No. 22-40367

In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS; STATE OF LOUISIANA,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary, U.S. Department of Homeland Security; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection, in his official capacity; UNITED STATES CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, Acting Director, U.S. Immigration and Customs Enforcement, in his official capacity; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, Senior Official Performing the Duties of the Director of the U.S. Citizenship and Immigration Services, in her official capacity; U.S. CITIZENSHIP AND IMMIGRATION SERVICES,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Victoria Division

OPPOSITION TO EMERGENCY MOTION FOR A STAY PENDING APPEAL

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Certificate of Interested Persons

State of Texas; State of Louisiana,
Plaintiffs-Appellees,

v.

United States of America; Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security; United States Department of Homeland Security; Troy Miller, Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection, in his official capacity; United States Customs and Border Protection; Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, in his official capacity; United States Immigration and Customs Enforcement; Tracy Renaud, Senior Official Performing the Duties of the Director of the U.S. Citizenship and Immigration Services, in her official capacity; U.S. Citizenship and Immigration Services,
Defendants-Appellants.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellee, as a governmental party, need not furnish a certificate of interested persons.

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Introduction

Federal law requires that Defendants detain certain criminal aliens—including those guilty of crimes of moral turpitude, aggravated felons, serious drug offenders, and sex traffickers. These aliens must be detained at a specific time—when they are released from criminal custody. Federal law likewise requires that Defendants detain aliens subject to a final order of removal during the removal period. The Supreme Court has repeatedly described these provisions as mandatory.

Defendants would rather not. In November 2021, DHS issued a memorandum titled *Guidelines for the Enforcement of Civil Immigration Law* (the "Final Memorandum"). Add.5. The Final Memorandum dispenses with Congress's mandatory-detention scheme in favor of one that eschews "bright lines or categories" and "requires an assessment of the individual and the totality of the facts and circumstances" for any alien who might be "a current threat to public safety." Add.102. Rather than requiring immigration officers to follow federal law, the Final Memorandum prevents them from doing so—unless its requirements are satisfied. Defendants have even created a review process for aliens who believe they have been detained in violation of the Final Memorandum.

But "Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985). "Congress makes laws and the President, acting at times through agencies like [DHS], 'faithfully execute[s]' them." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 327 (2014) (alteration in original) (quoting U.S. Const., art. II, § 3). "The power of

executing the laws . . . does not include a power to revise clear statutory terms" even if the agency believes those terms "turn out not to work in practice." *Id.*

The Final Memorandum is contrary to law, arbitrary and capricious, and procedurally invalid. This Court should deny Defendants' motion for a stay pending appeal.

STATEMENT

I. Legal Framework

While the INA makes detention of some aliens discretionary, *e.g.* 8 U.S.C. § 1226(a), it makes detention of others mandatory. Section 1226(c) provides that "[t]he Attorney General shall take into custody any alien who" has committed certain crimes. 8 U.S.C. § 1226(c)(1). These criminal aliens include, among others, those convicted of crimes of moral turpitude, *id.* § 1182(a)(2)(A), aggravated felons, *id.* § 1227(a)(2)(A)(iii), serious drug criminals, *id.* § 1227(a)(2)(B), and terrorists, *id.* § 1182(a)(3)(B). Section 1231(a)(2) provides that "the Attorney General shall detain" an alien with a final order of removal "[d]uring the removal period." *Id.* § 1231(a)(2).

Section 1226 and Section 1231 explain when the mandatory detention provisions are triggered. Aliens subject to Section 1231(a)(2) shall be detained "during the removal period" after entry of a final removal order. *Id.* § 1231(a)(2). And Section 1226(c) mandates detention "when the alien is released" from criminal custody. *Id.* § 1226(c)(1)(D).

The Supreme Court has repeatedly described Section 1226(c) and Section 1231(a)(2) as mandatory. "Section 1226(c) . . . carves out a statutory category of aliens who may *not* be released under § 1226(a)." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). Because "Congress has decided" that the Section 1226(a) "procedure is too risky in some instances" it "adopted a special rule for aliens who have committed certain dangerous crimes and those with connections to terrorism." *Nielsen v. Preap*, 139 S. Ct. 954, 959 (2019). These criminal aliens "must be arrested 'when [they are] released' from custody on criminal charges." *Id.* Congress adopted these special procedures because of the serious harms criminal aliens may cause if not detained. *Demore v. Kim*, 538 U.S. 510, 518-20 (2003). The Supreme Court has also confirmed, for Section 1231(a)(2), that "[d]uring the removal period, detention is mandatory." *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2281 (2021).

