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13  
 14 **UNITED STATES DISTRICT COURT**  
 15 **DISTRICT OF ARIZONA**

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 17 \_\_\_\_\_  
 17 Mark Brnovich, in his official capacity as  
 Attorney General of Arizona, *et. al*,  
 18 *Plaintiffs,*

19 v.

20  
 21 Joseph R. Biden in his official capacity as  
 22 President of the United States, *et. al*  
 23 *Defendants.*

Civil Action No. 2:21-CV-1568-MTL

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 25  
 26 **MEMORANDUM IN SUPPORT**  
 27 **OF DEFENDANTS' MOTION**  
 28 **TO DISMISS THE COMPLAINT**

1           The “federal power to determine immigration policy is well settled.” *Arizona v.*  
2 *United States*, 567 U.S. 387, 395 (2012). Because immigration policy has complex effects,  
3 Congress constructed an immigration enforcement system whose “principal feature” is the  
4 “broad discretion exercised by immigration officials.” *Id.* at 395-96. This reflects the  
5 reality—embodied in every Presidential administration’s policies for decades—that  
6 officials must deploy limited resources according to priorities set by policymakers.

7           Consistent with that reality, U.S. Customs and Border Protection (CBP), the  
8 component of the Department of Homeland Security (DHS) responsible for enforcing  
9 immigration laws at ports of entry and between ports of entry, authorized immigration  
10 officers to take certain enforcement actions in specific circumstances to relieve  
11 overcrowding in its congregate settings, to better protect its workforce and noncitizens in  
12 CBP custody, and to prioritize its limited enforcement resources.

13           Plaintiffs, Mark Brnovich, in his official capacity as Attorney General of Arizona,  
14 and the State of Arizona (Plaintiffs or Arizona), ask the Court to supervise the Executive’s  
15 prosecutorial discretion and border enforcement decisions and curtail its discretion to  
16 charge, detain, and/or release inadmissible noncitizens arriving at the Southwest border.  
17 Arizona maintains that 8 U.S.C. § 1225(b) requires the government to initiate removal  
18 proceedings against every noncitizen arriving at the southwest border and to detain them  
19 for those proceedings, without exception. Arizona alleges that any contrary actions violate  
20 the Administrative Procedure Act (APA), the Immigration and Nationality Act (INA), and  
21 the Constitution, including the Separation of Powers Doctrine and the Take Care Clause.

22           Arizona misreads the law, which does not require DHS to detain all inadmissible  
23 noncitizens arriving or encountered at the border or to limit its discretion to institute  
24 removal proceedings. The INA demonstrates Congress’s intent to allow the Executive to  
25 exercise its enforcement discretion in deciding what removal proceedings to initiate and  
26 whom to detain for those proceedings. Nothing in the INA prohibits DHS from “declin[ing]  
27 to institute proceedings.” *Reno v. Am.-Arab Anti-Discrimination Comm. (AADC)*, 525 U.S.  
28 471, 484 (1999). Likewise, the INA grants DHS broad discretion to release such

1 individuals “temporarily ... on a case-by-case basis for urgent humanitarian reasons or  
2 significant public benefit.” 8 U.S.C. § 1182(d)(5).

3 Arizona’s claims are non-justiciable and without merit. Arizona’s claims must be  
4 dismissed because Arizona lacks standing, some of its claims are moot, and the actions it  
5 challenges are committed to agency discretion, not final agency action, and precluded from  
6 review by statute. Arizona also lacks a cognizable cause of action to enforce the INA, and  
7 its immigration claims fail on the merits. The Court should dismiss counts 9 to 13 of the  
8 Third Amended Complaint (TAC) pursuant to Rule 12(b)(1), and 12(b)(6).

### 9 **BACKGROUND**

10 Legal Background. The Executive Branch has broad constitutional and statutory  
11 power over the administration and enforcement of the nation’s immigration laws. *Knauff*  
12 *v. Shaughnessy*, 338 U.S. 537, 543 (1950); **Error! Bookmark not defined.** *see e.g.* 6  
13 U.S.C. § 202(5), 8 U.S.C § 1103(a)(3). For decades, the Executive has exercised its  
14 discretionary authority to determine who to prioritize for removal and through what type  
15 of proceedings.

16 Congress has provided DHS with various overlapping tools, including authority in  
17 8 U.S.C. § 1225(b)(1) to initiate expedited removal proceedings against certain applicants  
18 for admission.<sup>1</sup> The Secretary may also place a noncitizen seeking admission into full  
19 removal proceedings held before an immigration judge under 8 U.S.C. § 1229a if the  
20 noncitizen is not “clearly and beyond a doubt entitled to be admitted,” *id.* § 1225(b)(2)(A),  
21 by filing a “Notice to Appear” (NTA), the charging document that initiates removal  
22 proceedings under section 1229a. The statute leaves to DHS’s discretion whether to use  
23 expedited or full removal proceedings for noncitizens amenable to both. *See Matter of E-*  
24 *R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011). Settled law also authorizes DHS to  
25 decline to initiate proceedings for individuals. *Reno*, 525 U.S. at 484. Further, within  
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27 <sup>1</sup> References to the Attorney General in § 1225 now mean the DHS Secretary. 6  
28 U.S.C. §§ 251, 552(d). “Noncitizen” is the equivalent of the statutory term “alien.”  
*Nasrallah v. Barr*, 140 S. Ct. 1683, 1689 n.2 (2020).

1 certain limits, DHS may either detain or release applicants for admission pending their  
2 removal proceedings. 8 U.S.C. §§ 1182(d)(5), 1225(b)(2)(A), 1226(a).<sup>2</sup> DHS may at its  
3 “discretion parole noncitizens into the United States temporarily”. . . “on a case-by-case  
4 basis for urgent humanitarian reasons or significant public benefit any alien applying for  
5 admission to the United States.” *Id.* § 1182(d)(5). DHS may also release on bond or  
6 conditional parole certain noncitizens arrested within the United States. 8 U.S.C. § 1226(a).

7 Procedural Background. Beginning in March 2021, CBP temporarily authorized the  
8 use of “notices to report” (NTRs) to relieve overcrowding in congregate settings and to  
9 better protect its workforce and noncitizens in CBP custody “when [noncitizen] encounters  
10 were consistently high, operational capacity strained, and COVID-19 acute.” Ex. A, Parole  
11 Plus Alternatives to Detention (Nov. 2, 2021), available at 3:21-cv-01066, ECF No. 62,  
12 at 1.<sup>3</sup> CBP authorized issuance of NTRs to individuals and family units who were processed  
13 at operationally strained border sectors on a case-by-case basis after initial processing and  
14 biometric screening. *Id.* NTRs were permitted in place of NTAs, the issuance of which are  
15 considerably more time consuming due to the necessary interagency coordination for  
16 initiating removal proceedings and creating an administrative record for the proceeding.  
17 *Id.* Substituting NTRs for NTAs decreased processing time substantially, especially for  
18 family units. *Id.* And, ICE later issued NTAs to those noncitizens who initially received  
19 NTRs.<sup>4</sup> *Id.*

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21 <sup>2</sup> An applicant for admission is a noncitizen “present in the United States who has  
not been admitted or who arrives in the United States.” 8 U.S.C. § 1225(a)(1).

22 <sup>3</sup> Factual challenges to subject-matter jurisdiction may rely upon material outside  
23 the pleadings. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The  
24 Court can therefore consider Exhibit A in connection with the government’s challenge to  
25 subject matter jurisdiction. The Court can also consider Exhibit A in connection with the  
26 government’s motion to dismiss under Rule 12(b)(6) without converting the motion into  
one for summary judgment because it is a public document and is incorporated by reference  
in the complaint as Plaintiff challenges the policy set forth in this document. *See infra*, FN  
8.

27 <sup>4</sup> DHS commences removal proceedings against non-citizens who received NTRs  
28 or were released under Parole Plus. Under the current policy, those non-citizens must still  
report to ICE within fifteen days to be issued NTAs, *see* Ex. A, and under the prior policy  
by a date certain. The decision whether to commence removal proceedings, as well as the

1           On November 2, 2021, CBP issued a memorandum ceasing the use of NTRs, *id.*  
2 stating that, “[g]oing forward, CBP will prioritize resources to issue NTAs to noncitizens  
3 who are processed for release”. *Id.* The memorandum outlines a narrow set of  
4 circumstances, applying exclusively to family units processed at the Del Rio or Rio Grande  
5 Valley sectors, in which alternative processing may be permitted by using parole in  
6 connection with ICE’s Alternatives to Detention (ATD) program. *Id.* at 2. The availability  
7 of this process is triggered when (a) “the temporary staffing support to the sector is  
8 maximized, [(b)] the seven-day average of encounters is greater than the sector’s Fiscal  
9 Year 2019 May daily average,” (c) the number of subjects who were taken into custody in  
10 the last 48 hours exceeds the number of individuals booked out in the same period, and (d)  
11 at least one of the following is true: (1) the average time in custody in the sector exceeds  
12 72 hours or (2) the sector exceeds 100% of the total non-COVID detention capacity. *Id.*  
13 Under this process, a U.S. Border Patrol agent may exercise discretion to release a family  
14 unit on parole prior to the issuance of an NTA, enroll them in ICE ATD, and, as a condition  
15 of their parole, require them to report to ICE within 15 days for issuing an NTA. *Id.* at 1-  
16 2. This alternative processing is not available to individuals determined to be a national  
17 security risk or public safety threat, or covered by the U.S. Centers for Disease Control and  
18 Prevention’s Title 42 Order. *Id.* at 3.

