No. 22-40367

In the United States Court of Appeals for the Fifth Circuit

The STATE OF TEXAS and the STATE OF LOUISIANA,
Plaintiff-Appellees,

v.

The UNITED STATES OF AMERICA, et al.,
Defendant-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Victoria Division
Civil Action No. 6:21-cv-00016

MOTION OF THE STATES OF ARIZONA, ALABAMA, ARKANSAS, FLORIDA, GEORGIA, INDIANA, KANSAS, KENTUCKY, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, WEST VIRGINIA, AND WYOMING FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

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Dated: June 22, 2022

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CERTIFICATE OF INTERESTED PARTIES

The amici curiae for this motion are exclusively governmental parties, and therefore not required to furnish a certificate of interested parties under Fifth Circuit Rule 28.2.1. The undersigned counsel of record nonetheless certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case in addition to those listed by Federal Appellants. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. The States of Arizona, Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, West Virginia, and Wyoming.
2. Drew C. Ensign, Brunn ("Beau") W. Roysden III, and James K. Rogers—*Counsel* for Amici States.
3. Mark Brnovich, Arizona Attorney General; Steve Marshall, Alabama Attorney General; Leslie Rutledge, Arkansas Attorney General; Ashley Moody, Florida Attorney General; Christopher M. Carr; Georgia Attorney General; Theodore E. Rokita, Indiana Attorney General; Derek Schmidt, Kansas Attorney General; Daniel Cameron, Kentucky Attorney General; Lynn Fitch, Mississippi Attorney General; Eric S. Schmitt, Missouri Attorney General; Austin Knudsen, Montana Attorney General; Douglas

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June 22, 2022

s/ Drew C. Ensign
Drew C. Ensign

MOTION FOR LEAVE

Proposed amici curiae the States of Arizona, Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, West Virginia, and Wyoming ("Amici" or "Amici States") respectfully move for leave to file the attached proposed amicus curiae brief in opposition to Federal Defendants' motion for a stay pending appeal.[1] Federal Defendants and Plaintiff States consent to this request.

As set forth in the attached proposed brief, the States continue to suffer ongoing irreparable harm caused by Defendants' unlawful actions. The district court's vacatur ensures that the status quo ante will prevail pending adjudication of this dispute, and thus will ameliorate the harms that the Amici States are suffering.

The legal issues in this case, and the real-world impact of their resolution, are of enormous importance to the Amici States. As the Supreme Court has recognized, the States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012).

[1] Although the States are permitted to file amicus briefs supporting parties on the merits without leave of court, no rule specifically grants them authority to do so when supporting or opposing motions, such as Federal Defendants' motion for a stay pending appeal at issue here. Amici States therefore seek leave to file the attached amicus brief in an abundance of caution.

CONCLUSION

For the foregoing reasons, this Court should grant the requested leave and file the attached amicus curiae brief.

Dated: June 22, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief contains 241 words, excluding the parts exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the program used for the word count).

s/ Drew C. Ensign
Drew C. Ensign

Dated: June 22, 2022

CERTIFICATE OF SERVICE

I, Drew C. Ensign, hereby certify that I electronically filed the foregoing Motion of the States of Arizona, Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, West Virginia, and Wyoming For Leave to File a Brief as Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on June 22, 2022, which will send notice of such filing to all registered CM/ECF users.

s/ Drew C. Ensign
Drew C. Ensign

No. 22-40367

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The STATE OF TEXAS and the STATE OF LOUISIANA,
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v.

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AMICUS CURIAE BRIEF OF THE STATES OF ARIZONA, ALABAMA, ARKANSAS, FLORIDA, GEORGIA, INDIANA, KANSAS, KENTUCKY, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, WEST VIRGINIA, AND WYOMING

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The amici curiae for this brief are exclusively governmental parties, and therefore not required to furnish a certificate of interested parties under Fifth Circuit Rule 28.2.1. The undersigned counsel of record nonetheless certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case in addition to those listed by Federal Appellants. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.[1]

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2. Drew C. Ensign, Brunn ("Beau") W. Roysden III, and James K. Rogers—*Counsel* for Amici States.
3. Mark Brnovich, Arizona Attorney General; Steve Marshall, Alabama Attorney General; Leslie Rutledge, Arkansas Attorney General; Ashley Moody, Florida Attorney General; Christopher M. Carr; Georgia Attorney

[1] Because the States are permitted to file amicus briefs without consent under FRAP 29(a)(2), they are not subject to FRAP 29(a)(4)(E). Nonetheless, the Amici States declare that this brief was authored entirely by counsel for the Amici States, and no party or person contributed money that was intended to fund preparation or submission of this brief. The Interests of Amici section, *infra* at 1, sets forth the identity of the Amici States, as well as their interests and authority. *See* FRAP 29(a)(4)(E).