II. Prior Proceedings

The Final Memorandum is the latest in a series of memoranda that ignore these requirements. First, in January 2021, "then-Acting Secretary of Homeland Security David Pekoske issued a memorandum titled *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*." Add.9 (the "January Memorandum"). The January Memorandum "announced substantial changes to the enforcement of the Nation's immigration laws," Add.10, prioritizing detention of aggravated felons who are determined to be threats to public safety, *id.*, but omitting detention of aliens with final removal orders and many criminal aliens.

Subsequently, "on February 18, 2021, Acting ICE Director Tae Johnson issued a memorandum titled *Interim Guidance: Civil Immigration Enforcement and Removal*

Priorities." Add.11 (the "February Memorandum"). The February Memorandum contained many of the same defects. Add.11-13. Like the January Memorandum, it made aliens "who pose[] a threat to public safety and have been convicted of an aggravated felony or are involved with criminal gangs" a "public safety priority" but did not instruct officers to prioritize other aliens subject to Section 1226(c) or Section 1231(a)(2). Add.11-12 (internal quotation marks omitted).

The district court preliminarily enjoined enforcement of the relevant portions of the January and February Memoranda. *Texas v. United States*, 555 F. Supp. 3d 351 (S.D. Tex. 2021). A panel of this Court stayed that order, *Texas v. United States*, 14 F.4th 332, 334 (5th Cir. 2021), but this Court vacated that decision en banc. *Texas v. United States*, 24 F.4th 407, 408 (5th Cir. 2021). While these proceedings were ongoing, "Secretary Mayorkas issued the Final Memorandum from DHS," which became effective in November 2021. Add.13. It "serve[d] to rescind the January and February Memoranda." Add.13. Defendants dismissed their appeal of the preliminary injunction concerning the January and February Memoranda. *Texas v. United States*, No. 21-40618, 2022 WL 517281, at *1 (5th Cir. Feb. 11, 2022).

The Final Memorandum "identifies the same three priority enforcement categories as the previous two memoranda: national security, border security, and public safety." Add.13. But "[u]nlike the February Memorandum, the Final Memorandum's priorities are not presumptively subject to enforcement action." Add.14. And "the Final Memorandum's public safety priority no longer presumptively subjects aliens convicted of aggravated felonies to enforcement action, including detention." Add.14. (internal quotation marks omitted).

Under the Final Memorandum, "enforcement, including detention, is not to be determined according to any bright lines or categories." Add.14 (internal quotation marks omitted). Instead, it "requires an assessment of the individual and the totality of the facts and circumstances." Add.14. "DHS personnel should not rely on the fact of conviction or the result of a database search alone when deciding to enforce the law," but "should, to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances." Add.14 (internal quotation marks omitted). "[T]he Final Memorandum does not instruct officers to prioritize criminal aliens convicted of" numerous crimes covered by Section 1226(c), including those convicted of crimes of moral turpitude, drug offenses, and participants in the commercial sex or human trafficking industry. Add.14-15.

The Final Memorandum moreover establishes a process to ensure "rigorous review of [DHS] personnel's enforcement decisions" and creates a "fair and equitable case review process" to allow aliens and their representatives "expeditious review of the enforcement actions taken" for compliance with the Final Memorandum. Add.15.

In response, the States filed an amended complaint that challenged the Final Memorandum as, among other things, contrary to law, arbitrary and capricious, and procedurally unlawful. ECF 109. The States also sought to postpone the effective date of the Final Memorandum or, alternatively, a preliminary injunction. *Id.*, ECF 111. The district court "consolidated the hearing on the States' Motion . . . with the trial on the merits" under Federal Rule of Civil Procedure 65(a)(2). Add.5.