19           This Lawsuit. Arizona alleges that CBP’s use of NTRs, and its release on parole of  
20 noncitizens on a case-by-case basis violate the APA (Counts 9-12) and the Constitution  
21 (Count 13). TAC at ¶¶ 216-234. Plaintiffs ask the Court to hold unlawful and set aside  
22 Defendants’ alleged “policy of releasing arriving aliens subject to mandatory detention, of  
23 paroling aliens without engaging in case-by-case adjudication or abiding by the other limits  
24 on that authority, and of failing to serve charging documents or initiate removal  
25 proceedings” and permanently enjoin Defendants “from releasing arriving aliens subject  
26 to mandatory detention, [] paroling aliens without engaging in case-by-case adjudication  
27 or abiding by the other limits on that authority, and [] failing to serve charging documents  
28 \_\_\_\_\_  
timing of such proceedings, are covered by Section 1252(g).

1 or initiate removal proceedings against plainly inadmissible aliens who are being released  
2 into the interior of the United States.” TAC at 68-69, ¶¶ F, I.

### 3 **ARGUMENT**

4 The Court should dismiss claims 9 to 13 under Rule 12(b)(1) because the NTR  
5 allegations are moot, Arizona lacks standing, the APA’s threshold requirements are not  
6 satisfied, and the INA precludes jurisdiction. Alternatively, they should be dismissed under  
7 Rule 12(b)(6) because none of Plaintiffs’ claims states a plausible claim for relief.<sup>5</sup>

#### 8 **I. Arizona’s Challenges to NTRs are Moot.**

9 Plaintiffs’ challenge to CBP’s use of NTRs is moot because CBP has ended the use  
10 of NTRs. Ex. A; *U.S. v. Alder Creek Water Co.*, 823 F.2d 343, 345 (9<sup>th</sup> Cir. 1987) (“A case  
11 becomes moot when interim relief or events have deprived the court of the ability to redress  
12 the party’s injuries.”). CBP’s November 2021 memorandum superseded the NTR  
13 guidance, such that any decision on the merits regarding NTRs “would be an impermissible  
14 advisory opinion.” *Akina v. Hawaii*, 835 F.3d 1003, 1011 (9<sup>th</sup> Cir. 2016).

#### 15 **II. Arizona Lacks Standing.**

16 Claims 9 to 13 fail because Arizona cannot demonstrate any actual or imminent  
17 injury caused by the challenged policies. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560  
18 (1992). Although Arizona fails to identify any specific challenged policy, the complaint  
19 addresses: (1) the now-discontinued use of NTRs; and (2) the current limited use of parole  
20 for recent entrants, including such use based on capacity and resource constraints. *See* TAC  
21 at ¶¶ 133-143. Despite the narrowness of those challenged actions, Arizona alleges that  
22 they result in generalized harms. *Id.* at ¶¶ 147-149. But no one has a legally protected  
23 interest in the prosecution of another. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).  
24 Further, the law already permits (and, in some instances, requires) the release of these

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27 <sup>5</sup> If the Court does not dismiss claims 9 to 13, all defendants except CBP should be  
28 dismissed because claims 9 to 13 do not raise allegations against any of the other  
components of DHS, which are not involved in making admission and release  
determinations of noncitizens apprehended and inspected at or near the border.

1 individuals from immigration detention. Thus, none of the harms alleged is fairly traceable  
2 to challenged policies, nor are they capable of being remedied by an order by this Court.

3 Arizona cannot show any actual or imminent harm from DHS's discontinued  
4 practice of issuing NTRs. Even assuming Arizona's challenge were not moot, all  
5 previously issued NTRs have expired and all individuals issued NTRs have been directed  
6 to report for processing. Ex. A at 1. Thus, any alleged impact on Arizona caused by  
7 noncitizens released on NTRs stems not from the policy but from individual  
8 noncompliance, for which standing is "substantially more difficult to establish." *California*  
9 *v. Texas*, 141 S. Ct. 2104, 2117 (2021). And Arizona has not alleged any facts to show that  
10 the use of an NTR, rather than an NTA, meaningfully impacted an individual's decision  
11 whether to abscond. *See Arpaio v. Obama*, 797 F.3d 11, 15-20 (D.C. Cir. 2015) (rejecting  
12 injury as too attenuated where policy did not apply to current and future entrants).

13 Nor can Arizona plausibly allege any harm from DHS's limited practice of using  
14 parole, at times in tandem with ICE's ATD program, for certain family units. Despite  
15 calling detention under section 1225(b) "mandatory," Arizona concedes that DHS has the  
16 authority to release individuals on parole on a case-by-case basis. TAC at ¶ 116. Indeed,  
17 DHS is obligated by a longstanding court order to release noncitizen minors "without  
18 unnecessary delay" or, in the case of an emergency or influx, if not released, to transfer  
19 them to a licensed program "as expeditiously as possible." *See Flores v. Lynch*, 828 F.3d  
20 898, 905 (9th Cir. 2016) (confirming settlement agreement applies to accompanied  
21 minors); *Flores Settlement Agreement* ¶¶ 12.A, 14).

22 If Arizona is contending that individuals are paroled too often, this claim is similarly  
23 non-justiciable. Simply alleging that a state provides social benefits to state residents who  
24 are paroled—here, medical care (SAC at ¶¶ 148-149)—and speculating that costs will  
25 increase if the population increases is insufficient to satisfy Article III standing, which  
26 requires Plaintiffs show a "concrete and particularized" injury that is "fairly traceable" to  
27 the challenged government action. *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*  
28 *(TOC), Inc.*, 528 U.S. 167 (2000); *Crane v. Johnson*, 783 F.3d 244, 252 (5th Cir. 2015)



1 (merely alleging that a particular policy increases immigration, which will require the state  
2 to spend money on social benefits does not confer Article III standing).

3 Plaintiffs allege that the policy will increase its noncitizen population, and that  
4 Arizona will expend more resources on noncitizens than they otherwise would. TAC at  
5 ¶¶ 146-149 (alleging costs associated with law enforcement activity and emergency  
6 medical care). But a state “has not suffered an injury in fact to a legally cognizable interest”  
7 when “a federal government program is anticipated to produce an increase in that state’s  
8 population and a concomitant increase in the need for the state’s resources.” *Arpaio v.*  
9 *Obama*, 27 F. Supp. 3d 185, 202 (D.D.C. 2014), *aff’d*, 797 F.3d 11. Such an injury is a  
10 generalized grievance; to accept it “would permit nearly all state officials to challenge a  
11 host of Federal laws simply because they disagree with how many—or how few—Federal  
12 resources are brought to bear on local interests.” *Id.* “[S]uch a ‘generalized grievance,’ no  
13 matter how sincere, is insufficient to confer standing.” *Hollingsworth v. Perry*, 570 U.S.  
14 693, 706 (2013) (quoting *Lujan*, 504 U.S. at 573-74).

15 Regardless, any costs that Arizona might incur as a result of the alleged criminal  
16 acts of third parties are not fairly traceable to the challenged conduct, but rather would be  
17 the consequence of the “unfettered choices made by independent actors.” *Lujan*, 504 U.S.  
18 at 562. Although standing may sometimes be found where the challenged conduct has a  
19 “determinative or coercive effect upon” those choices (*Levine v. Vilsack*, 587 F.3d 986,  
20 992 (9th Cir. 2009)), here, the conduct Plaintiffs challenge—the issuance of NTRs and the  
21 use of parole—do not encourage or cause any noncitizen to perform an illegal act. *See*  
22 *Arpaio*, 797 F.3d at 15-20. Similarly, even if Arizona incurs increased medical expenses  
23 caring for noncitizens, this expense would be the result of events unrelated to the  
24 challenged policies, including noncitizens needing medical care, noncitizens not paying for  
25 that care, healthcare providers requesting the Arizona to pay, and Arizona paying without  
26 federal reimbursement. *Cf. Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 43  
27 (1976). Arizona therefore lacks standing.

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### III. Claims 9 To 13 Are Not Reviewable Under the APA.

Claims 9 to 13 are barred by the APA and INA. The challenged policies are committed to agency discretion, do not constitute final agency action, are precluded by the INA, and do not fall within the INA's zone of interests.

