed costs of care for each patient it sees in this population. *Id.* at ¶ 3. Plaintiffs investigation regarding the expenditures for this program is ongoing.

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Interrogatory No. 2: For each injury identified in response to Interrogatory No. 1, describe in detail the factual basis for your contention that the injury is or will be caused by the Interim Guidance.

Response to Interrogatory No. 2: Plaintiffs object to this request. It is unduly burdensome and not proportional to the needs of the case. It is impossible for Plaintiffs to "describe in detail" the entire factual basis for their "contention that the injury is or will be caused by the Interim Guidance." This is especially true as harms are ongoing and new facts and injuries may arise, and Plaintiffs' respective agencies and all of its subdivisions do not track information relating to the immigration status of every recipient of every state benefit or who causes the state to incur a cost.

Subject to and without waving its objections, Plaintiffs fully incorporate their response to Interrogatory Number 1 as if set forth herein.

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Interrogatory No. 3: For each injury identified in response to Interrogatory No. 1, describe in detail whether and to what extent the Interim Guidance caused you to expend funds above what you had previously budgeted for those services.

Response to Interrogatory No. 3:

Plaintiffs object to this request. Plaintiffs cannot answer this interrogatory as it concerns future events but asks to what extent the Interim Guidance "caused you to expend" funds. Subject to those objections, Plaintiffs fully incorporate their answer to Interrogatory Number 1 and further answer as follows.

The Ninth Circuit has stated that when a plaintiff "seeks to enforce a procedural right," "the requirements for causation and redressability are relaxed." *WildEarth*

Guardians v. U.S. Department of Agriculture, 795 F.3d 1148, 1155 (9th Cir. 2015). Moreover, Courts relax traceability when a state alleges that a defendant violated a congressionally accorded procedural right. *See Texas v. United States*, No. 6:21-cv-00003, 2021 WL 723856, at *10 (S.D. Tex. Feb. 23, 2021) (citing *Massachusetts v. EPA*, 549 U.S. 497, 520-21 (2007)).

The investigation into the financial impact of the Interim Guidance is necessarily still ongoing as the continued implementation of the Interim Guidance increases the magnitude of its harms and may lead to new harms not yet realized for the duration that it remains in effect. Additionally, the state budgets involved are set well in advance and the opportunity to adjust these budgets to account for the impact of the Interim Guidance has not yet arisen. For instance, Arizona's fiscal year begins on July 1 and ends on June 30 of the following calendar year. Arizona State Legislature, *Arizona's Budget Process*, available at https://www.azleg.gov/jlbc/budgetprocess.pdf. The budget for the upcoming fiscal year is submitted by the governor to the legislature "within 5 days after the start of each regular session," typically in the January preceding the start of the fiscal year to which it applies. *Id.* And state agencies must submit their budget request to the governor by September 1 of the year before that legislative session. *Id.* That is, the governor issued the Fiscal Year 2022 Budget in January 2021, prior to issuance of the Interim Guidance, based on agency submissions due on September 1, 2020, and this budget applies to the period from July 1, 2021, to June 30, 2022. The state budget concerning the period during which the Interim Guidance has been active was released in January 2020, based on 2019 agency submissions, and the next opportunity for the state government to respond to the costs of the Interim Guidance through its budget process is not expected to be realized until the legislative session beginning in January 2022.

Similarly, Montana's budget for Fiscal Year 2021—which runs from July 1, 2020 to June 30, 2021—was set years in advance. *See Understanding State Finances and the*

State Budget Process, https://leg.mt.gov/content/Publications/fiscal/leg_reference/Understanding_State_Finances.pdf. Montana's Fiscal Year 2022 does not begin until July 1, 2021. *Id.*

As one example, Arizona seeks reimbursement from the federal government for the State Criminal Alien Assistance Program ("SCAAP"). The funds received are always a fraction of the funds requested. *See* SCAAP Stats Summary FY2009-2019. For FY2019, the State requested $19 million and received $1.3 million resulting in a deficit of $17.7 million.

Neither Arizona nor Montana has yet completed its FY 2022 budget process, which requires a budget bill to be passed by the legislature and signed by the governor. *See id.*

A forensic investigation of the unrecoverable financial harms of the Interim Guidance can only be completed in retrospect, and budget adjustments at the state level have not yet occurred. Therefore, Plaintiffs cannot provide an appropriate factual answer sufficient to respond to this interrogatory.

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Interrogatory No. 4: For each injury identified in response to Interrogatory No. 1, describe in detail the factual basis for your contention that a judicial order that sets aside the Interim Guidance will redress that injury.

Response to Interrogatory No. 4:

Plaintiffs object to this request as unduly burdensome and not proportional to the needs of the case. It is impossible for Plaintiffs to describe "each and every injury" as

requested in the interrogatory, and it is impossible to describe in detail how a judicial order that sets aside the Interim guidance "will" redress each such injury. Ninth Circuit case law requires that it be "likely" that injury be redressed by a favorable decision. *See Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 968 F.3d 738, 743 (9th Cir. 2020). This "likely" is in contrast to "merely speculative." *See Novak v. United States*, 795 F.3d 1012, 1019 (9th Cir. 2015) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Moreover, a forensic investigation of the unrecoverable financial harms of the Interim Guidance can only be completed in retrospect, and budget adjustments at the state level have not yet occurred. Subject to those objections, Plaintiffs fully incorporate their answer to Interrogatory Number 1 and further answer as follows.