After trial, the district court concluded that the States have standing, Add.25-30, and that no obstacle prevented judicial review of the Final Memorandum, Add.30-65. It then found the Final Memorandum contrary to law, Add.65-70, arbitrary and capricious, Add.70-77, and procedurally invalid, Add.77-83. The district court vacated and remanded the Final Memorandum, Add.88-94, but declined to enter injunctive relief. Add.94-96.

ARGUMENT

Defendants cannot satisfy the "four factors [courts consider] in deciding whether to grant a stay pending appeal: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Texas v. United States*, 787 F.3d 733, 746-47 (5th Cir. 2015) (cleaned up).

I. Defendants Are Unlikely to Succeed on the Merits Because the Final Memorandum Violates Federal Law.

A. The States have standing.

Standing requires "an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Texas v. United States*, 809 F.3d 134, 150 (5th Cir. 2015) ("*Texas DAPA*") (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)). The district court concluded that the States have standing because they have been harmed by the Final Memorandum and as *parens patriae*. Add.25-29.

The district court made detailed findings reviewable only for clear error, *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 367 (5th Cir. 2020), demonstrating the States' standing, Add.16-25. In particular, the district court found that "[t]he Final Memorandum increases the number of aliens with criminal convictions and aliens with final orders of removal released into the United States." Add.21. This creates costs for the States, including related to incarcerating criminal aliens DHS does not detain, Add.21-22, recidivism, Add.22-23, education, Add.23, and healthcare, Add.24-25.

This Court has repeatedly held such costs establish injury in fact. *E.g.*, *Texas DAPA*, 809 F.3d at 155-57 (costs related to issuing driver's licenses); *Texas v. Biden*, 20 F.4th 928, 969 (5th Cir. 2021) ("*Texas MPP*") (healthcare costs). Defendants (at 10) concede as much.

The district court found these costs traceable to Defendants and redressable. Immigration detainers rescinded because of the Final Memorandum have "led to aliens remaining in TDCJ custody longer than they otherwise would, which imposes additional costs on the State of Texas." Add.28. The Final Memorandum "has also caused, and continues to cause, increases in the number of criminal aliens and aliens with final orders of removal released into Texas" and "increases in Texas's expenditures on public services such as healthcare and education." Add.28. As this Court recently explained, "an increase in the number of aliens in Texas, many of whom" will create costs for the States, is sufficient to establish standing. *Texas v. Biden*, 10 F.4th 538, 547 (5th Cir. 2021).

These harms are redressable because "vacatur of the Final Memorandum would directly contribute to the decrease in the number of criminal aliens in the States' prisons and the number of aliens who are subject to a final order of removal being released into the States," which would "decrease the financial injury and *parens patriae* injury that the States are suffering." Add.29. That is sufficient. "When 'establishing redressability, [a plaintiff] need only show that a favorable ruling could potentially lessen its injury; it need not definitively demonstrate that a victory would completely remedy the harm.'" *Sanchez v. R.G.L.*, 761 F.3d 495, 506 (5th Cir. 2014) (quoting *Antilles Cement Corp. v. Fortuno*, 670 F.3d 310, 318 (1st Cir. 2012)).

Were there any doubt, the States receive special solicitude in the standing analysis. *Texas MPP*, 20 F.4th at 969-70; *Texas DAPA*, 809 F.3d at 151-55. At a minimum, "that means imminence and redressability are easier to establish here than usual." *Texas MPP*, 20 F.4th at 970.

Defendants' counterarguments fail. First, Defendants contend (at 8) that the Final Memorandum "does not mandate a reduction in immigration enforcement." But that is beside the point. The district court found "the Final Memorandum has caused ICE to detain fewer criminal aliens" imposing harms on the States. Add.29. Vacating the Final Memorandum redresses the attendant injuries. Moreover, this Court's "standing analysis is not an accounting exercise." *Texas DAPA*, 809 F.3d at 156. Defendants' contention (at 9-10) that their failure to comply with Congress's instructions may be offset by gains elsewhere is unavailing.