#### A. Claims 9 to 13 Are Subject to Dismissal Because the Challenged Conduct Is Committed to Agency Discretion.

“[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*, CV-10-1413-PHX-SRB, 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 to be 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) (“While Arizona may disagree with the established enforcement priorities, Arizona’s allegations do not give rise to a claim that the Counter-defendants have abdicated their statutory responsibilities.”); *Arizona v. United States Dep’t of Homeland Sec.*, No. CV-21-00186-PHX-SRB, 2021 U.S. Dist. LEXIS 125687, at \*29, \*31, FN 15 (D. Ariz. June 30, 2021) (concluding that guidance concerning enforcement priorities, based on resource constraints, is committed to agency discretion):

The Court does not read the use of a naked ‘shall’ in § 1231(a)(1)(A) as stripping the Government of its discretion to prioritize the removal of certain noncitizens over others .... Plaintiffs argue that the Interim Guidance ‘is not mere prioritization/allocation of scarce resources, but rather a substantive rule.... The Court does not agree.... [The Government] is prioritizing the removal of some noncitizens over others. While Plaintiffs may not agree with this prioritization scheme’, “the Court finds that it is barred from conducting judicial review of the Interim Guidance as agency action committed to agency discretion by law. *Id.* (internal citations omitted).

1 *see also Morales de Soto v. Lynch*, 824 F.3d 822, 827 (9th Cir. 2016). Both alleged  
2 activities Arizona challenges in this lawsuit fall under this exception.

3 First, the decision whether to commence a removal proceeding or to release instead  
4 with an NTR is committed to agency discretion. The choice to refrain from pursuing  
5 particular enforcement actions is “generally committed to an agency’s absolute discretion.”  
6 *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Such decisions “often involve[] a  
7 complicated balancing of a number of factors which are peculiarly within [the agency’s]  
8 expertise,” including “whether agency resources are best spent on this violation or another,  
9 whether the agency is likely to succeed if it acts, whether the particular enforcement action  
10 requested best fits the agency’s overall policies, and, indeed, whether the agency has  
11 enough resources to undertake the action.” *Id.*

12 Arizona does not dispute that the presumption against reviewability applies to  
13 enforcement decisions, but contends only that Congress imposed statutory duties on DHS  
14 through 8 U.S.C. § 1225. TAC, *in passim*. The statute, however, imposes no unconditional  
15 duty on DHS. *See infra* pp. 18-24. In brief, Congress has not displaced the power inherent  
16 to the Executive to exercise prosecutorial discretion—a power the Supreme Court has held  
17 is “greatly magnified” in the immigration context, *AADC*, 525 U.S. at 490, as immigration  
18 policy may also “affect trade, investment, tourism, and diplomatic relations for the entire  
19 Nation, as well as the perceptions and expectations of aliens in this country who seek the  
20 full protection of its laws,” and the “nation’s foreign policy.” *Arizona v. United States*, 567  
21 U.S. 387, 395, 397 (2012). Although section 1225 uses the word “shall,” the Supreme  
22 Court has instructed that the “deep-rooted nature of law-enforcement discretion” persists  
23 “even in the presence of seemingly mandatory legislative commands.” *Town of Castle Rock*  
24 *v. Gonzales*, 545 U.S. 748, 761 (2005); see, e.g., *Richbourg Motor Co. v. United States*,  
25 281 U.S. 528, 534 (1930) (“Undoubtedly, ‘shall’ is sometimes the equivalent of ‘may’  
26 when used in a statute prospectively affecting government action.”). Thus, a state law  
27 instructing that officers “shall arrest” an individual who violates a restraining order did not  
28 “truly ma[k]e enforcement of [such] orders *mandatory*,” because “‘insufficient resources’”

1 and “sheer physical impossibility,” among other factors, required enforcement discretion.  
2 *Castle Rock*, 545 U.S. at 760 (citation omitted). *See also Arizona*, 2021 U.S. Dist. LEXIS  
3 125687, at \*27 (a blanket ‘shall’ does not automatically constitute a statutory mandate,  
4 especially when it concerns the enforcement of laws”).

5 The justification for dismissal is further bolstered by examination of section 1225.  
6 Enforcement discretion encompasses not just choices about whether to enforce, but also  
7 choices about *how* to enforce. *Arizona*, 567 U.S. at 396 (DHS has “broad discretion” to  
8 decide “whether it makes sense to pursue removal at all.”). DHS must consider a host of  
9 issues, such as the “dynamic nature of relations with other countries” and the need for  
10 enforcement policies to be “consistent with this Nation’s foreign policy with respect to  
11 these and other realities.” *Id.* at 397. Accordingly, DHS may “decline to institute  
12 proceedings” in the first instance. *AADC*, 525 U.S. at 484; *see also Crane*, 783 F.3d at 249  
13 (“[Section 1225] does not limit the authority of DHS to determine whether to pursue the  
14 removal of the immigrant.”). Congress has not required that DHS initiate removal  
15 proceedings and detain every inadmissible noncitizen it encounters at or near the border,  
16 and therefore CBP’s policy prioritizing when and how to issue NTAs at crowded border  
17 patrol stations, particularly during the pandemic, is committed to agency discretion by law.  
18 *See, e.g., Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 967 (9th Cir. 2017) (“the federal  
19 statutory and regulatory scheme, as well as federal case law, vest the Executive with very  
20 broad discretion to determine enforcement priorities.”);<sup>6</sup> *Morales de Soto*, 824 F.3d at 827  
21 (enforcement priorities are committed to agency discretion by law); *Arizona*, 2021 WL  
22 2787930, at \*9-11 (same). In fact, “the Department of Homeland Security only has funding  
23 annually to remove a few hundred thousand of the 11.3 million undocumented aliens living  
24 in the United States. Constrained by these limited resources, the Department of Homeland

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26 <sup>6</sup> “[T]he Department of Homeland Security only has funding annually to remove a  
27 few hundred thousand of the 11.3 million undocumented aliens living in the United States.  
28 Constrained by these limited resources, [DHS] must make difficult decisions about whom  
to prioritize for removal.” *Dream Act Coal.*, 855 F.3d at 976.

1 Security must make difficult decisions about whom to prioritize for removal.” *Ariz. Dream*  
2 *Act Coal*, 855 F.3d at 976.

3 Second, “[s]ection 1182(d)(5)(A) gives the government broad parole discretion,  
4 without mentioning any threshold standard that the government must meet or the timing of  
5 when a decision as to admissibility must be made.” *Romero v. Garland*, 999 F.3d 656, 664  
6 (9th Cir. 2021); *see also Garcia-Mir v. Smith*, 766 F.2d 1478, 1484 (11th Cir. 1985)  
7 (“Congress has delegated remarkably broad discretion to executive officials under the  
8 [INA]” and its grants of authority “are nowhere more sweeping than in the context of  
9 parole.”). Accordingly, the parole statute provides that the Secretary “*may. . . in his*  
10 *discretion* parole into the United States temporarily under such conditions as he may  
11 prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public  
12 benefit any alien applying for admission,” 8 U.S.C. § 1182(d)(5)(A) (emphasis added).  
13 Courts lack jurisdiction to review the discretionary decision whether to parole an individual  
14 under 8 U.S.C. § 1252(a)(2)(B)(ii). *See e.g. Padilla v. ICE*, 953 F.3d 1134, 1145 (9th Cir.  
15 2020), *vacated on other grounds*, 141 S. Ct. 1041 (2021) (“parole decisions are solely in  
16 the discretion of the Secretary of DHS and are not judicially reviewable”); *Torres v. Barr*,  
17 976 F.3d 918, 931 (9th Cir. 2020) (similar); *Lopez v. DHS*, No. 20-cv-1063, 2021 WL  
18 2079840, at \*3 (D. Ariz. Jan. 28, 2021) (similar); *see also Hassan v. Chertoff*, 593 F. 3d  
19 785 (9th Cir. 2010) (affirming district court decision that court lacked jurisdiction to  
20 consider the revocation of advance parole because the revocation, like the grant of  
21 advance parole, is discretionary).

22 More generally, the decision to release an individual on parole involves the same  
23 “complicated balancing of a number of factors which are peculiarly within [the agency’s]  
24 expertise.” *Heckler*, 470 U.S. at 831. Indeed, parole determinations encompass, among  
25 other things, “the possibility that [a noncitizen] may abscond to avoid being returned to his  
26 or her home country,” “priorities for the use of limited detention space,” whether detention  
27 is in the public interest, and of course, the statutorily undefined requirements that parole  
28 be for “urgent humanitarian reasons or significant public benefit.” *Jeanty v. Bulger*, 204 F.

1 Supp. 2d 1366, 1377, 1382 (S.D. Fla. 2002), *aff'd*, 321 F.3d 1336 (11th Cir. 2003); 8 U.S.C.  
2 § 1182(d)(5); *accord Padilla*, 953 F.3d at 1145 (describing ICE policy allowing parole “in  
3 light of available detention resources”). Because the parole decision involves a complicated  
4 balancing of factors that are not well suited to judicial supervision, that decision has long  
5 been committed to agency discretion and not subject to judicial review.

6 Finally, Arizona essentially maintains that section 1225 requires CPB to pursue a  
7 policy of “absolute” enforcement. But Congress has said otherwise, authorizing DHS and  
8 its components to establish “immigration enforcement policies and priorities,” 6 U.S.C. §  
9 202(5), and to “issue such instructions” and “perform such other acts as he deems necessary  
10 for carrying out [DHS’s] authority” under the INA, 8 U.S.C. § 1103(a)(3). Indeed, DHS  
11 has unreviewable “discretion regarding when and whether to initiate deportation  
12 proceedings.” *Cortez-Felipe v. INS*, 245 F.3d 1054, 1057 (9<sup>th</sup> Cir. 2001).

