No. 22-03272

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF ARIZONA, *et al*,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, *et al*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Ohio

BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES

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Pursuant to Rule 7.1 of the FEDERAL RULES OF CIVIL PROCEDURE, *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.

DATED: May 25, 2022

Respectfully submitted,

/s/ Gina M. D'Andrea

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. IRLI has litigated or filed briefs as *amicus curiae* in many immigration-related cases before federal courts and administrative bodies, 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); *Wash. 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. United States 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). 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, because the Board considers IRLI an expert in immigration law.

[1] All parties have consented in writing to IRLI's filing this *amicus* brief. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus*, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief.

INTRODUCTION

The executive branch is currently refusing to enforce, and thereby effectively suspending, the immigration laws passed by Congress. This refusal, which has led to an uncontrolled border, constitutes a failure by the administration to perform its duty to take care that the laws be faithfully executed. Furthermore, the administration's active opposition to federal immigration law was enacted through a series of procedurally invalid memoranda, culminating in the document at issue in this case.

As the district court opined, "the Executive [cannot] displace clear congressional command[s] in the name of resource allocation and enforcement goals[.]" D. Ct. Opinion and Order, R.44 at PageID# 1069. Furthermore, such commands are not subject to the prosecutorial discretion traditionally granted in enforcement situations. Congress's commands regarding mandatory arrest and detention of certain criminal aliens reflect the clear intent to remove discretion with respect to certain enumerated classes of aliens. Thus, the District Court properly enjoined the implementation of the Guidelines for the Enforcement of Civil Immigration Law ("Permanent Guidance") issued by the Secretary of Homeland Security on September 30, 2021.

First, the Permanent Guidance violates the Administrative Procedure Act ("APA"). In the Permanent Guidance, the Secretary issued a rule that bars

immigration officers from taking enforcement action against an alien solely on the basis that such alien is removable under the law. *See* Guidelines for the Enforcement of Civil Immigration Law, R.4-1 at PageID# 99. ("The fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them. We will use our discretion and focus our enforcement resources in a more targeted way."). The Permanent Guidance, which amounts to a vast grant of amnesty by the executive, is a substantive rule because it withholds officers' statutorily granted authority, and thus is procedurally invalid because it was not issued in accordance with the notice-and-comment requirements of the APA.

Additionally, although the Department of Homeland Security ("DHS") has broad discretion with respect to enforcement of certain immigration laws, such discretion is not unlimited. Congress intentionally constrained DHS's discretion by mandating certain enforcement actions for certain classes of aliens, including criminal aliens and aliens who illegally cross U.S. borders. But, in blatant disregard for the statutory commands of Congress, DHS issued a substantive rule that instructs officers not to rely "on the fact of conviction of the result of a database search alone" for enforcement actions. R.4-1 at PageID# 101. This order by DHS directly conflicts with Congress's mandate that certain criminal aliens be detained and removed based solely on such convictions. Thus, this rule is contrary to law as well as procedurally invalid.

Finally, the Permanent Guidance was intentionally designed to frustrate the well-established objectives of Congress by suspending these statutory commands. The Permanent Guidance, along with prior executive actions, is a move calculated to create a highly porous border that will attract more illegal border crossers. These actions—suspension of the law and extreme frustration of congressional objectives—go beyond even a failure to take care that the laws be faithfully executed. The Permanent Guidance and other immigration policies represent active opposition to these laws by the executive branch.

This Court should affirm the Preliminary Injunction issued by the District Court because the Permanent Guidance is contrary to law, procedurally invalid, and amounts to the rejection by the executive of the constitutional duty to take care that the laws be faithfully executed.

ARGUMENT

I. The Permanent Guidance is Both Contrary to Law and Procedurally Invalid.

The Supreme Court has long recognized Congress's "broad power over naturalization and immigration." *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976). *See also Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (internal citation omitted) ("And we observed recently that in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens."). Congress used this power to enact the Immigration and Nationality

Act ("INA"). 8 U.S.C. § 1101 *et seq.* Through the INA, Congress established a comprehensive and uniform immigration system that governs who may enter and remain in the United States as well as procedures for removing those who may not remain. The INA specifies that numerous classes of aliens are inadmissible or removable, including aliens who attempt illegal entry, commit certain crimes, violate the terms of their status (visa overstays), obtain admission through fraud or misrepresentation, vote unlawfully, become a public charge, and whose work would undermine the wages or working conditions of American employees. *See generally* 8 U.S.C. §§ 1182(a), 1227(a).

Congress determined that DHS would be responsible for enforcement of federal immigration laws. 8 U.S.C. § 1103(a)(1) (providing that 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."). Although the INA defines the numerous classes of inadmissible or removable aliens and establishes the system by which such aliens may be ordered removed, Congress left many enforcement decisions to the discretion of DHS. *See* 8 U.S.C. § 1229a (establishing removal proceedings); *Arizona v. United States*, 567 U.S. 387, 395 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials."). Thus, as DHS Secretary Mayorkas stated in the Permanent Guidance, the executive branch exercises broad authority over the

enforcement of federal immigration law. *See* R.4-1 at PageID# 99. ("It is well established in the law that federal government officials have broad discretion to decide who should be subject to arrest, detainers, removal proceedings, and the execution of removal orders.").