General; Theodore E. Rokita, Indiana Attorney General; Derek Schmidt, Kansas Attorney General; Daniel Cameron, Kentucky Attorney General; Lynn Fitch, Mississippi Attorney General; Eric S. Schmitt, Missouri Attorney General; Austin Knudsen, Montana Attorney General; Douglas J. Peterson, Nebraska Attorney General; Dave Yost, Ohio Attorney General; John M. O'Connor, Oklahoma Attorney General; Alan Wilson, South Carolina Attorney General; Patrick Morrisey, West Virginia Attorney General; and Bridget Hill, Wyoming Attorney General.

June 22, 2022

s/ Drew C. Ensign
Drew C. Ensign

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INTERESTS OF AMICI

The Amici States and their citizens continue to suffer significant costs from illegal immigration—including billions of dollars in new expenses relating to law enforcement, education, and healthcare programs—as a direct result of Defendants' failures to enforce immigration law. Those harms are exacerbated by DHS's increasingly brazen disrespect for the requirements of our nation's immigration laws and the Administrative Procedure Act ("APA")

As sovereigns within our federal system of dual sovereigns, the States also have an interest in ensuring that the federal government respects the rule of law. DHS's challenged policies here, however, reflect a corrosive disrespect for that bedrock principle.

ARGUMENT

I. The Situation At The Border Worsens Every Day That The Permanent Guidance Continues In Force

The challenged Permanent Guidance (a.k.a. Permanent Memorandum) here is part of a constellation of Administration policies that have intentionally hobbled immigration enforcement and led to enormous increases in attempted border crossings. This, in turn, has caused the Amici States extensive harms through increased law enforcement, education, and health care expenditures. To put those harms in perspective, it is useful to consider first the unprecedented scale of the current border crisis.

DHS has itself admitted that it is "encountering record numbers of noncitizens ... at the border," which "ha[s] strained DHS operations and caused border facilities to be filled beyond their normal operating capacity." Declaration of David Shahoulian (DHS Assistant Secretary for Border and Immigration Policy) at 1-2, *Huisha-Huisha v. Mayorkas*, No. 21-cv-100, ECF No. 116 (D.D.C. Aug. 6, 2021).

DHS's own statistics reveal the unprecedented surge of unlawful migration and the collapse of DHS's operational control of the border. DHS admitted that July 2021 had the highest number of monthly encounters in *decades*—and, very likely, *ever*. *Id*. at 7 ("[T]he highest monthly encounter number since Fiscal Year 2000.") "Monthly family encounter rates have generally been increasing since April 2020, rising 100-fold from 738 encounters in April 2020 to over 75,000 in July 2021." *Id.* at 9. DHS itself characterized these summer-2021 numbers as "an historic surge" and an "influx." *Id*. at 6, 3, respectively.

That "historic surge" has only gotten worse. U.S. Border Patrol statistics for migrants illegally crossing the southwestern border show that, in *each month* in 2021, alien encounters were significantly higher than encounters during the same month in previous years. And, so far, monthly encounters for each month in 2022 was higher than the number of encounters in 2021.

The most recent data, for May 2022, (copied below) illustrates the unprecedented nature of the crisis. Notably, the number of encounters in May 2022

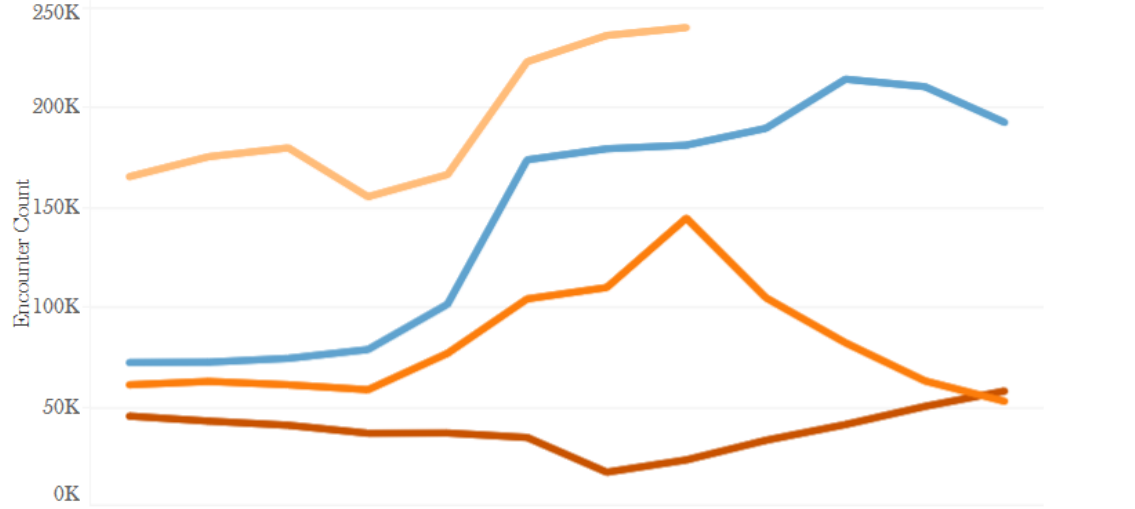
with illegal border-crossers—239,416—was more than *ten times* the April 2020 numbers, and roughly *1.7 times* the corresponding number for April 2019.