13 A. Because There Is No Final Agency Action, Claims 9-13 Must Be Dismissed.

14 Plaintiffs’ challenge to Defendants’ alleged parole and NTR policies do not  
15 challenge “final agency action” subject to judicial review. 5 U.S.C. § 704. Agency action  
16 is final if it determines legal “rights or obligations.” *Bennett v. Spear*, 520 U.S. 154, 178  
17 (1997). The actions that Arizona challenges are not in fact “policies,” but are a set of  
18 individual enforcement decisions taken by CBP officers, but even if they did constitute  
19 general policies, they are not final agency action, because they do not finally determine  
20 legal rights or obligations. A nonfinal agency order is one that “does not of itself adversely  
21 affect complainant but only affects his rights adversely on the contingency of future  
22 administrative action”. *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939).

23 Neither the NTR nor the alleged parole “policies” satisfy this rule. As to the NTR  
24 guidance and its replacement, “Parole Plus,” neither creates legal rights nor imposes legal  
25 obligations. *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014). Indeed,  
26 the agency retains the discretion to alter or revoke the guidance at will, so the guidance is  
27 nonfinal notwithstanding any expectation that rank-and-file officers will comply with the  
28 guidance while it is in effect. *Cf. Wilderness Soc’y v. Norton*, 434 F.3d 584, 596 (D.C. Cir.

1 2006). Nor does the NTR and Parole Plus guidance require CBP officers to take any  
2 specific action in any specific circumstance. Under the policy, CBP officers retained  
3 discretion on a “case-by-case basis” to release an individual on an NTR, now on Parole  
4 Plus, or to take any other enforcement action authorized by statute. Ex. A at 1-2. And the  
5 INA “makes clear that whether and for how long temporary parole is granted are matters  
6 entirely within the discretion” of DHS, *Kwai Fun Wong v. United States INS*, 373 F.3d  
7 952, 968 (9th Cir. 2004), such that the NTR and Parole Plus guidance do not constitute  
8 final agency action. Prioritization guidelines “are not statutes and do not have the status of  
9 law as they constitute a prioritization and not a prohibition of enforcement”. *Florida v.*  
10 *United States*, No. 8:21-cv-541-CEH-SPF, 2021 U.S. Dist. LEXIS 94083, at \*28-29 (M.D.  
11 Fla. May 18, 2021). Prioritization schemes which “do not change anyone’s legal status nor  
12 [] prohibit the enforcement of any law or detention of any noncitizen” do “not constitute  
13 final agency action reviewable under the APA.” *Id.*

14 Second, Arizona has not identified any parole “policy” that exists generally. Instead,  
15 Arizona challenges an amalgam of parole decisions made by DHS at the Southwest border.  
16 But as explained, parole is an individual discretionary decision made on a “case-by-case  
17 basis.” 8 U.S.C. § 1182(d)(5)(A). Accordingly, Plaintiffs cannot establish a unified  
18 “policy” to challenge. *Cf. Lightfoot v. D.C.*, 273 F.R.D. 314, 326 (D.D.C. 2011) (“The  
19 question is not whether a constellation of disparate but equally suspect practices may be  
20 distilled from the varying experiences” but rather, Plaintiffs must first identify the ‘policy  
21 or custom’ they contend violates the” law).

22 A particular noncitizen’s parole decision may be a final agency action with respect  
23 to that individual, as that decision has direct consequences for his/her personal legal status  
24 regarding detention versus release. *See Nat’l Min. Ass’n*, 758 F.3d at 253. But an individual  
25 noncitizen’s decision is not final with respect to Arizona, because it does not create “direct  
26 and appreciable legal” consequences to satisfy the APA’s finality inquiry requires. *Bennett*,  
27 520 U.S. at 178. Regardless, even if Defendants’ had a general “parole” policy, it would  
28 not constitute final agency action for the same reasons. Parole by its nature requires a case-



1 by-case assessment, and Plaintiffs have identified nothing that *requires* DHS officers to  
2 take a specific action with respect to parole in any specific case. *See* 8 U.S.C. § 1182(d)(5);  
3 8 C.F.R. § 212.5. No identified policy prevents DHS officials from granting or denying  
4 parole in any specific case.

5 Arizona asserts that it will shoulder the burden of increased social service costs  
6 caused by the possible increase in migration to Arizona. It further argues that this influx of  
7 immigrants to Arizona is due to Defendants’ parole practices. Accordingly, Arizona  
8 argues, Defendants’ parole practices have determined rights and obligations, rendering  
9 them “final agency action”. Arizona’s argument fails. Defendants’ alleged guidance to  
10 enforcement officers on how to use their discretion regarding release of noncitizens does  
11 not “require” any State or noncitizen “to do anything,” nor does it “prohibit” any State or  
12 noncitizen “from doing anything.” *Nat’l Mining Ass’n*, 758 F.3d at 252. *If* more noncitizens  
13 settle in Arizona because of Defendants’ actions, there may be downstream *practical*  
14 consequences to Plaintiffs, such as increased expenditures on social services. *See e.g.*,  
15 *Louisiana v. U.S. Army Corps of Engineers*, 834 F.3d 574, 583 (5th Cir. 2016)  
16 (distinguishing practical consequences from legal consequences). These consequences,  
17 however, do not constitute the “direct and appreciable legal” consequences that the APA’s  
18 finality inquiry requires. *Bennett*, 520 U.S. at 178.

19 B. Statutes Preclude Judicial Review Of Claims 9 to 13.

20 Several provisions of the INA also bar Arizona’s claims. *See* 5 U.S.C. § 701(a)(1)  
21 (no APA review when “statutes preclude judicial review”).

22 Section 1252(g). Arizona’s claim that DHS must issue NTAs to each inadmissible  
23 noncitizen who is apprehended at or near the border and inspected under section 1225 is  
24 barred by section 1252(g). Section 1252(g) bars jurisdiction over any claim “arising from  
25 the decision or action by the [Secretary] to commence proceedings, adjudicate cases, or  
26 execute removal orders against any alien under this chapter.” Section 1252(g) reflects  
27 Congress’s desire to “protect[] the Executive’s discretion from the courts” in general and  
28



1 from “attempts to impose judicial constraints upon prosecutorial discretion” in particular.  
2 *AADC*, 525 U.S. at 485-86, 485 n.9.

3 Arizona challenges the NTR policy on the grounds that “the government is also  
4 required to initiate removal proceedings against these aliens.” TAC at ¶ 125. But DHS does  
5 issue notices to appear, just not on the timeline Arizona would prefer as a policy matter.  
6 *See supra* 3. Plaintiffs thus challenge Defendants’ decision whether and when to  
7 “commence proceedings,” a claim which falls squarely under the jurisdictional bar of  
8 section 1252(g). *See AADC*, 525 U.S. at 487.

9 Section 1252(a)(2)(b)(ii). Arizona’s challenges to Defendants’ individual decisions  
10 to release noncitizens on parole are barred by section 1252(a)(2)(B)(ii)—which bars review  
11 of “decision or action[s] ... the authority for which is specified under this subchapter to be  
12 in the discretion of ... the Secretary of Homeland Security”—as the parole decision is  
13 expressly specified by the INA to be within the Secretary’s discretion. 8 U.S.C. §  
14 1182(d)(5)(A); *supra* pp. 10-12.<sup>7</sup> The court would similarly lack jurisdiction over any  
15 challenge to a parole policy or procedure. *See Loa-Herrera v. Trominski*, 231 F.3d 984,  
16 991 (5th Cir. 2000) (“discretionary judgment regarding the application of parole--including  
17 the *manner* in which that discretionary judgment is exercised, and whether the procedural  
18 apparatus supplied satisfies regulatory, statutory, and constitutional constraints--is not . . .  
19 subject to review.”) (internal citations omitted).

20 C. Arizona Does Not Fall Within the Zone of Interests of the Statutes They Invoke.

21 Arizona’s claims also do not fall within the zone of interests of sections 1182(d)(5)  
22 or 1225(b). This inquiry asks whether Congress intended for a particular plaintiff to invoke  
23 a particular statute to challenge agency action. *See Clarke v. Security Indus. Ass’n*, 479  
24 U.S. 388, 399 (1987). If a plaintiff is not the object of a challenged regulatory action—  
25 which Arizona is not—the plaintiff has no right of review as its “interests are so marginally  
26

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27 <sup>7</sup> To the extent Arizona challenges the decision not to serve NTAs on noncitizens  
28 subject to section 1225(b)(1), i.e., processed for expedited removal but establishing a  
credible fear of persecution or torture, review of these decisions is separately barred by the  
INA. *See* 8 U.S.C. § 1252(a)(2)(A)(i), (iv).

1 related to or inconsistent with the purposes implicit in the statute that it cannot reasonably  
2 be assumed that Congress intended to permit the suit.” *Id.* at 399.