Second, Defendants' reliance (at 8-10) on *Arizona v. Biden*, 31 F.4th 469 (6th Cir. 2022) is misplaced. At the outset, its standing analysis is out of step with this

Court's precedent. *E.g. Texas DAPA*, 809 F.3d at 155-57. Moreover, the district court was aware of and persuasively distinguished the case. It recognized that "the Sixth Circuit noted that it did not have evidence that there was a connection between the decrease in enforcement actions and the Final Memorandum." Add.29. But here, "the States' theory of injury is based on the Final Memorandum causing increased numbers of *criminal* aliens within their borders, and . . . the Final Memorandum has caused ICE to detain fewer criminal aliens." Add.29.

Third, Defendants assert (at 11) vacatur of the Final Memorandum would not completely redress the States' harms, as "[r]esource limitations preclude DHS from enforcing the INA against all noncitizens potentially described in §§ 1226(c) and 1231(a)." But the States must show only that some of their harms would be redressed. *Sanchez*, 761 F.3d at 506; *Texas MPP*, 20 F.4th at 973-74.

B. Defendants cannot escape judicial review.

Next, Defendants raise a slew of reviewability arguments, contending (at 11-12) that review is barred by 8 U.S.C. § 1252(f)(1), that (at 12-14) the Final Memorandum is not final agency action, that (at 14) the Final Memorandum reflects decisions committed to agency discretion by law, and that (at 14-15) the States do not fall within the INA's zone of interests. Each is incorrect.

1. Defendants' resort to Section 1252(f)(1) is unavailing. Defendants forfeited this argument by failing to raise it below. While Section 1252(f)(1) uses the term "jurisdiction," that "is a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998). Section 1252(f)(1) limits a district court's jurisdiction to enter an injunction. It does not address a court's power to adjudicate a

case, and so does not speak to subject-matter jurisdiction. *Id.* It may be forfeited, and Defendants have done so.

They are also wrong on the merits. Section 1252(f)(1) states that "[r]egardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter"—that is, Sections 1221-1232 of the INA. 8 U.S.C. 1252(f)(1). In *Garland v. Aleman Gonzalez*, No. 20-322, 2022 WL 2111346, at *4 (U.S. June 13, 2022), the Supreme Court held that "§ 1252(f)(1) generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out" the covered provisions.

But the district court did not enter an injunction. Add.94-96. Rather, the district court vacated the Final Memorandum. Vacatur and injunctive relief are different remedies under the APA. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010). Vacatur is the "less drastic remedy." *Id.* And vacatur under the APA does not "enjoin or restrain" the INA's operation; vacatur alone does not enjoin or restrain anything at all.

Defendants wrongly assert (at 12) that *Aleman Gonzalez* applies with equal force to vacatur. That does not follow from the Court's opinion—which held only as to injunctive relief—and conflicts with precedent describing Section 1252(f)(1) as "nothing more or less than a limit on injunctive relief." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999). It also conflicts with the well-recognized "strong presumption favoring judicial review of administrative action."

Salinas v. U.S. R.R. Ret. Bd., 141 S. Ct. 691, 698 (2021); *Texas MPP*, 20 F.4th at 976. And Defendants' assertion (at 12) that "enjoin or restrain" applies equally to vacatur under the APA is inapt—rather, the term restrain most naturally applies to temporary restraining orders under Federal Rule of Civil Procedure 65(b).

2. Defendants next assert (at 12-14) the Final Memorandum is not final agency action because it does not determine rights or obligations. This argument fails; the Final Memorandum easily fits this Court's precedent concerning final agency action.

First, final agency action "must mark the consummation of the agency's decisionmaking process" *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). Defendants do not contest this portion of the test.

"[S]econd, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (internal quotation marks omitted). "The Supreme Court has long taken a pragmatic approach to finality, viewing the APA's finality requirement as flexible." *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019) (cleaned up). "[W]here agency action withdraws an entity's previously-held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action." *Id.* at 442. Agency action may also be final when the action "binds its staff or creates safe harbors." *Id.*

The district court held the Final Memorandum satisfies this test in at least four ways: (1) "the Final Memorandum is facially binding on DHS personnel;" (2) "evidence of DHS's internal practices demonstrate that the Final Memorandum is being applied in a way that makes it binding;" (3) "detention data also demonstrate that

the Final Memorandum is being applied in a way that makes it binding;" and (4) "the Final Memorandum creates legal rights for aliens subject to enforcement action." Add.31.