U.S. Customs and Border Protection

U.S. Customs and Border Protection (CBP) Encounters
US Border Patrol (USBP) Title 8 Apprehensions,
Office of Field Operations (OFO) Title 8 Inadmissible Volumes,
and Title 42 Expulsions by Fiscal Year (FY)

FY: (All) | Component: (All) | Demographic: (All)
Citizenship Grouping: (All) | Title of Authority: (All) | Reset Filters

FY 2019 2020 2021 2022 (FYTD)



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2022 (FYTD)	164,846	174,848	179,254	154,816	165,902	222,339	235,478	239,416					1,536,899
2021	71,929	72,113	73,994	78,414	101,099	173,277	178,795	180,597	189,034	213,593	209,840	192,001	1,734,686
2020	45,139	42,643	40,565	36,585	36,687	34,460	17,106	23,237	33,049	40,929	50,014	57,674	458,088
2019	60,781	62,469	60,794	58,317	76,545	103,731	109,415	144,116	104,311	81,777	62,707	52,546	977,509

Source: https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters.

As the Washington Post explained, "Immigration arrests along the U.S. southern border rose in May *to the highest levels ever recorded*.... CBP made 239,416 arrests along the Mexico border last month.... The agency is on pace to exceed 2 million detentions during fiscal 2022 ... after tallying a record 1.73 million in 2021."[2]

Border encounters with DHS unfortunately only tell a small part of the story. DHS fails to encounter (*i.e.*, apprehend) *most* illegal border-crossers entirely. These so-called "gotaways" comprise about three-fourths of all border crossers. *See Louisiana v. CDC*, __ F.Supp.3d __, 2022 WL 1604901, at *6 (W.D. La. May 20, 2022) ("[O]nly 27.6% of undocumented persons crossing the southern border were apprehended by DHS personnel.") Thus, the actual number of crossers may be *four times* DHS actual encounter numbers (*i.e.*, roughly three gotaways for every encounter).

Many of those migrants encountered by DHS are nonetheless permitted entry into the U.S. Although most migrants that DHS encounters are *supposed* to be subject to mandatory detention if they are not immediately removed, *see, e.g.*, 8

[2] Nick Miroff, *U.S. border arrests rose to record high in May, data shows*, THE WASHINGTON POST, June 16, 2022 (emphasis added), https://www.washingtonpost.com/immigration/2022/06/16/united-states-border-immigration-arrests/.

U.S.C. §1225(b), DHS has circumvented this mandate too through abuse of its parole authority under 8 U.S.C. §1182(d)(5). That parole authority is carefully circumscribed "within narrow parameters," and requires individualized decisions that are made "case-by-case and with a public-interest justification." *Texas v. Biden*, 20 F.4th 928, 996 (5th Cir. 2021) *cert. granted* 142 S. Ct. 1098 (2022). But DHS has instead been "releas[ing] undocumented immigrants into the United States *en masse*" under that authority. *Id* at 978.

Thus, in May 2022, DHS paroled 68,527 aliens into the United States; in April, the number was 91,250 aliens. *Texas v. Biden*, No. 21-cv-00067, ECF No. 139 at 3 and ECF No. 140 at 3 (N.D. Tex. June 15, 2022). These numbers are escalating rapidly: in March 2022, DHS "only" paroled 36,777. *Id.* ECF No. 136.

In a nutshell: aliens are unlawfully crossing the southwestern border in historically unprecedented numbers. Most—roughly ¾—elude DHS entirely. And for that small portion that DHS does not slip through the agency's fingers entirely, DHS unlawfully paroles many of them into the U.S. rather than detaining them. For the vast majority of migrants unlawfully entering the U.S., actual enforcement of U.S. immigration laws by DHS is thus the rare exception, rather than the rule.

This is a crisis, even if the Administration steadfastly will not describe it as such.

II. The Need For The District Court's Injunction Is Underscored By The Administration's Lawless Actions

The Administration's brazen defiance of APA requirements underscores the need for federal courts to act decisively to break the Administration's escalating and cynical pattern of lawlessness. Since Inauguration Day, DHS has engaged in a systematic pattern of violating the APA. These serial APA violations underscore why a stay pending appeal is particularly unwarranted here.