3 Nothing in the text, structure, or purpose of the INA generally, or sections  
4 1182(d)(5) or 1225(b) specifically, suggests that Congress intended to permit a State to  
5 invoke attenuated financial impacts of immigration enforcement policies to contest those  
6 policies. *See Fed’n for Am. Immigration Reform (FAIR), Inc. v. Reno*, 93 F.3d 897, 902  
7 (D.C. Cir. 1996) (“*FAIR*”) (“The immigration context suggests the comparative  
8 improbability of any congressional intent to embrace as suitable challengers in court all  
9 who successfully identify themselves as likely to suffer from the generic negative features  
10 of immigration.”). The D.C. Circuit in *FAIR* rejected a similar challenge that the federal  
11 government’s “scheme for parole” of arriving noncitizens violated statutory limits on  
12 parole authority, holding that the plaintiffs were not within the zone of interests because  
13 there was nothing in the “language of the statutes on which [plaintiffs] rely” nor the  
14 “legislative history that even hints at a concern about regional impact” of immigration. *Id.*  
15 at 900-01. So too here.

16 Indeed, a litigant does not have a “judicially cognizable interest” in another’s  
17 prosecution, *Linda R.S.*, 410 U.S. at 619, or “in procuring enforcement of the immigration  
18 laws” against third parties in particular ways. *Sure-Tan, Inc. v. NLRB*, 457 U.S. 883, 897  
19 (1984). Congress has enacted several provisions aimed at protecting the Executive’s  
20 discretion from the courts, *AADC*, 525 U.S. at 486–87, making clear that only noncitizens  
21 may challenge enforcement decisions, and only certain types of decisions, and only through  
22 their removal proceedings. *See, e.g.*, 8 U.S.C. §§ 1226(e); 1252(a)(2)(B)(ii), 1252(a)(5),  
23 (b)(9), (g); *see also id.* §§ 1226a(b)(1), 1229c(f), 1231(h), 1252(a)(2)(A), (a)(2)(C),  
24 (b)(4)(D), (b)(9), (d), (f), (g); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029-31 (9th Cir. 2016)  
25 (district courts lack jurisdiction over “any issue—whether legal or factual—arising from  
26 any removal-related activity.”). A detailed review scheme that allows some parties, but not  
27 others, to challenge specific executive action is “strong evidence that Congress intended to  
28 preclude [other parties] from obtaining judicial review.” *United States v. Fausto*, 484 U.S.

1 439, 448 (1988); *see Ayuda, Inc. v. Reno*, 7 F.3d 246, 250 (D.C. Cir. 1993) (holding that  
 2 organizational plaintiff could not challenge INS policies “that bear on an alien’s right to  
 3 legalization”); *Las Americas Immigrant Advoc. Ctr. v. Biden*, No. 3:19-CV-02051-IM,  
 4 2021 WL 5530948, at \*5 (D. Or. Nov. 24, 2021) (INA provides only noncitizens with cause  
 5 of action for enforcement, so other entities lack a cause of action).

#### 6 **IV. Plaintiffs Fail to State a Claim for Relief.**

7 The complaint should also be dismissed under Rule 12(b)(6) as each of the five  
 8 counts fails to state a plausible, cognizable claim for relief.<sup>8</sup>

9  
 10 <sup>8</sup> In support of this motion, the government relies upon:

11 **Exhibit A**, (Parole Plus Alternatives to Detention (Nov. 2, 2021), available at 3:21-  
 12 cv-01066, ECF No. 62),

13 **Exhibit B** (Memorandum from Gene McNary, INS Comm’r, *Parole Project for*  
 14 *Asylum Seekers at Ports of Entry and INS Detention* (Apr. 20, 1992), 9 Immigration Law  
 15 Service 2d PSD Selected DHS Document 4110),

16 **Exhibit C** (Memorandum from John Kelly, Sec’y of Homeland Security,  
 17 *Implementing the President’s Border Security and Immigration Enforcement Improvement*  
 18 *Policies* (Feb. 20, 2017), available at  
 19 [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf)  
 20 [Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf)),

21 **Exhibit D** (Memorandum from Matthew T. Albence, Exec. Assoc. Dir., U.S.  
 22 Immigration and Customs Enf’t, *Implementing the President’s Border Security and*  
 23 *Interior Immigration Enforcement Policies* (Feb. 21, 2017), available at  
 24 [https://www.ice.gov/doclib/foia/eoRecords/eoRecordsEnforcement\\_01-20-2017\\_03-14-](https://www.ice.gov/doclib/foia/eoRecords/eoRecordsEnforcement_01-20-2017_03-14-2017.pdf)  
 25 [2017.pdf](https://www.ice.gov/doclib/foia/eoRecords/eoRecordsEnforcement_01-20-2017_03-14-2017.pdf)),

26 **Exhibit E** (ICE Policy No. 11002.1, *Parole of Arriving Aliens Found to Have a*  
 27 *Credible Fear of Persecution or Torture* (Dec. 8, 2009), available at  
 28 [https://www.ice.gov/doclib/dro/pdf/11002.1-hd-](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole-of-arriving-aliens-found-credible-fear.pdf)  
 29 [parole-of-arriving-aliens-found-credible-fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole-of-arriving-aliens-found-credible-fear.pdf)), and

30 **Exhibit F** (Memorandum from Victor X. Cerda, Acting Dir., Det. and Removal  
 31 Operations, U.S. Immigration and Customs Enf’t, *ICE Transportation, Detention and*  
 32 *Processing Requirements* (Jan. 11, 2005), available at  
 33 [https://www.ice.gov/doclib/foia/dro\\_policy\\_memos/icetransportationdetentionandprocess](https://www.ice.gov/doclib/foia/dro_policy_memos/icetransportationdetentionandprocessingrequirements.pdf)  
 34 [ingrequirements.pdf](https://www.ice.gov/doclib/foia/dro_policy_memos/icetransportationdetentionandprocessingrequirements.pdf)).

35 Each of these documents is a publically available government document. Exhibit A  
 36 is also incorporated in to the complaint by reference. Therefore the Court can consider  
 37 these exhibits without converting this motion into one for summary judgment. *United*  
 38 *States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003) (in evaluating Rule 12(b)(6)  
 39 motion, court may consider documents external to the complaint by judicial notice or by  
 40 incorporation by reference in the complaint); *U.S. ex rel Robinson Rancheria Citizens*  
 41 *Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir.1992)(“Federal courts may take notice  
 42 of proceedings in other courts, both within and without the federal judicial system, if those  
 43 proceedings have a direct relation to the matters at issue.”); *Collins v. Wells Fargo Bank*,  
 44 No. CV-12-2284-PHX-LOA, 2013 U.S. Dist. LEXIS 102791, at \*20 (D. Ariz. July 22,  
 45 2013).

1           A. Counts 9 and 12 (Substantive APA Claims)

2           Counts 9 and 12 assert essentially the same claim: Defendants’ practices are “not in  
3 accordance with law” or “in excess of statutory . . . authority,” 5 U.S.C. § 706(2)(A), (C)  
4 (Count 9), and are “unlawfully withheld or unreasonably delayed,” 5 U.S.C. § 706(1)  
5 (Count 12), because they allegedly violate detention mandates of section 1225(b)(1) and  
6 (2) and the parole provision, 8 U.S.C. 1182(d)(5)(A). TAC at ¶¶ 216-221, 231-232. These  
7 claims fail as a matter of law because the cited statutes do not support Plaintiffs’ theory.  
8 Sections 1225(b)(1) and (2) do not require that Defendants initiate removal proceedings or  
9 detain every noncitizen encountered at or near the border. First, nothing in sections  
10 1225(b)(1) and (b)(2) overcomes the “deep-rooted nature of law-enforcement discretion.”  
11 *Town of Castle Rock*, 545 U.S. at 760-61. The fact that § 1225(b) uses the terms “shall ...  
12 detain[.]” and “shall order” does not constrain the government’s longstanding discretion to  
13 determine whether commencement of removal proceedings is appropriate. DHS is  
14 “invested with the sole discretion to commence [such] removal proceedings,” *Matter of*  
15 *Avetisyan*, 25 I. & N. Dec. 688, 690-91 (BIA 2012), and nothing in the statute evinces a  
16 “stronger indication” of intent to impose a true mandate on the Executive to mandate  
17 removal in every instance. *See Town of Castle Rock*, 545 U.S. at 761; *Arizona*, 2021 U.S.  
18 Dist. LEXIS 125687, at \*27 (a blanket ‘shall’ does not automatically constitute a statutory  
19 mandate, especially when it concerns the enforcement of laws”).