Defendants first contend (at 13) that the text of the Final Memorandum disclaims creating rights or obligations. That argument fails twice over. First, as the district court concluded "[t]he Final memorandum facially binds DHS personnel using mandatory language"—explaining that "DHS personnel must evaluate the individual and the totality of the facts and circumstances" and "[w]hether a noncitizen poses a current threat to public safety is not to be determined according to bright lines or categories, [but by] an assessment of the individual." Add.31-32. That is itself sufficient. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000).

Second, this Court is "mindful but suspicious of the agency's own characterization" and focuses "primarily on whether the rule has binding effect on agency discretion or severely restricts it." *Texas DAPA*, 809 F.3d at 171 & n.125. It is not enough for Defendants to simply point to language in the Final Memorandum saying it creates no rights or obligations—especially where the district court found to the contrary. Add.31-39.

Next, Defendants contend (at 13-14) the Final Memorandum leaves immigration officers free to exercise their judgment in individual cases. But the district court made contrary findings of fact, including that "the Final Memorandum and its priorities" are "perceived by many ICE officers and agents as substantially limiting if not eliminating their discretion to make detention decisions." Add.21; *see also* Add.19 ("[O]fficers do not have discretion to go outside the enforcement

priorities."). Though Defendants may disagree with the district court's findings, they have not shown it clearly erred.

3. Defendants contend (at 14) the Final Memorandum is committed to agency discretion by law (citing *Heckler*, 470 U.S. at 831). That argument is all but foreclosed in this Circuit. In *Texas MPP*, this Court concluded that "*Heckler* does not apply to agency rules." 20 F.4th at 978. "*Heckler* recognized and carried forward the executive's longstanding, common-law based discretion to do nothing in a particular case," *id.* at 982, but "the Supreme Court and the Fifth Circuit have consistently read *Heckler* as sheltering one-off nonenforcement decisions rather than decisions to suspend entire statutes," *id.* at 983. Thus, this Court's cases "apply *Heckler*, if at all, to one-off agency enforcement decisions rather than to agency rulemakings." *Id.* at 984. Defendants' argument fails because the Final Memorandum is not a "one-off nonenforcement decision" but an agency rule.

4. Finally, Defendants contend (at 14-15) that the States are outside the INA's zone of interests. The "test is not meant to be especially demanding and is applied in keeping with Congress's evident intent when enacting the APA to make agency action presumptively reviewable." *Texas DAPA*, 809 F.3d at 162 (cleaned up). "The test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* (internal quotation marks omitted). The States easily satisfy this standard, as this Court has concluded in similar cases. *E.g.*, *Texas MPP*, 20 F.4th at 975-976; *Texas DAPA*, 809 F.3d at 162-63.

C. The Final Memorandum is substantively unlawful, arbitrary and capricious, and procedurally invalid.

The district court correctly determined that the Final Memorandum was substantively unlawful, arbitrary and capricious, and procedurally invalid.

1. The district court determined that the Final Memorandum is contrary to law because it "flatly contradicts the detention mandates under Sections 1226(c) and 1231(a)(2)" and purports to "replace[] those statutes by conferring discretion to independently decide who will be detained and when—if ever." Add.67.

Both Sections 1226(c) and 1231(a)(2) create mandatory requirements to detain covered aliens. "The first sign that the statute impose[s] an obligation is its mandatory language: 'shall.'" *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020). "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Id.* (quoting *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171-72 (2016)). Section 1226(c) provides that "[t]he Attorney General shall take into custody any alien who" has committed certain crimes "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c)(1). And Section 1231(a)(2) provides that "the Attorney General shall detain" an alien with a final order of removal "[d]uring the removal period." *Id.* § 1231(a)(2).

The "mandatory nature" of Sections 1226(c) and 1231(a)(2) are "underscore[d] by "adjacent provisions." *Me. Cmty. Health Options*, 140 S. Ct. at 1321. "'When', as is the case here, Congress 'distinguishes between "may" and "shall," it is generally clear that 'shall' imposes a mandatory duty.'" *Id.* (quoting *Kingdomware*, 579 U.S. at 172). The INA generally—and Sections 1226 and 1231 specifically—use both

"may" and "shall," demonstrating that Congress distinguished between duties that the executive must undertake and duties that the executive has discretion whether to undertake.

