**No. 21-40618**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**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, Acting Commissioner, 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; United States Citizenship and Immigration Services,**

**Defendants - Appellants.**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**

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# BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN OPPOSITION TO A STAY PENDING APPEAL

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## SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1 and Fed. R. App. P. 26.1, *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

3) The following entity has an interest in the outcome of this case: Immigration Reform Law Institute.

DATED: August 30, 2021

Respectfully submitted,

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## INTEREST OF *AMICI CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens, and also to assisting courts in understanding and accurately applying federal immigration law. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C.2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 942 F.3d 504 (D.C. Cir. 2019); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

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[1] No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

## INTRODUCTION

IRLI respectfully submits that the Court should deny the Appellants' request for a stay pending appeal. Congress has charged the Department of Homeland Security ("DHS") with the responsibility of enforcing the immigration laws. *See* 6 U.S.C. § 202 ("The [DHS] Secretary shall be responsible for … (3) [c]arrying out the immigration enforcement functions vested by statute …."); 8 U.S.C. § 1103(a)(1) (the DHS Secretary "shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens").

Nevertheless, on this Administration's first day in office, it immediately began dismantling programs and policies designed to secure the nation's borders and enforce the Immigration and Nationality Act ("INA"). For example, Executive Order 13993, 86 Fed. Reg. 7051 (Jan. 25, 2021), revised immigration enforcement priorities, and Proclamation 10142, 86 Fed. Reg. 7225 (Jan. 27, 2021), terminated border wall construction. DHS also announced the "suspension" of the MPP program. Finally, DHS issued two memoranda in which it announced an immediate 100-day pause of all removals[2] and, at issue here, extremely narrow

[2] On January 26, 2021, a district court entered a nationwide temporary restraining order against the 100-day stay of removals, and on February 23, that court converted the TRO into a preliminary injunction. *See Texas v. United States*,

immigration enforcement priorities consisting of recent arrivals, aggravated felons, terrorists, spies, or other national security risks.[3] *See* Addendum to Stay Motion ("Add.") at 162-66 (DHS's January 20, 2021, Memorandum); Add. at 168-74 (ICE's February 18, 2021, Memorandum) (collectively, "the Memoranda").

Collectively, these Administration actions signal to potential border crossers that the Administration is uninterested in securing—or unwilling to secure—our border, and these actions have resulted in the ongoing, record-setting surge of migrants at the southwest border. Indeed, the actions by the Administration reflect a conscious decision to cease effective immigration enforcement policies and to pursue a general policy of non-enforcement. This case arises in the context of the Executive branch's ongoing abdication of its duty to enforce the nation's immigration laws.

## ARGUMENT

### I. The Administration Fails To Show A Likelihood Of Success On The Merits

The considerations for granting a stay pending appeal are well-settled—the Court considers "(1) whether the stay applicant has made a strong showing that he

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2021 U.S. Dist. LEXIS 33890, *9, *147-48, 2021 WL 723856 (S.D. Tex. Feb. 23, 2021).

[3] In its February 18 Memorandum, DHS added gang members to its list of enforcement priorities. Add. 168, 171-72.

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." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quotation omitted). The Administration has failed to satisfy any of these standards for a stay.

In particular, the Administration cannot show that the district court erred in determining that the Memoranda constitute substantive or legislative rules subject to the APA's notice-and-comment procedure (which was not followed here). Add. 127-44; 5 U.S.C. § 553. The Administration argues that the prioritization scheme established by the Memoranda constitutes "a general statement of policy" because "it does not 'impose any rights and obligations' and [] it leaves 'the agency and its decisionmakers free to exercise discretion' in individual cases." Stay Motion at 17 (quoting *Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995)). According to the Administration, the Memoranda "do not eliminate individual officers' authority to pursue noncitizens outside the priority categories." *Id.* But the district court correctly rejected these contentions on the ground that the Memoranda affect the rights and obligations of certain aliens, DHS, and the States, Add. at 133-34, and because the Memoranda constrain individual officers' authority to exercise their discretion to take enforcement actions against non-priority aliens. Add. at 135-39.

The INA establishes a comprehensive and uniform immigration system governing who may enter and remain in the United States, and the DHS Secretary is charged with the administration and enforcement of that system. *See* 8 U.S.C. § 1103(a)(1); *see also* 6 U.S.C. §§ 202, 251 (listing immigration-related duties for which the DHS Secretary is responsible).

In enacting the INA, Congress specified many classes of aliens who are removable from the United States. Section 1182(a) of Title 8 of the United States Code describes classes of aliens who are ineligible for admission to the United States. These include: aliens with communicable diseases (§ 1182(a)(1)), aliens who have been convicted of specified crimes (§ 1182(a)(2)), aliens who are a threat to national security (§ 1182(a)(3)), aliens who are likely to become a public charge (§ 1182(a)(4)), alien workers who would adversely affect the wages and working conditions of American workers (§ 1182(a)(5)), aliens who are present in the United States without being admitted or who enter the United States by fraud or misrepresentation (§ 1182(a)(6)), aliens who do not possess a valid entry document (§ 1182(a)(7)), aliens who are permanently ineligible for citizenship due to draft evasion (§ 1182(a)(8)), aliens who apply for admission within a certain period after being removed (§ 1182(a)(9)), and various other aliens such as polygamists, unlawful voters, and individuals who renounced U.S. citizenship in order to avoid taxes (§ 1182(a)(10)).