20           Second, sections 1225(b)(1) and (b)(2) by their terms do not require initiating  
21 removal and detention in all cases. Section 1225(b)(1)—which authorizes the expedited  
22 removal of certain noncitizens—does not mandate expedited removal. Immigration  
23 officers must first make a discretionary determination whether a noncitizen should be  
24 processed under § 1225(b)(1) at all. *See Matter of E-R-M-*, 25 I. & N. Dec. at 523 (“DHS  
25 has discretion to put aliens in [§ 1229a] removal proceedings even though they may also  
26 be subject to expedited removal”). The Board of Immigration Appeals (BIA) has concluded  
27 that nothing in the statute compels “DHS to exercise its prosecutorial discretion to initiate  
28 expedited removal proceedings.” *Matter of J-A-B- & I-J-V-A-*, 27 I. & N. Dec. 168, 172

1 (BIA 2017). The BIA’s longstanding position that DHS has discretion not to apply section  
2 1225(b)(1) in individual cases is entitled to judicial deference under *Chevron, U.S.A., Inc.*  
3 *v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See INS v. Aguirre-*  
4 *Aguirre*, 526 U.S. 415, 424-425 (1999).

5 Next, nothing in section 1225(b)(2)(A) mandates the commencement of removal  
6 proceedings under section 1229a against all applicants for admission at the border or  
7 physically present in the country. *See, e.g., E-R-M-*, 25 I. & N. Dec. at 523 (noting “broad  
8 discretion given to ... charging decisions by the Executive Branch, that is, the DHS, in the  
9 immigration context”). Rather, section 1225(b)(2)(A) “authorizes the government to detain  
10 certain aliens” seeking admission to the United States *if* it decides to remove them through  
11 section 1229a removal proceedings. *Jennings v. Rodriguez*, 138 S. Ct. 830, 838 (2018).  
12 The antecedent decision whether to pursue removal at all is a separate, discretionary  
13 decision of the Secretary that is not subject to judicial review—just as prosecutors’  
14 decisions whether to bring criminal charges against suspected offenders are not subject to  
15 judicial review. *See Arizona*, 567 U.S. at 396; *AADC*, 525 U.S. at 483, 485-86, 485 n.9.  
16 Accordingly, even if Section 1225(b)(2)(A) “directs [immigration officers] to detain an  
17 alien for the purpose of placing that alien in removal proceedings”—a proposition the  
18 government disputes—the provision “does not limit the authority of DHS to determine  
19 whether to pursue the removal of the immigrant” in the first place. *Crane*, 783 F.3d at 249;  
20 *Cortez-Felipe*, 245 F.3d at 1057 (DHS has unreviewable “discretion regarding when  
21 and whether to initiate deportation proceedings”).

22 As to Plaintiffs’ argument that detention is mandatory once proceedings are  
23 initiated, TAC at ¶ 122, nothing in the statute requires DHS to take into custody and detain  
24 all eligible noncitizens. Instead, as explained, the INA authorizes DHS to release detained  
25 noncitizens in particular circumstances, subject to statutory and regulatory limitations,  
26 including through parole, 8 U.S.C. § 1182(d)(5)(A), or “bond” and “conditional parole,” 8  
27 U.S.C. § 1226(a)(2)(A)-(B). And, the decision whether to release is a complex decision  
28

1 that considers many factors, and is not subject to judicial review. *See* 8 U.S.C. §  
2 1252(a)(2)(B)(ii); 1226(e); *Loa-Herrera*; 231 F.3d at 991.<sup>9</sup>

3 Finally, the federal government has exercised discretionary release authority for as  
4 long as it has been regulating immigration. *See, e.g., Nishimura Ekiu v. U.S.*, 142 U.S. 651,  
5 651, 661 (1892) (discussing release of noncitizen to care of private organization); *Kaplan*  
6 *v. Tod*, 267 U.S. 228, 230 (1925) (same). Indeed, Congress enacted 8 U.S.C. § 1182(d)(5)  
7 as a “codification of the [prior] administrative practice.” *Leng May Ma v. Barber*, 357 U.S.  
8 185, 188 (1958). DHS has long interpreted section 1182(d)(5) to authorize parole of  
9 noncitizens who “present neither a security risk or a risk of absconding” and “whose  
10 continued detention is not in the public interest.” 8 C.F.R. § 212.5(b)(5). It is the agency,  
11 not the court, that determines what undefined statutory terms like “significant public  
12 benefit” warranting parole may include, *see* 8 U.S.C. §§ 1103(a)(1), 1182(d)(5), and that  
13 determination has always encompassed resource constraints. *See e.g., Padilla*, 953 F.3d at  
14 1145, *vacated on other grounds*, 141 S. Ct. 1041 (2021) (describing ICE policy allowing  
15 parole “in light of available detention resources”); *Jeanty*, 204 F. Supp. 2d at 1377 (parole  
16 decision may take into consideration “priorities for the use of limited detention space”).

17 Multiple presidential administrations have construed section 1182(d)(5) this way.  
18 For example, in 1992, the former Immigration and Naturalization Service (INS), expanding  
19 upon a pilot project conducted in May 1990 to October 1991, issued guidelines on  
20 releasing, through parole, asylum seekers from INS detention. In the memorandum, INS  
21 explained that it “has limited detention space” and that by adopting the parole project it  
22 would “be able to detain those persons most likely to abscond or to pose a threat to public  
23 safety rather than to base the detention decision solely or primarily on the availability of  
24 detention space.” Ex. B, Memorandum from Gene McNary, INS Comm’r, *Parole Project*  
25 *for Asylum Seekers at Ports of Entry and INS Detention* (Apr. 20, 1992), 9 Immigration

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27  
28 <sup>9</sup> Section 1252(f)(1) bars this Court from issuing an injunction placing requirements  
and limitations on Defendants’ authority to charge and detain or release noncitizens under  
section 1225, *see AADC*, 525 U.S. at 481-82; *Hamama v. Adducci*, 912 F.3d 869, 880 (6th  
Cir. 2018), and so Arizona’s claims for such injunctive relief must be dismissed.



1 Law Service 2d PSD Selected DHS Document 4110, at 1. Likewise, in February 2017,  
2 then-Secretary John Kelly issued a policy memorandum stating that “[a]s the Department  
3 works to expand detention capabilities, detention of all [individuals described in section  
4 1225] may not be immediately possible, and detention resources should be prioritized  
5 based upon potential danger and risk of flight if an individual [noncitizen] is not detained,  
6 and parole determinations will be made in accordance with current regulations and  
7 guidance. *See* 8 C.F.R. §§ 212.5, 235.3.” Ex. C, Memorandum from John Kelly, Sec’y of  
8 Homeland Security, *Implementing the President’s Border Security and Immigration*  
9 *Enforcement Improvement Policies* (Feb. 20, 2017), available  
10 at [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf)  
11 [Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf), at 3.  
12 ICE similarly issued policy guidance stating that “[p]arole or other release, with all  
13 available safeguards, may also be warranted where detention capacity limits the agency’s  
14 ability to detain the [noncitizen] consistent with legal requirements, including court orders  
15 and settlement agreements.” Ex. D, Memorandum from Matthew T. Albence, Exec. Assoc.  
16 Dir., U.S. Immigration and Customs Enf’t, *Implementing the President’s Border Security*  
17 *and Interior Immigration Enforcement Policies* (Feb. 21, 2017), available at  
18 [https://www.ice.gov/doclib/foia/eoRecords/eoRecordsEnforcement\\_01-20-2017\\_03-14-](https://www.ice.gov/doclib/foia/eoRecords/eoRecordsEnforcement_01-20-2017_03-14-2017.pdf)  
19 [2017.pdf](https://www.ice.gov/doclib/foia/eoRecords/eoRecordsEnforcement_01-20-2017_03-14-2017.pdf), at 3.<sup>10</sup>

20 And, in July 2019, following legal decisions addressing whether certain noncitizens  
21 were entitled to bond hearings before an immigration judge, (*see Padilla v. ICE*, 387 F.  
22 Supp. 3d 1219 (W.D. Wash. 2019); *Matter of M-S-*, 27 I. & N. Dec. 509 (A.G. 2019)), ICE  
23 issued interim guidance to its workforce specifically noting that it lacked the detention  
24 capacity to detain all noncitizens to whom the immigration law detention provisions apply,  
25 that the agency accordingly needed to appropriately prioritize the use of this limited

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27 <sup>10</sup> *See also* Ex. E, ICE Policy No. 11002.1, *Parole of Arriving Aliens Found to Have*  
28 *a Credible Fear of Persecution or Torture* (Dec. 8, 2009), available at  
[https://www.ice.gov/doclib/dro/pdf/11002.1-hd-](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf)  
[parole\\_of\\_arriving\\_alien\\_found\\_credible\\_fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf).



1 detention capacity, and that the public interest favored maintaining custody of noncitizens  
2 posing the greater potential danger to public safety or risk of flight. *See Interim Guidance*  
3 *for Implementation of Matter of M-S-*, 27 I. & N. Dec. 509 (A.G. 2019): Parole of Aliens  
4 Who Entered Without Inspection, Were Subject to Expedited Removal, and Were Found  
5 to Have a Credible Fear of Persecution or Torture.<sup>11</sup>

6 Courts have long acknowledged and upheld this practice. *See e.g Padilla*, 953 F.3d  
7 at 1145 (describing ICE policy allowing parole “in light of available detention resources”);  
8 *Jeanty*, 204 F. Supp. 2d at 1377 (parole decision may take into consideration “priorities for  
9 the use of limited detention space”); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 324 (D.D.C.  
10 2018) (describing DHS’s “Parole Directive,” effective since 2009); *see also New Mexico*  
11 *v. McAleenan*, 450 F. Supp. 3d 1130, 1214 (D.N.M. 2020) (“[8 U.S.C. § 1182(d)(5)(A)]  
12 grants the Attorney General the discretion to parole asylum seekers for ‘significant public  
13 benefit.’ [] This vague standard conceivably encompasses a wide range of public benefits,  
14 such as conserving resources otherwise spent on housing asylum seekers or allowing an  
15 individual to carry on their employment in the United States.”).