Defendants (at 15) appeal to prosecutorial discretion to evade this straightforward exercise in statutory interpretation, citing *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 760-61 (2005). This fails. First, the Supreme Court has repeatedly characterized Sections 1226(c) and 1231(a)(2) as mandatory. *E.g.*, *Johnson*, 141 S. Ct. at 2280-81 & n.2 (Sections 1226(c) and 1231(a)(2)); *Nielsen*, 139 S. Ct. at 959 (Section 1226(c)); *Jennings*, 138 S. Ct. at 846 (Section 1226(c)); *Zadvydas v. Davis*, 533 U.S. 678, 683 (2001) (Section 1231(a)(2)); *Demore*, 538 U.S. at 521 (Section 1226(c)). Defendants' response—that those cases involve aliens seeking to resist detention rather than the government seeking to ignore congressional mandates—is a distinction without a difference. The provisions at issue are either mandatory or they are not; the Supreme Court has said they are mandatory.

Even setting aside those precedents, *Castle Rock* does not untie Defendants' knot. First, this Court has previously rejected this argument, explaining that "*Castle Rock* is relevant only where an official makes a nonenforcement decision." *Texas MPP*, 20 F.4th at 997. But rather than an individual nonenforcement decision, this case involves a challenge to the rule reflected in the Final Memorandum.

Past that, Defendants' argument fails even on its own terms. Assuming it applies, *Castle Rock* requires only "some stronger indication" than the use of the mandatory "shall." 545 U.S. at 761. Here, that stronger indication is present. Add.53-58. The "Transition Period Custody Rules"—enacted along with Sections 1226(c) and

1231(a)(2)—"gave the Executive Branch a grace period as it transitioned to mandatory detention." Add.53-55. If neither Sections 1226(c) nor 1231(a)(2) mandated detention, this grace period was superfluous. And Congress's refusal to extend that grace period, Add.54, was meaningless. Moreover, Congress passed Sections 1226(c) and 1231(a)(2) precisely because of concerns that the executive was releasing potentially dangerous aliens. *Demore*, 538 U.S. at 515, 518-20; *Zavydas*, 533 U.S. at 697.

Of course, DHS may have limited resources.[1] And it "may adopt policies to prioritize its expenditures *within the bounds established by Congress.*" *Util. Air Regul. Grp.*, 573 U.S. at 327. But Defendants have no "power to revise clear statutory terms that turn out not to work in practice." *Id.* Likewise, "[f]ederal agencies may not ignore statutory mandates simply because Congress has not yet appropriated all of the money necessary." *In re Aiken Cnty.*, 725 F.3d 255, 259 (D.C. Cir. 2013) (Kavanaugh, J.). Nor should courts or federal agencies "infer that Congress has implicitly repealed or suspended statutory mandates based simply on the amount of money Congress has appropriated." *Id.* at 260. Defendants cannot "cavalierly toss . . .

[1] The district court found Defendants have not acted in good faith making this argument. Add.56. While "the Government has trumpeted the fact that it does not have enough resources to detain those aliens it is required by law to detain" and "blames Congress for this deficiency" it "has submitted two budget requests in which it asks Congress *to cut* those very resources and capacity by 26%" and has "persistently underutilized existing detention facilities." Add.56.

aside" federal law, Add.69—either because they find it insalubrious or difficult to comply with.[2]

2. The Final Memorandum is also arbitrary and capricious. Add.70-77. "The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Courts must ensure "the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.* "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). It must consider the reliance interests of those affected by the regulation, *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913-15 (2020), and must consider less-disruptive policies in light of those interests. *Id.*

The Final Memorandum is arbitrary and capricious because DHS failed to consider recidivism among criminal aliens; instead, DHS considered "criminality among all aliens, not studies about aliens who have already been convicted of a serious crime." Add.72. DHS thus failed to "examine the relevant data" and draw a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43; *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2569-71 (2019).

[2] As the district court found, "[p]rior administrations have made clear that their priorities do not displace 'mandatory detention.'" Add.70.