A. DHS Has Repeatedly Violated Notice-and-Comment Requirements

The decision below vacating the Permanent Guidance is only the latest iteration in a string of decisions reviewing successive DHS anti-enforcement rules/memoranda. The first rule was a memorandum issued—without notice-and-comment—on January 20, 2021, the "January Memorandum." The January Memorandum imposed a 100-day moratorium on all deportations and also created a list of "enforcement priorities" that would significantly limit the detention and removal of aliens going forward.

The Southern District of Texas quickly concluded that the January Memorandum was both procedurally and substantively invalid. That court specifically held that the January Memorandum was "a rule that is not exempt from the notice and comment requirements of section 553." *Texas v. United States*, 524 F. Supp. 3d 598, 662 (S.D. Tex. 2021); *accord* Texas v. United States, 515 F. Supp.

3d 627, 638 (S.D. Tex. 2021) (granting temporary restraining order). That court further held that the January Memorandum violated 8 U.S.C. §1231(a)(1)(A) and was arbitrary and capricious. 524 F. Supp. 3d at 644-56.

DHS neither appealed that decision, nor attempted to comply with it. Instead, the agency doubled down on its lawlessness. DHS thus issued a new, superseding memorandum on February 18, 2021 (the "Interim Guidance")—also without complying with notice-and-comment procedures, even though it adopted "enforcement priorities" substantially similar to its predecessor.

The Southern District unsurprisingly held this was unlawful, again, and issued a preliminary injunction. *Texas v. United States*, 555 F. Supp. 3d 351, 435 (S.D. Tex. 2021). Once again, that court held that DHS had violated notice-and-comment requirements (among other violations). *Id.* at 426-35. This time DHS did appeal and initially obtained a partial stay pending appeal, but this Court then granted rehearing en banc and dissolved the stay. *See Texas v. United States*, 14 F.4th 332 (5th Cir.) (granting stay), *vacated on rehearing en banc* 24 F.4th 407 (5th Cir. 2021).

By this time, DHS's third serial notice-and-comment violation was already well underway. DHS issued a successor memorandum on September 30, 2021, the "Permanent Guidance," along with an accompanying "Considerations Memorandum"—again without either complying with notice-and-comment procedures nor attempting to invoke the "good cause" exception. *See Texas v. United*

States, __ F.Supp.3d __, No. 6:21-CV-00016, 2022 WL 2109204, at *10 (S.D. Tex. June 10, 2022).

DHS's third evasion of notice-and-comment requirements was not the charm: The same district court again held DHS's non-compliance unlawful. *Id.* at *39-42. DHS's persistent refusal either (1) to abide by the APA's requirements or (2) attempt to address any of the district court's repeated holdings that DHS violated applicable legal requirements, is brazenly lawless. And this third violation was particularly noteworthy, as DHS had more than seven months after issuing the Interim Guidance—*i.e.*, ample time—to take and respond to public comment. Indeed, this Court has expressly held that "seven months" was sufficient time that "[f]ull notice-and-comment procedures could have been run in the time taken to issue the [challenged] rule." *United States v. Johnson*, 632 F.3d 912, 928-29 (5th Cir. 2011).

But despite having sufficient time to conduct notice-and-comment rulemaking for the Permanent Guidance here, DHS simply *chose* not to do so—apparently concluding that the judicial rebukes it has received to date were not yet sufficiently stinging to justify any change of course. But denial of a stay pending appeal here may start the very necessary process of convincing DHS that APA compliance is not optional and readily dispensed with.

Notably, the Administration's serial APA notice-and-comment violations for DHS's anti-enforcement memoranda are paired with other parallel APA violations

in the immigration context. In particular, the Center for Disease Control and Prevention issued an order purporting to terminate the federal government's "Title 42 policy" without notice-and-comment rulemaking. The Western District of Louisiana concluded this too violated the APA and issued a preliminary injunction. *Louisiana*, 2022 WL 1604901, at *21. CDC appealed that decision, but has neither sought a stay pending appeal nor begun complying with notice-and-comment requirements. DHS was also caught red-handed illegally—and clandestinely—implementing the Title 42 Termination Order before its actual effective date, necessitating a temporary restraining order. *See Louisiana v. CDC*, No. 22-CV-885, 2022 WL 1276141 (W.D. La. Apr. 27, 2022).

B. DHS Has Repeatedly And Illegally Refused To Consider The States' Reliance Interests

Notice-and-comment requirements are hardly the only APA mandates of which DHS is a repeat offender. In particular, DHS has *repeatedly* failed to consider the States' reliance interests in promulgating its immigration (non-)enforcement policies.

"When an agency changes course … it must 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'" *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (citation omitted)). "It would be arbitrary and capricious to ignore such matters." *Id.*

The Permanent Guidance, however, makes no attempt to consider the States' reliance interests. Instead, DHS endeavors only to *delegitimize* those reliance interests, rather than weigh them meaningfully or fairly. Thus, just as in *Regents*, DHS "does not contend that [it] considered potential reliance interests; it counters that [it] did not need to." *Id.* at 1913.