16 Yet, the Fifth Circuit recently concluded that that DHS may not parole noncitizens  
17 “*en masse*” under Section 1182(d)(5) based on insufficient detention capacity, because  
18 doing so would be an abdication of the case-by-case adjudication required by Section  
19 1182(d)(5). *Texas v. Biden*, No. 21-10806, 2021 U.S. App. LEXIS 36689, \*142 (5th Cir.  
20 Dec. 13, 2021) (emphasis in original). That decision is incorrect and should not be

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22 <sup>11</sup> Guidance from both ICE and the former INS has long recognized the need to  
23 release individuals in light of limited detention capacity. For example, in 2005, ICE issued  
24 guidance indicating that noncitizens subject to mandatory detention or a high priority for  
25 detention should be released at the time of processing only “when national bed space  
26 population is at capacity.” Ex. F, Memorandum from Victor X. Cerda, Acting Dir., Det.  
27 and Removal Operations, U.S. Immigration and Customs Enf’t, *ICE Transportation,*  
28 *Detention and Processing Requirements* (Jan. 11, 2005), available at  
[https://www.ice.gov/doclib/foia/dro\\_policy\\_memos/icetransportationdetentionandprocessingrequirements.pdf](https://www.ice.gov/doclib/foia/dro_policy_memos/icetransportationdetentionandprocessingrequirements.pdf), at 2. *See also Matter of Garvin-Noble*, 21 I. & N. Dec. 672, 674–75 (BIA 1997) (noting that insufficient INS detention capacity motivated the enactment of the Transition Period Custody Rules); U.S. Gov’t Accountability Off., GAO-92-85, *Immigration Control: Immigration Policies Affect INS Detention Efforts* 27–28, 54–55 (1992) (discussing the 18-month parole pilot program ending in October 1991 through which asylum seekers were released based on detention capacity).

1 followed. Moreover, it is inapplicable to this case, which does not involve any practice of  
2 paroling “en masse.”<sup>12</sup>

3 First, Congress charged *the Secretary* with determining, “in his discretion,” whether  
4 the parole of specific persons—such as those whom DHS cannot detain due to insufficient  
5 appropriations and who do not pose a danger or a flight risk—would be a “significant  
6 public benefit.” 8 U.S.C. 1182(d)(5)(A).

7 Second, *Texas* fails to acknowledge the longstanding practice across multiple  
8 administrations—which is entitled to deference—of relying in part on detention capacity  
9 as a factor in case-by-case parole determinations. Indeed, without addressing the many  
10 policies discussed here, the Fifth Circuit simply assumed that the government *must* be  
11 releasing individuals without addressing their individual factors case-by-case. But the fact  
12 that a particular factor such as lack of detention capacity might be implicated in many cases  
13 does not mean that DHS has abdicated case-by-case review or is paroling “en masse.” *Id.*  
14 at \* 91. To the contrary, as the guidance discussed earlier implementing section 1182(d)(5)  
15 demonstrates, DHS’s parole regulations require “case-by-case” decisions, including a  
16 threshold determination that a noncitizen “presents neither a security risk nor a risk of  
17 absconding” and a further determination that parole is appropriate, including because  
18 “continued detention is not in the public interest.” 8 C.F.R. 212.5(b). In making those  
19 determinations, DHS must of course account for its actual detention capacity. But that does  
20 not make its decisions any less case-by-case.

21 Third, the Fifth Circuit ignored the government’s argument that detention capacity  
22 must be a factor in parole decisions because Congress has not appropriated enough funds

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23  
24 <sup>12</sup> *Texas* involved a challenge to DHS’s termination of the Migrant Protection  
25 Protocols, which implemented DHS’s statutory authority permitting the return of certain  
26 noncitizens to Mexico pending the disposition of their removal proceedings. *See* 8 U.S.C.  
27 1225(b)(2)(C) (authorizing Secretary to return certain noncitizens arriving by land to  
28 contiguous territory). The Fifth Circuit concluded that the government is required by 8  
U.S.C. §1225 to detain all such noncitizen applicants for admission who are not returned  
to contiguous territories—except for those paroled into the United States based on case-  
by-case humanitarian considerations—and that parole of such individuals is not permitted  
based on capacity limitations. *Id.* at \*7-8, \*141-142. The government filed a Petition for a  
Writ of Certiorari on December 29, 2021. *See Texas v. Biden*, No. 21-954.

1 to detain everyone potentially subject to detention under Section 1225. Instead, the Court  
2 perfunctorily noted that “Section 1225(b)(2)(C) authorizes contiguous-territory return  
3 as an alternative” to parole. *Id.* at 140-141. But contiguous-territory return was employed  
4 principally on a limited, ad hoc basis for over two decades after Section 1225(b)(2)(C) was  
5 enacted, and yet Congress never amended the statute to require greater use of contiguous  
6 territory return. Nor did Congress amend Section 1182(d)(5) at any time since 1996 to limit  
7 consideration of detention capacity or appropriate sufficient additional funds to increase  
8 capacity when amending the INA, despite the agency’s longstanding practice. *See Lorillard*  
9 *v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative  
10 ... interpretation of a statute and to adopt that interpretation when it re-enacts a statute  
11 without change.”). Moreover, contiguous-territory return is not an alternative option for  
12 many individuals potentially subject to detention under Section 1225, as it is limited to  
13 noncitizens who *arrive by land* via Mexico or Canada. It cannot be used for noncitizens  
14 who arrive by boat or by plane. But under the Fifth Circuit’s reasoning, all such individuals  
15 must be detained, and cannot be paroled even if DHS lacks any means of detaining them.  
16 *Texas*, 2021 U.S. App. LEXIS 36689 at \*94, 138. That contravenes settled law that  
17 Congress does not intend for statutory provisions like Sections 1225 and 1182 to mean  
18 different things for different people in different circumstances. *Clark v. Martinez*, 543 U.S.  
19 371, 378 (2005) (“To give these same words a different meaning for each category [of  
20 person it applied to] would be to invent a statute rather than interpret one.”). In sum,  
21 Defendants’ parole practices are fully consistent with the discretionary authority vested in  
22 DHS by the statute under longstanding interpretation by the agency and courts.

23 **B. Count 10 (APA Arbitrary and Capricious Claim)**

24 Count 10 alleges that “Defendants’ policy is arbitrary and capricious for several  
25 reasons,” including its alleged failure to consider costs to States and their reliance interests,  
26 alternatives to parole, and the agency’s purported departure from prior practice. Plaintiffs  
27 also allege that the agency’s reliance on resource constraints is pre-textual. TAC at ¶¶ 222-  
28 223. Plaintiffs’ argument fails at the threshold because it presumes Defendants’ release

1 practices are spelled out in a policy document. But the only “policy” addressed in such a  
2 document at issue here are NTRs, and the policy document has *ended* that practice, Ex. A,  
3 mooting Plaintiffs’ challenge to it.

4 As to Arizona’s general “parole” and “release” allegations, no such “policy” exists  
5 and the Third Amended Complaint does not identify any specific policy, but reveals that  
6 the parole “policy” at issue is Plaintiffs’ undeveloped speculation that the release of a  
7 certain threshold number of noncitizens means the government must not be adhering to the  
8 criteria permitting parole under the statute and regulation. *See* TAC at ¶ 132 (“*If they are,*  
9 *instead, paroling each of these individuals, they are not limiting the use of parole to “case-*  
10 *by-case bas[e]s” nor to situations presenting “urgent humanitarian reasons or significant*  
11 *public benefit.”*) (emphasis added). Plaintiffs’ mere conjecture fails to plausibly allege the  
12 existence of any cohesive policy addressing the conduct at issue. *See Bell Atl. Corp. v.*  
13 *Twombly*, 550 U.S. 544, 570 (2007); *Lightfoot*, 273 F.R.D. at 326 (cannot allege a “policy”  
14 by looking at disparate individual actions). Indeed, Arizona appears to be challenging as a  
15 “policy” merely an amalgam of individual release decisions issued under the parole statute  
16 and regulation that it disagrees with. *See* 8 U.S.C. § 1182(d)(5); 8 C.F.R. § 212.5. However,  
17 the APA may not be invoked to demand “day-to-day agency management” of agency  
18 decisions *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 67 (2004). And as  
19 explained, the Court lacks jurisdiction to review these expressly discretionary individual  
20 determinations. *See* 8 U.S.C. § 1252(a)(2)(B)(ii); *supra* pp. 15-17.