Section 1227 of Title 8 of the United States Code defines certain classes of aliens who are deportable (that is, removable) from the United States. These include: aliens who were inadmissible at the time of entry, have violated the terms of their status (visa overstays), participated in human smuggling, or engaged in marriage fraud (§ 1227(a)(1)); aliens who have been convicted of specified crimes (§ 1227(a)(2)); aliens who fail to comply with registration requirements, falsify immigration documents, or falsely claim citizenship (§ 1227(a)(3)); aliens who are a threat to national security or have engaged in terrorist activities (§ 1227(a)(4)); aliens who have become a public charge (§ 1227(a)(5)); and aliens who unlawfully vote in the United States (§ 1227(a)(6)).

Under the Memoranda, immigration officers are restricted from taking any enforcement action[4] against the vast majority of these classes of inadmissible or deportable aliens, because aggravated felons constitute a small fraction of removable aliens. The DHS has long prioritized the removal of criminal aliens. For example, in fiscal year 2020, "90 percent of ICE ERO's administrative arrests were for aliens with criminal convictions or pending criminal charges while the

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[4] These restricted actions include: issuing a detainer; issuing, serving, filing, or cancelling a Notice to Appear; stopping, questioning, or arresting a noncitizen for an immigration violation; deciding whether to detain or release an alien from custody; deciding whether to grant deferred action; and executing a removal order. Add. at 170.

remaining 10 percent were other immigration violators." U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations, Fiscal Year 2020 Enforcement and Removal Operations Report ("2020 ICE Report") at 13, available at: https://www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf, (last visited August 30, 2021). In fiscal year 2018, criminal aliens constituted 87 percent of all ICE interior removals. *See id.* at 14 (Figure 9). Yet even though 87-90 percent of all ICE interior removals are criminal aliens, only a fraction of those criminal aliens are aggravated felons and would therefore be subject to removal under the Memoranda.

According to one analysis, in fiscal year 2018 (the latest year for which data were available), "88 percent of all interior deportations" were classified as "not aggravated felons" by the government, and "only about 15 percent of the criminal aliens removed from the interior in 2018" were aggravated felons. *See Center for Immigration Studies, Biden Freezes ICE; Suspends 85% of Criminal Alien Deportations* ("CIS Analysis"), available at: https://cis.org/Vaughan/Biden-Freezes-ICE-Suspends-85-Criminal-Alien-Deportations (last visited August 30, 2021). In other words, although the vast majority of aliens arrested and removed by

ICE are criminal aliens, aggravated felons make up only about 15 percent of those criminal aliens.[5]

The number of gang-related or terrorist aliens removed are even a smaller fraction of those removed. According to the 2020 ICE Report, aliens removed who are known or suspected gang members make up approximately two percent of total removals. *See* 2020 ICE Report at 19, 21 (compare Figures 19 and 21, depicting total ICE removals and ICE removals of gang members, respectively). The number of terrorist removals is statistically small. *See id.* at 23 (Figure 22, showing that between 31 and 58 terrorists were removed during the past three years).

Thus, it is remarkable how narrowly the Memoranda defined interim enforcement priorities, a narrowness that reflects the government's conscious decision not to enforce these immigration laws in the vast majority of their applications. The only aliens identified as enforcement priorities under the Memoranda consist of: 1) terrorists, spies, or other national security risks; 2) recent arrivals (defined as those aliens who enter or attempt to enter the United States on or after November, 1, 2020); and 3) aggravated felons or criminal gang members who pose a risk to public safety. Add. at 171-72. The Memoranda permit

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[5] Aliens removed by ICE "include both aliens arrested by ICE ERO in the interior of the country" (interior deportations or removals) and aliens "who are apprehended by CBP and subsequently turned over to ICE ERO for removal." 2020 ICE Report at 18.

immigration officers to exercise their discretion in taking enforcement actions against aliens who fall within one of the three priority categories, but require preapproval by a Field Office Director or Special Agent in Charge before any enforcement action may be taken against an alien who falls outside those priority categories. *Id.* at 172-73. By limiting enforcement priorities to terrorists, spies, aggravated felons, and gang members, the government is consciously refusing to enforce the law against the vast majority of aliens unlawfully present in the United States. Put another way, even though 90 percent of removals prior to issuance of the Memoranda involved criminal aliens, under the enforcement priorities established by those Memos, about 85 to 88 percent of those criminal aliens will no longer be subject to any enforcement action. These numbers quantify how drastically officers' discretion has been reduced. As the district court correctly concluded, "the amount of discretion [the Memoranda] afford is insufficient for them to be classified as general statements of policy." Add. 135.