In *Regents*, DHS argued that "DACA recipients have no 'legally cognizable reliance interests' because the DACA Memorandum stated that the program 'conferred no substantive rights' and provided benefits only in two-year increments." *Id.* In other words, echoing its rationale here, DHS argued in *Regents* that any reliance interests were not reasonable or legitimate because the immigration enforcement program at issue created no vested rights and was inherently temporary. *Regents* makes plain that rationale squarely violates the APA. *Id.* at 1913-15.

Recalcitrant in the face of *Regents*'s holding, DHS recycles its same discredited rationale here. DHS thus claims that States' reliance on prior enforcement policies were illegitimate as a matter of law since, in DHS's view, it "would be unreasonable in light of the long history of the Executive's use of evolving enforcement priority schemes in this area." Considerations Memorandum at 16.

But the Supreme Court has already rejected this argument as putting the cart before the horse: "[N]either the Government nor the lead dissent cites any legal

authority establishing that such features automatically preclude reliance interests, and we are not aware of any." *Regents*, 140 S. Ct. at 1913-14. Moreover, *Regents* too involved an "evolving enforcement priority schemes"—*i.e.*, DACA and DAPA. DHS's reasoning here thus offers nothing beyond what the agency already said in *Regents*, which the Supreme Court squarely found wanting.

Indeed, this Court has *already* invalidated *another* equivalent rationale post-*Regents*, involving the MPP or "Remain in Mexico" program. There too DHS had discounted outright the States' reliance interests based on its assertion that the agency "had *no* obligation to consider the States' reliance interests at all." *Texas v. Biden,* 20 F.4th at 990. This Court, however, found that rationale "astonishing[]" since it was "squarely foreclosed by" Supreme Court precedent. *Texas v. Biden*, 20 F.4th at 990. It is no less astonishingly bad here.

It is an old adage that "there is no education in the second kick of a mule." Here, DHS's immunity to edification is palpable: the agency plainly has learned *nothing* about the need to consider State reliance interests from either *Regents* or this Court's reiteration of *Regents* in *Texas v. Biden*. It is perhaps dangerously optimistic to hope that DHS might learn anything from a third kick from this Court—but controlling precedent nonetheless demands that it be delivered anyway.

Defendants' refusal to consider the States' reliance interests is particularly egregious because Defendants *did* consider the reliance interests of, and practical

impact on, "non-governmental entities, including immigrant advocacy organizations." Considerations Memo at 8, 11. But no such consideration was extended to the States, even though they "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). DHS's contempt for the States is thus paired with palpable solicitude for the interests of Administration's ideological allies. The APA exists *precisely* to avoid this sort of myopic decision-making in which only the interests and input of political pals is considered.

DHS's *repeated* refusal to consider the reliance interests of the States thus underscores the lawlessness that pervades the Permanent Guidance.

* * *

These violations of the requirements of notice-and-comment rulemaking and considering States' reliance interests are merely some of the most egregious legal violations by DHS in its efforts to cripple immigration enforcement. DHS's own Inspector General, for example, has concluded that the agency violated procurement law in awarding a $17 million no-bid contract, putatively for supplementing DHS's detention capacity—but the agency then overwhelmingly failed to use that capacity that it had unlawfully secured.[3] Similarly, as explained above, DHS also secretly and

[3] Office of Inspector Gen., ICE Spent Funds on Unused Beds, Missed COVID-19 Protocols and Detention Standards while Housing Migrant Families in Hotels (April

illegally began implementing CDC's attempted rescission of Title 42 Orders *more than a month* before the effective date. *Supra* at 9.

The district court refused to indulge DHS's further lawlessness with the Permanent Guidance below. This Court should too by denying a stay pending appeal.

III. The Permanent Guidance Harms States Through Increased Law Enforcement Costs And Crime

Amici States are also suffering harms under the Permanent Guidance similar to those of Texas and Louisiana here. Arizona's experience provides an illustration of this, including harms recognized by the Western District of Louisiana and the District of Arizona. *Louisiana*, 2022 WL 1604901, at *5-6 (discussing law enforcement, incarceration, and health costs to Arizona caused by increased immigration); *Arizona v. DHS*, No. CV-21-186, 2021 WL 2787930, at *6-8 (D. Ariz. June 30, 2021) (same).

The Western District of Louisiana also recognized the harms caused by increased immigration to non-border states, such as Missouri. *Louisiana*, 2022 WL 1604901, at *7 (recognizing education, health, and administrative costs to Missouri of increased immigration, and relationship between increased immigration and increased human trafficking). These harms are ongoing and compounding by the day as the backlog of unremoved individuals grows.

12, 2022), https://www.oig.dhs.gov/sites/default/files/assets/2022-04/OIG-22-37-Apr22.pdf.