21 Further, the APA’s limitation of review to “agency action” does not permit this  
22 “kind of broad programmatic attack” seeking “*wholesale* improvement of [a] program by  
23 court decree.” *Norton*, 542 U.S. at 64. “Under the terms of the APA, [Plaintiffs] must  
24 direct its attack against some particular ‘agency action’ that causes it harm.” *Lujan*, 497  
25 U.S. at 891. The APA does not provide a cause of action for Plaintiffs to promote their  
26 view of how parole determinations generally must be decided. *See id.*; *Ctr. for Biological*  
27 *Diversity v. Zinke*, 260 F. Supp. 3d 11, 20 (D.D.C. 2017) (“The discreteness limitation  
28 precludes using broad statutory mandates to attack agency policy[.]”). Plaintiffs thus fail

1 to allege a cognizable “agency action” that could even be scrutinized under the APA for  
2 arbitrary and capricious reasoning.

3 C. Count 11 (APA Notice and Comment)

4 Count 11 alleges that Defendants violated 5 U.S.C. § 553, arguing “[e]ven assuming  
5 Defendants have discretion to depart from the clear requirements of the INA with respect  
6 to arriving aliens, a sea change of this magnitude required notice and comment.” TAC at  
7 ¶ 230. First, this claim suffers the same deficiency as Count 10. The APA requires notice  
8 and comment only for “rule making.” 5 U.S.C. § 533; *see id.* § 551(4)–(5) (defining “rule”  
9 and “rule making”). Plaintiffs have not identified any “rule” that they challenge regarding  
10 parole, but merely what they view as unlawful decisions in aggregate of individual  
11 discretionary determinations. These individual determinations based on the facts of  
12 specific cases are best described as “adjudications,” not “rules,” and are not bound by  
13 notice-and-comment rulemaking. *See* 5 U.S.C. § 551(6)–(7); *United States v. Florida E.*  
14 *Coast Ry.*, 410 U.S. 224, 244–45 (1973).

15 Second, regarding the NTR guidance and Defendants’ alleged general parole  
16 policy—assuming one exists—both are “general statements of policy,” 5 U.S.C.  
17 § 553(b)(3)(A), that “advise the public prospectively of the manner in which the agency  
18 proposes to exercise a discretionary power,” *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993),  
19 and not subject to notice-and-comment rulemaking. “The critical factor to determine  
20 whether a directive announcing a new policy constitutes a rule or a general statement of  
21 policy is the extent to which the challenged directive leaves the agency, or its implementing  
22 official, free to exercise discretion to follow, or not to follow, the announced policy in an  
23 individual case.” *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987) (cleaned  
24 up). The policy document ending the NTR practice and providing for Parole Plus instead  
25 offered guidelines, but no requirements, for when agency officers “may consider” such  
26 release mechanisms, and provided that these discretionary decisions must still be assessed  
27 “on a case-by-case basis.” Ex. A at 1-2. The policy thus “leaves the agency, or its  
28

1 implementing official, free to exercise discretion to follow, or not to follow, the announced  
2 policy in an individual case.” *Mada-Luna*, 813 F.2d at 1013.

3 Similarly, while Plaintiffs do not allege that Defendants have made any relevant  
4 policy statement regarding parole, past policy statements regarding parole have historically  
5 left discretion in the hands of the line officer adjudicators. *See* ICE, “Exercising  
6 Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of  
7 the Agency for the Apprehension, Detention, and Removal of Aliens,” June 17, 2011,  
8 *available at* [https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-](https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf)  
9 [memo.pdf](https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf); ICE Policy Directive No. 11002.1, “Parole of Arriving Aliens Found to Have a  
10 Credible Fear of Persecution or Torture,” Dec. 8, 2009, *available at*  
11 [https://www.ice.gov/doclib/dro/pdf/11002.1-hd-](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf)  
12 [parole\\_of\\_arriving\\_alien\\_found\\_credible\\_fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf), § 4.4 (“Parole remains an inherently  
13 discretionary determination entrusted to the agency; this directive serves to guide the  
14 exercise of that discretion.”). The alleged “policies,” to the extent they even exist, “do[]  
15 not negate the discretionary nature of” the determination regarding release and “each case  
16 receives individual consideration” indicating that such policies “do[] not establish a  
17 ‘binding norm’” and “need not be promulgated as a rule under the APA.” *Bulger*, 204 F.  
18 Supp. 2d at 1383. Count eleven should be dismissed.

19 D. Count 13 (INA and Constitution Claim)

20 Count 13 alleges that “the federal government cannot ignore federal statutes, and  
21 the Constitution—including the separation of powers doctrine and the Take Care Clause—  
22 provides a separate cause of action to challenge the conduct described in Count VII.” TAC  
23 at ¶ 234. This Count fails to state a cognizable claim for relief.

24 First, Arizona offers no factual allegations to support this claim, and its one-  
25 sentence, conclusory, legal assertion is insufficient to plead a claim for relief. *Ashcroft v.*  
26 *Iqbal*, 556 U.S. 662, 678 (2009). Second, even if Arizona had offered factual allegations,  
27 sections 1225(b) and 1182(d), as explained above, do not override the government’s  
28



1 discretion to decide whether to initiate proceedings or to release noncitizens on parole or  
2 otherwise. *Supra* pp. 8-12.

3 Third, separation of powers principles, to the extent they are implicated at all, defeat  
4 Plaintiffs' legal theory. Both the Constitution, and Congress in the INA, vest the Executive  
5 with authority over decisions regarding detention and removal of noncitizens. *See, e.g.,*  
6 *Knauff*, 338 U.S. at 543; *United States v. Velasquez*, 524 F.3d 1248, 1253 (11th Cir. 2008)  
7 (holding that Executive, not judiciary, has the authority to decide to detain noncitizens).<sup>13</sup>

8 Finally, Plaintiffs' Take Care Clause argument fails as it is merely a conclusory  
9 legal assertion, *see id.*, and lacks a cause of action. No court has ever found that the Take  
10 Care Clause provides a private right of action. *Las Americas Immigrant Advocacy Center*  
11 *v. Biden*, No. 3:19-cv-02051-IM, 2021 U.S. Dist. LEXIS 226730, at \*8 (D. Or. Nov. 24,  
12 2021) (collecting cases); *see, e.g., City of Columbus v. Trump*, 453 F. Supp. 3d 770, 800  
13 (D. Md. 2020) ("No court in this circuit, or any other circuit, has definitively found that the  
14 "Take Care Clause" provides a private cause of action which a Plaintiff may bring against  
15 the President of the United States or his administration."); *Robbins v. Reagan*, 616 F. Supp.  
16 1259, 1269 (D.D.C.), *aff'd*, 780 F.2d 37 (D.C. Cir. 1985) (similar)). The Supreme Court  
17 has cautioned courts against "creat[ing] new causes of action" under the Constitution. *See*  
18 *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020). Plaintiffs' conclusory invocation of this  
19 Clause offers no basis for this Court to be the first to break with the caution that has deterred  
20 all other courts from recognizing a private right of action.

21 Even were the Court to recognize such a cause of action, Plaintiffs' claim still fails.  
22 The Supreme Court has distinguished between duties that are ministerial and that are  
23 "executive and political," explaining that court lacked authority to order the Executive to

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25 <sup>13</sup> *See also United States v. Litton Indus., Inc.*, 462 F.2d 14, 18 (9th Cir. 1972);  
26 *Dalton v. Specter*, 511 U.S. 462, 474 (1994) (holding that claims that executive branch  
27 actions are inconsistent with carrying out their "statutory authority are not 'constitutional'  
28 claims" but rather statutory claims, and that the "distinction between claims that an official  
exceeded his statutory authority, on one hand, and claims that he acted in violation of the  
Constitution, on the other, is too well established to permit this sort of evisceration").



1 take certain action in the latter case but possibly could for ministerial duties, because  
2 “nothing was left to discretion. There was no room for the exercise of judgment.” *State of*  
3 *Mississippi v. Johnson*, 71 U.S. 475, 498, 18 L. Ed. 437 (1866); *see Nat’l Treasury Emps.*  
4 *Union v. Nixon*, 492 F.2d 587, 608 (D.C. Cir. 1974). Ordering the Executive to take action  
5 involving discretion and political judgment would violate separation of powers “and the  
6 general principles which forbid judicial interference with the exercise of Executive  
7 discretion.” *Johnson*, 71 U.S. at 499.

8 Here, Plaintiffs request an injunction requiring Defendants to take action under  
9 sections 1225(b) and 1182(d) that is not purely ministerial, but political, in that it involves  
10 inherently discretionary duties—requiring that the government charge and detain  
11 noncitizens for removal and deny parole. Plaintiffs’ claim falls squarely under the  
12 longstanding bar on judicial interference with the exercise of Executive discretion, *see id.*,  
13 and must be dismissed.

#### 14 CONCLUSION

15 For the foregoing reasons, the Court must dismiss Counts 9 through 13 of the Third  
16 Amended Complaint.  
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1 Date: January 3, 2022

Respectfully submitted,

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