Second, the district court concluded DHS failed to consider costs to the States and the States' reliance interests. Add.75-77. Instead, DHS announced that costs to the States would be difficult to quantify, and that the States had no reliance interests. Add.75-76. Merely "[s]tating that a factor was considered . . . is not a substitute for considering it." *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986); *see also Texas MPP*, 20 F.4th at 990. That DHS believes the States have no reliance interests is particularly difficult to understand because this litigation—where the States have asserted reliance interests—was ongoing as to the January and February Memoranda when DHS issued the Final Memorandum.

Defendants simply assert (at 16-17) that the contrary conclusion is true. They are incorrect—but at a minimum their arguments are insufficient to show a likelihood of success on the merits.

3. Finally, the district court found the Final Memorandum invalid because DHS failed to go through notice-and-comment procedures. Add.77-83. Defendants contend (at 17-18) only that the Final Memorandum is a general policy statement. This is incorrect for many of the same reasons that Defendants are incorrect to assert the Final Memorandum is not committed to agency discretion by law. *Supra*, I.B.2.

Again, Defendants' arguments amount to a simple disagreement with the district court's findings of fact. Because "the Final Memorandum is" "facially binding," "applied in a way that demonstrates it is binding," and "imposes rights and obligations by allowing aliens to challenge enforcement actions taken against them if they believe they do not fall within the Final Memorandum's priorities," Add.79, notice-and-comment procedures were required. *EEOC*, 933 F.3d at 473.

II. Defendants Cannot Satisfy the Remaining Stay Factors.

Defendants' failure to show a likelihood of success on the merits is sufficient to deny a stay. *Biden v. Texas*, 142 S. Ct. 926, 926 (2021). Nonetheless, Defendants fail to demonstrate the remaining factors.

To start, Defendants' showing of irreparable harm is largely predicated on a post-judgment declaration that was not before the district court when it entered judgment. This Court recently declined to consider similar post-judgment evidence, *Texas MPP*, 20 F.4th at 1003 & n.21, and should do the same here.

Defendants' arguments are nonetheless unavailing. They complain (at 18-19) that absent the Final Memorandum, agents might "fill[] up bed space with noncitizens whose detention doesn't meet" DHS's goals and "possible inequitable outcomes" might result. But this is to simply complain that Defendants might be obliged to follow Congress's instructions. Defendants make plain their disagreement with Congress's statutory scheme when they posit (at 19) that Section 1226(c) might be over- and under-inclusive. Defendants are not authorized to ignore Congress's instructions, whatever they may think of them. *Util. Air Regul. Grp.*, 573 U.S. at 327.

The States, on the other hand, suffer irreparable harms because they cannot recover the costs imposed on them by the Final Memorandum. *Texas*, 787 F.3d at 768; *Texas MPP*, 20 F.4th at 1002.

The public interest also favors the States. Defendants have no "interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)). Rather, "there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence

and operations." *Id.* (internal quotation marks omitted). And "[t]here is always a public interest in prompt execution of removal orders." *Nken v. Holder*, 556 U.S. 418, 436 (2009). Thus, courts often stay orders that would prevent the enforcement of immigration restrictions, as Defendants show (at 18). But here the opposite is true.

III. The District Court's Vacatur Is Not Overbroad.

Finally, Defendants contend (at 20-22) that the district court's vacatur is overbroad. But federal courts routinely vacate agency action on a nationwide basis. Add.92-93 (collecting authority). And even in the context of injunctive relief—stronger medicine than vacatur—this Court has approved nationwide relief in the immigration context. That is because, as the district court observed, "[u]niversal relief can be appropriate to ensure uniformity in immigration policies as prescribed by federal law." Add.93 (citing *Texas DAPA*, 809 F.3d. at 187-88). Moreover, "there is a substantial likelihood that a geographically-limited [remedy] would be ineffective because" aliens who are not detained due to the Final Memorandum would be "free to move among states." *Texas DAPA*, 809 F.3d. at 188. Vacating the Final Memorandum was appropriate—and the district court did not err in failing to limit relief to the Plaintiff States. Defendants cite no binding contrary precedent.

Conclusion

The Court should deny Defendants' motion for a stay pending appeal.

Respectfully Submitted.

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Certificate of Service

On June 22, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d) because it contains 5,195 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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