In particular, the Amici and Plaintiff States have suffered, and will suffer, increased costs of incarceration and other law enforcement services due to the challenged actions. Significantly, the Permanent Guidance has directly resulted in ICE lifting detainers on criminals who have completed their sentences. *Texas v. United States*, 2022 WL 2109204, at *10-13 ("The Final Memorandum has led to the rescission of detainers, which has at least in part contributed to fewer criminal aliens being detained by ICE."). Instead of being removed, these individuals are instead being released on the street and into communities. *Id.* at *13-15.

DHS's actions have directly led to States incurring supervised-release costs that they otherwise would not occur. Arizona, for example, has identified convicted criminal aliens whose ICE detainers were lifted prior to their release from state prisons due to the new removal priorities in just the first two months since the institution of new removal priorities. *See Louisiana*, 2022 WL 1604901, ECF No. 13-3 at 44-430 (Declaration of Jennifer Abbotts). Indeed, emails received from ICE itself specify that the new removal priorities were the reason ICE lifted each detainer. *See, e.g.*, *id.* at 50-52, 57, and 62-62.[4] These individuals were placed on community supervision (similar to federal supervised release), which costs Arizona $4,163.60

[4] For example, an April 14, 2021, email titled "316717 Detainer lift" from ICE employee Christopher Murphy informs ADCRR that the detainer for inmate 316717 has been lifted, explaining "Subject does not meet the current enforcement priorities." *Louisiana*, 2022 WL 1604901, ECF No. 13-3 at 57.

annually per individual. *See id.* at 432-35 (Declaration of Shaka Okougbo). The population involved is large: "over 6% of Arizona's prison population—2,434 noncitizen inmates—currently have ICE detainers lodged against them." *Arizona v. DHS*, 2021 WL 2787930, at *7.

Defendants' actions also impose direct law enforcement costs and crime-based injuries due to criminal recidivism committed by removable criminal aliens that DHS refuses to remove. *See, e.g.*, *Arizona*, 2021 WL 2787930, ECF No. 15-1 at 6-9. 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. Given those recidivism rates, the release of convicts into the community pursuant to the Permanent Guidance makes it virtually certain that the States will incur additional law enforcement and incarceration costs and direct crime-based losses from the Permanent Guidance's provisions, which closely mirror the Interim Guidance.

Testimony of senior ICE official Albert Carter confirms that the "only factor" for the "big drop-off" both in immigration detainers being issued and in removals overall from before and after February 2021 was the new enforcement priorities (there the Interim Guidance). *Arizona*, 2021 WL 2787930, ECF no. 79-1 at 18-20

(Deposition of Albert Carter at 81:10-84:5; 87:1-89:11).[5] Director Carter further testified that ICE is releasing detainers for aliens who do not fit Interim Guidance priorities, and when detainers are released, jails have to put aliens on supervisory release or just release them into the community. *Id.* at 84:6-14. The same is true of the operation of the Permanent Guidance.

IV. "Shall" In 8 U.S.C. §§1231(a)(1)(A) And 1226(c) Means "Must"

A core issue in this case is whether the "shall"s in 8 U.S.C. §§1231(a)(1)(A) and 1226(c) imposes mandatory duties on DHS to detain and remove aliens. The plain language of the statute, canons of construction, and legislative history all make clear that "shall" in this context means "must."[6]

That is undoubtedly why the Supreme Court has already construed both provisions to be mandatory. *See Nielsen v. Preap*, 139 S. Ct. 954, 959 (2019) (Under

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[5] Albert Carter is a career law enforcement officer who served as the Acting ICE Phoenix Filed Office Director from December 2020 to early-May 2021. *Arizona*, 2021 WL 2787930, ECF no. 79-1 at 12-13 (Deposition of Albert Carter at 15:20-24; 18:15-19:19).

[6] In a suit brought by Arizona, Montana, and Ohio, the Southern District of Ohio preliminarily enjoined the Permanent Guidance. *Arizona v. Biden*, --- F. Supp.3d --, 2022 WL 839672 (S.D. Ohio Mar. 22, 2022). A Sixth Circuit motions panel stayed that injunction. *Arizona v. Biden*, 31 F.4th 469 (6th Cir. 2022). The author that opinion stressed that it "should be taken with a grain of adjudicative salt [since the] [i]mperatives of speed in decisionmaking—less than a week since the last brief was filed—do not always translate into accuracy in decisionmaking." *Id.* at 483 (Sutton, J., concurring). As explained in the plaintiff states' briefs in the Sixth Circuit, that stay decision is both contrary (1) to Supreme Court authority and (2) multiple Fifth Circuit decisions, including *Texas v. Biden*, with which it repeatedly and irreconcilably splits on nearly every issue presented.

§1226(c), "aliens *must be* arrested 'when [they are] released' from custody on criminal charges," and they must subsequently be detained.) (emphasis added); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2281 (2021) ("Once an alien is ordered removed, DHS *must* physically remove him from the United States within a 90-day 'removal period.'") (emphasis added).