As an initial matter, redressability is straightforward in the specific instances of the Arizona Department of Corrections prisoners who have reached the end of their prison sentences and for whom ICE specifically released their immigration detainers based on the priority guidance. Some of those prisoners are now in community supervision. If ICE had picked up these prisoners, the State would not have to spend the resources it is spending to keep these individuals in community supervision. As long as the interim guidance continues, these situations will continue to occur and the state will be required to continue expending monies for community supervision that it would not otherwise have to expend. If ICE returned to normal operations, it is likely, and not merely speculative, that it would take custody of these prisoners and remove them. This

is clear because ICE cited the priority guidelines as the basis for not taking the former prisoners into custody at the end of their prison terms.

Moreover, in cases asserting procedural harm such as this case, which challenges ICE's failure to follow the Administrative Procedures Act, the Ninth Circuit has stated that when a plaintiff "seeks to enforce a procedural right," "the requirements for causation and redressability are relaxed." *WildEarth Guardians v. U.S. Department of Agriculture*, 795 F.3d 1148, 1155 (9th Cir. 2015). Courts also relax redressability when a state alleges that a defendant violated a congressionally accorded procedural right. *See Texas v. United States*, No. 6:21-cv-00003, 2021 WL 723856, at *10 (S.D. Tex. Feb. 23, 2021) (citing *Massachusetts v. EPA*, 549 U.S. 497, 520-21 (2007)).

Montana did not even have its SAFE Agreement (MOU) or February 1 Letter to DHS included in the Administrative Record. This is the case even though the MOU specifically acknowledges that Plaintiffs will suffer "concrete injuries" should DHS undertake any of a number of actions related to the Interim Guidance, including but not limited to "a decrease of any immigration enforcement priorities" and "a decrease or pause on returns or removals of removable or inadmissible aliens." Dkt. 12-1 Ex. H at 49. Thus, from a procedural injury perspective, simply forcing DHS to read and acknowledge Montana's SAFE Agreement and communication would remedy a part of the injury.

Further, courts presume that officials follow the law. Therefore, if the Court were to enjoin the Interim Guidance as it relates to limiting ICE's carrying out of removals of aliens with final orders of removal, then ICE would "return to normal removal operations

as prior to the issuance of the January 20, 2021 memorandum." *See* Document #12, AR_AZ_00004631.pdf. This would mean the difference between 5,840 removals in November, 5,886 removals in December, and 5,732 removals in January versus 3,180 removals in February, 3,687 removals in March, and 1,448 removals in the first half of April. *See* Defendants' Response to Interrogatory No. 2. In other words, removals have dropped 47.5% since February. Nationwide, this represents an estimated 8,300 aliens who would have been removed who have not been removed since February.[1] Based on data from FY2019, the Phoenix Field Office accounted for 23,043 out of 185,884 removals or approximately 12.4%. *See* ERO FY2020 Local Statistics, at p. 6, https://www.ice.gov/doclib/news/library/reports/annual-report/ero-fy20-localstatistics.pdf. Applying this 12.4% to 8,300 means that there are an estimated 1,029 aliens that have not been removed by the Phoenix field office that would have been removed if ICE had continued conducting removal operations at normal levels since February. It is also reasonable to assume that these lowered rates will continue as long as the Interim Guidance or a similar policy is kept in effect. A favorable decision will redress the harm of associated with Plaintiffs' having their share of thousands of aliens who have final orders of removal and would otherwise be removed not being removed.

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[1] This number is derived by estimating the total number of removals in April as 2,296. Then comparing the 17,458 removals in November-January with the estimated 9,163 removals in February-April.

Interrogatory No. 5: For each document that you produce in response to Request for Production No. 1, identify which interrogatory response the document relates to.

Response to Interrogatory No. 5:

Interrogatories 1-4 are all interrelated. Unless otherwise specifically indicated in the interrogatory responses, the documents produced support injury, traceability, redressability for standing and irreparable injury for purposes of the preliminary injunction. Therefore, it is not possible to separate which interrogatory response the documents relate to.

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REQUESTS FOR PRODUCTION

Request for Production No. 1: Provide all documents that you contend support your answers to the interrogatories.

Response to Request for Production No. 1: Plaintiffs object to the request to produce "all documents" as overly burdensome and not proportional to the needs of this case. Many documents supporting the fact that Plaintiffs have standing and will be irreparably injured are publicly available and equally accessible to Plaintiffs and Defendants. This includes court filings in this case, as well as in the lawsuits by Texas, Louisiana, and Florida against DHS and other Defendants in this case, that also arise out of the February 18, 2021 Interim Guidance. The complete docket in those cases is incorporated herein as if it were reproduced in this case. Plaintiffs will produce documents that we have uncovered after a reasonable search. This includes bates numbers AZMT000001 to AZMT008127.

Request for Production No. 2: Provide all documents that demonstrate the monies Arizona and Montana appropriated for Fiscal Years 2018, 2019, 2020, 2021, and 2022 for each item listed in response to Interrogatory No. 3.

Response to Request for Production No. 2: Plaintiffs object to the request to produce "all documents" as overly burdensome and not proportional to the needs of this case. Many documents regarding Plaintiffs' budgets are publicly available and equally accessible to Plaintiffs and Defendants. Plaintiffs will produce documents located after a reasonable search. Plaintiffs incorporate the spreadsheets that are being produced in response to Request for Production Number 1. Additionally the Arizona Governor's website with budget information is located at. https://azospb.gov/publications2014newweb.aspx. The Arizona Governor's budgets have an "actual v. expected" breakdown of costs for the previous fiscal year. Additional Arizona budget documents are being produced as AZMT000001 to AZMT007146. Montana budget documents and declarations are being produced as AZMT007419 to AZMT007438.

Dated this 3rd day of May, 2021.

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ATTORNEY GENERAL

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