In addition, as the district court observed, the preapproval process established by the February Memorandum contradicts the INA and implementing regulations. Add. at 135 (citing 8 U.S.C. § 1357; 8 C.F.R. § 287.5). The INA establishes the powers of immigration officers, which include the authority to take certain actions without warrant, to administer oaths and take evidence, and to detain aliens in specified situations. *See* 8 U.S.C. § 1357. The applicable

regulations grant certain authorized immigration officers the "[p]ower and authority to interrogate[;] [to] patrol the border[;] to arrest[;] to conduct searches[;] to execute warrants[;] [and] to carry firearms." 8 C.F.R. § 287.5. Authorized officers are those "who have successfully completed basic immigration law enforcement training" and generally include:

> border patrol agents; air and marine agents; special agents; deportation officers; CBP officers; immigration enforcement agents; supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and immigration officers who need the authority to arrest persons under [8 U.S.C. § 1357(a)(4)] in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP, the Assistant Secretary/Director of ICE, or the Director of the USCIS.

8 C.F.R. § 287.5(c).

The February Memorandum, however, severely limits this authority by requiring immigration officers to seek pre-approval for non-priority enforcement actions, as well as instituting a new level of review for such decisions. It provides that "[a]ny civil immigration enforcement or removal actions that do not meet the . . . criteria for presumed priority cases will require preapproval." Add. 173. Furthermore, such approval, if obtained, only applies to the alien it references and does not extend to any aliens "encountered during an [approved] operation if" the aliens are not in one of the priority categories. *Id.* Thus, immigration officers who previously had the authority to interrogate and arrest aliens without a warrant have

been stripped of such authority and may now only exercise it in "exigent circumstances." *Id.*

Such officers are also prevented from taking enforcement actions against aliens who are already subject to a final order of removal, but who do not meet DHS's priority criteria. *See id.* Any officer who takes an enforcement action against a non-priority alien without the preapproval required by the new DHS policy must subsequently submit paperwork for such approval. *See id.* It is unclear what consequences will follow should such retroactive preapproval be denied. Thus, these new procedures are not supported by the INA and are in direct conflict with current regulations, which authorize immigration officers to conduct enforcement and removal operations without first obtaining preapproval. *See* 8 C.F.R. § 287.5.

Because the district court correctly concluded that the Memoranda do not fall within an exception to the APA's notice and comment requirement, the Administration cannot demonstrate any likelihood of success on appeal.

## II. The Balance Of Interests Does Not Support A Stay

The Administration argues that the government and the public will be harmed absent a stay. Stay Motion at 17-21. In particular, the Administration suggests that the district court's injunction will prevent it from focusing its resources on aggravated felons. Stay Motion at 18-19 (noting an increase in arrests

of aggravated felons from 2020 to 2021). But the Administration ignores the fact that many dangerous criminal aliens have not been convicted of an aggravated felony and that immigration officers are prevented from taking actions against such aliens under the prioritization scheme established by the Memoranda.

In any event, the district court properly concluded that the Memoranda are contrary to law and were issued in violation of the APA. The Administration will suffer no harm from an injunction that merely requires the Administration to comply with the law. As the district court observed, "'the public is served when the law is followed.'" Add. 150 (quoting *Daniels Health Scis., LLC v. Vascular Health Scies., LLC*, 710 F.3d 579, 585 (5th Cir. 2013)).

If the Administration refuses to enforce the law, the States are left with no recourse. Although the various States and local communities throughout the country bear many of the consequences of illegal immigration, federal law regulating immigration largely preempts any State or local laws aimed at addressing those consequences. *See Arizona v. United States*, 567 U.S. 387, 397 (2012) (acknowledging that States bear consequences of unlawful immigration); *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress . . . ."). Not only are States and localities prevented from legislating with respect to immigration, State officials are largely prevented from enforcing federal

immigration laws. *See Arizona*, 567 U.S. at 407-10 (describing the limited circumstances in which State officers may perform the functions of an immigration officer). Thus, States are powerless to address the consequences of illegal immigration if the federal government refuses to enforce the immigration laws.

A return to the enforcement priorities established by the Memoranda would result in a marked increase in the illegal alien population because ICE will only take enforcement actions against terrorists, spies, aggravated felons, and gang members. As noted above, of all interior deportations in fiscal year 2020, 90 percent involved criminal aliens, but only 15 percent involved aggravated felons and about two percent involved gang members. *See* CIS Analysis; 2020 ICE Report. Accordingly, under the restrictive enforcement priorities established by the Memoranda, enforcement actions against the remaining 83 percent of removable aliens would all but cease.

## CONCLUSION

For the foregoing reasons, the Administration's request for a stay pending appeal should be denied.

DATED: August 30, 2021

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The foregoing brief complies with Fed. R. App. P. 27(d)(2)(A) and 29(a)(5) because it contains 2,869 words, as measured by Microsoft Word software. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, Roman-style typeface of 14 points or more.

DATED: August 30, 2021

Respectfully submitted,

/s/ Matt Crapo
Matt A. Crapo

## CERTIFICATE OF SERVICE

I certify that on August 30, 2021, I electronically filed the foregoing motion and attached *amicus* brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Matt Crapo
Matt A. Crapo