But even if this Court were construing those provisions on a blank precedential slate, DHS's permissive interpretations are plainly untenable.

A. Plain Text

The plain texts of sections 1226(c) and 1231(a)(1)(A) establish that DHS has a non-discretionary duty to detain criminal aliens and aliens with final removal orders. "Shall" in those sections means just that: an actual mandate and not just a readily-ignorable suggestion.

"[A]ny question of statutory interpretation … begins with the plain language of the statute. It is well established that, when the statutory language is plain, [courts] must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (citations omitted). Thus, this Court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). That is just so here.

It is well-established that "'shall' generally means 'must.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995). That accords with dictionary

definitions, both legal and non-legal. The "mandatory sense" of the word "shall" is the one "that drafters typically intend and that courts typically uphold." *Shall*, *Black's Law Dictionary* (11th ed. 2019). Similarly, American Heritage Dictionary defines "shall" as an "order, promise, requirement, or obligation." *Shall*, American Heritage Dictionary (5th ed.).

The Supreme Court has thus repeatedly made clear that "Congress' use of the term 'shall' indicates an intent to 'impose discretionless obligations.'" *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) (citation omitted)). Indeed, "the mandatory 'shall' ... normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). It is equally impervious to executive discretion.

The plain texts of sections 1226(c) and 1231(a)(1)(A) therefore create an unequivocal obligation to detain the aliens with final orders of removal and to detain the specified types of criminal aliens. Defendants thus lack *any* discretion not to detain them.

B. Canons of Construction

The canons of construction confirm what the text of Section 1226(c) and 1231(a)(1)(A) already makes plain. Two are critical here: 1) the avoidance of surplusage, and 2) *expressio unius*.

1. Canon Against Surplusage

"It is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted). Defendants' interpretation of Sections 1226(c) and 1231(a)(1)(A) violates this cardinal principle.

Section 1226(c)(1) requires that the government "shall take into custody" any alien having certain kinds of criminal convictions or who is involved in terrorism. Section 1226(c)(2) goes on to state that the government "may release" such an alien if "necessary" to protect a witness cooperating with an investigation.

Similarly, section 1231(a)(1)(A)'s requirement of removal within 90 days is completely superfluous if that section's "shall" means only "may." Under DHS's interpretation, that section is effectively rewritten as providing that it "may remove within 90 days, or after 90 days, or never." The 90-day language is thus surplusage under DHS's reading.

2. *Expressio Unius*

Under the venerable *expressio unius* canon, "[t]he expression of one thing implies the exclusion of others." *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018). Thus, '"[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode."' *Christensen v. Harris Cty.*, 529 U.S. 576, 583 (2000)

(citation omitted)).

Under *expressio unius*, the enumeration of only the single exception for testifying aliens in Sections 1226(c)(2) and 1231(c)(2)(C) means, quite simply, that only one such exception exists. But DHS has never claimed that the Permanent Guidance (or its predecessors, the January Memorandum and the Interim Guidance) can squeeze within that exception. The *expressio unius* canon thus strongly militates against reading in a second, unwritten exception allowing for other justifications for release, let alone complete discretion to release.

Similarly, section 1231(a)(1)(A) explicitly begins with an "[e]xcept as otherwise provided in this section" exception. Under the canon of *expression unius*, that explicit exception is presumably the *only* exception that Congress intended. And DHS does not argue that the Permanent Guidance's exclusions from removals can be squeezed within that exception.

C. The Legislative History Makes It Clear That the Permanent Guidance is Unlawful.

1. 1996 Amendments To Statutory Text.

Congress adopted the current versions of Sections 1226 and 1231 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). *Coyt v. Holder*, 593 F.3d 902, 906 (9th Cir. 2010). The changes made to the text of Sections 1226 and 1231 in IIRIRA make plain Congress's intent to constrain sharply the discretion of the Attorney General (and now DHS) in effecting

removals and detaining aliens subject to removal.

The plain language of Section 1226 is already perfectly clear, but the House Conference Report leaves no doubt that Congress's intent was strictly to limit the government's discretion: "New section 236(c) provides that the Attorney General *must* detain an alien who is inadmissible under section 212(a)(2) or deportable under new section 237(a)(2).... This subsection also provides that such an alien may be released from the Attorney General's custody *only if* the Attorney General decides . . . that release is *necessary to provide protection* to a witness ... [or] a person cooperating with an investigation into major criminal activity...." H.R. Conf. Rep. No. 104-828, at 210-211 (emphasis added).

Congress's amendments to Section 1231 also show its intent to limit the Executive's discretion. In enacting the current version of §1231, Congress made substantial changes. The old §1252 became §1231(a), and Table 1 shows the changes in language:

Table 1: Comparison Of Language Pre- and Post-IIRIRA	
Prior §1252	**Current §1231(a) (emphasis added)**
"[D]uring [the six-month deporation period], at the Attorney General's *discretion*, the alien *may be* detained, released on bond in an amount and containing such conditions *as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe*."	"During the removal period, the Attorney General *shall detain* the alien." 8 U.S.C. §1231 (a)(2) (emphasis added).

8 U.S.C. §1252 (1996) (emphasis added).	

Congress thus removed language that explicitly granted "discretion" and that allowed for release on "condition[s] as the Attorney General may prescribe" and replaced that language with a direct, clear, laconic command: "shall detain."

Congress's intent to accelerate removals and decrease the Executive Branch's discretion to forego deportations is confirmed by other statutory changes. In particular, three predecessor sections that were consolidated into §1231 contained specific grants of discretion to the Attorney General (now DHS)—all of which Congress tellingly abolished. As the House Conference Report explains, IIRIRA "inserts a new section 241 [8 U.S.C. §1231]" that "restates and revises provisions in current sections 237, 242, and 243 [8 U.S.C. §§1227, 1252, and 1253] regarding the detention and removal of aliens." H.R. Conf. Rep. No. 104-828, at 215.

For example, the old §1252 provided that during the prior six-month removal period "the Attorney General shall have a period of six months ... to effect the alien's departure from the United States." 8 U.S.C. §1252 (c)(1) (1996). But IIRIRA amended Section 1231 to remove the prior language that only called for a general outcome to take place within a long period of time (6 months) with an unequivocal command for the federal government to remove the alien within a time period less than half as long: "[T]he Attorney General *shall remove* the alien from the United States within a period of 90 days." 8 U.S.C. §1231 (a)(1)(A) (emphasis added).

Similarly, the prior §1227 stated that arriving aliens who are excluded "shall be immediately deported ... unless the Attorney General, in an individual case, *in his discretion*, concludes that immediate deportation is not practicable or proper." 8 U.S.C. §1227(a)(1) (1996) (emphasis added). But discretion too was expressly eliminated, and the current §1231(c) has no such "in his discretion" language.

Nor are these eradications of discretion isolated or subtle. While the word "discretion" appeared *thirteen times* in the prior versions of §§1227, 1252, and 1253, it no longer appears *even once* in the amended (and current) Section 1231. In essence, Congress through IIRIRA engaged in a search-and-destroy mission regarding the Executive Branch's discretion. That is hardly the action of a Congress that intended to confer unbounded and unreviewable discretion.

2. Legislative History And Intent

The legislative history and cases examining it confirms the intent already evident from IIRIRA's text. In IIRIRA, "Congress amended the INA aggressively to expedite removal of aliens lacking a legal basis to remain in the United States." *Kucana v. Holder*, 558 U.S. 233, 249 (2010). Congress's purpose in adopting IIRIRA was "to expedite the physical removal of those aliens not entitled to admission to the United States" and "[t]o that end, IIRIRA 'inverted' certain provisions of the INA, encouraging prompt voluntary departure and *speedy government action*." *Coyt,* 593 F.3d at 906 (emphasis added).

The House Conference Report on IIRIRA similarly made plain that the bill's purpose was "to improve deterrence of illegal immigration to the United States by ... reforming exclusion and deportation law and procedures." H.R. Conf. Rep. No. 104-828, at 1 and 199 (1996). President Clinton's signing statement likewise described IIRIRA as "landmark immigration reform legislation that ... strengthens the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system." 32 Weekly Comp. Pres. Doc. 1935, 1996 U.S.C.C.A.N. 3388, 3391 (Sep. 30, 1996).

DHS's interpretation thwarts this intent: while IIRIRA was intended to *expedite* removals and deter illegal entries, DHS invokes its provisions to assert unlimited and unreviewable discretion to *thwart and slow* removals and to *encourage* illegal entries. That is neither what Congress intended nor can Congress's text bear that construction.

CONCLUSION

The border is in crisis. This DHS Administration is lawless. And the States continue to suffer escalating irreparable harm as the border slips further and further away from DHS's operational control. This Court should deny DHS's motion for a stay pending appeal.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief contains 5,110 words, excluding the parts exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the program used for the word count). Because it is an amicus brief relating to a motion, there is no specifically applicable word limitation. It is, however, within the general limitation of 6,500 words for merits-stage amicus briefing under Rule 29(a)(5).

s/ Drew C. Ensign
Drew C. Ensign

Dated: June 22, 2022

CERTIFICATE OF SERVICE

I, Drew C. Ensign, hereby certify that I electronically filed the foregoing Brief of Amici Curiae States of States of Arizona, Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, West Virginia, and Wyoming in Opposition to the Emergency Motion for Stay Pending Appeal with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on June 22, 2022, which will send notice of such filing to all registered CM/ECF users.

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