As the District Court recognized when it granted the injunction, however, the executive branch's discretion, while broad, is not unlimited. R.44 at PageID# 1102-1103 (explaining that although "DHS has discretion to choose whom to enforce the immigration laws against . . . . DHS cites no authority allowing it to discard Congress's judgment on who should be mandatorily detained after removal proceedings have commenced.") (citations omitted). When Congress defined which classes of aliens are removable it did not grant DHS the power to alter those classifications. Congress only empowered DHS to grant certain discretionary forms of relief to removable aliens who satisfy statutory requirements. *See, e.g.*, 8 U.S.C. §§ 1158 (asylum), 1229b (cancellation of removal). Therefore, Congress did not authorize DHS to modify or alter the classes of aliens it deemed removable in the INA.

Despite these clear limits on its authority, DHS attempted to alter these statutory classifications with the Permanent Guidance, which announced that evidence that an alien is removable under the law is no longer sufficient reason for immigration officials to take enforcement action against that alien. *See* R.4-1 at

PageID# 99. ("The fact that an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them. We will use our discretion and focus our enforcement resources in a more targeted way."). The District Court was correct to enjoin implementation of the Permanent Guidance because DHS does not have the discretion to contravene the clear statutory commands of Congress that established mandatory detention and removal of certain aliens. This Court has recognized the mandatory nature of the detention and removal provisions of the INA, explaining that

> *Jennings* indeed forbade this precise form of interpretation in construing § 1225(b). "Here, by contrast," it reasoned, § 1225(b) "do[es] not use the word 'may.' Instead, [it] unequivocally mandate[s] that aliens falling within [its] scope 'shall' be detained." 138 S. Ct. at 843-44. And it said the same thing about § 1226(c), another mandatory detention statute, for the same reason. *Id.* at 846.

Usama Jamil Hamama v. Adducci, 946 F.3d 875, 879-80 (6th Cir. 2020). In other words, the Permanent Guidance should remain enjoined because DHS has changed the rules made by Congress, determining that what Congress deemed both necessary and sufficient for removal is now necessary, but insufficient, to warrant removal.

With the Permanent Guidance, DHS announced that it will require something more than the law specifies before immigration officials can deem an alien removable. *See* R.44 at PageID# at 1107 ("The Permanent Guidance displaces the custody and removal factors Congress intended DHS officials to consider for its

extra-textual totality-of-the-circumstances analysis."). Because it attempts to change or modify which classes of aliens are removable under the law, the Permanent Guidance has substantive legal consequences, and thus is procedurally invalid. *See Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (1993) (explaining that a rule is substantive where it has "legal effect"); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (explaining that substantive rules "have the force of law") (internal citations omitted); *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1821 (2019) (explaining that "it is the *substantive legal effect* that will matter" when determining if a rule is substantive) (Breyer, J., dissenting) (emphasis original); *Morton v. Ruiz*, 415 U.S. 199, 232 (1974) (explaining that the an agency has "the responsibility . . . to employ procedures that conform to the law") (internal citation omitted). The District Court recognized the legal effect of the Permanent Guidance on states, noting that "[c]hanging the standards by which agency decisions are made constitutes a legal effect." R.44 at PageID# 1115 (citing *Barrios Garcia v. Dep't of Homeland Sec.*, 25 F.4th 430, 445 (6th Cir. 2022)). Accordingly, "[DHS] is not free . . . to adopt new substantive regulations without notice and comment." *St. Francis Health Care Ctr. v. Shalala*, 205 F.3d 937, 950 (6th Cir. 2000). *See also Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015) ("[I]f a rule is 'substantive,' . . . the full panoply of notice-and-comment requirements [under the APA] must be adhered to scrupulously."). Where, as here,

an agency enacts such a rule but fails to follow proper procedures, the agency action is invalid.

The Permanent Guidance is a substantive rule for another reason—it removes immigration officers' discretion to initiate enforcement action against an alien on the "mere" ground that that alien was deemed removable by Congress. A rule "is also likely to be considered binding if it narrowly circumscribes administrative discretion in all future cases, and if it finally and conclusively determines the issues to which it relates." *Dyer v. Sec'y of Health & Human Servs.*, 889 F.2d 682, 685 (6th Cir. 1989). *See also Texas*, 809 F.3d at 172-73 (holding that the Deferred Action for Childhood Arrivals program was a substantive rule because it withheld officers' discretion). This substantive rule—which amounts to a tremendous administrative grant of amnesty—was not issued with the required notice-and-comment procedures and thus is in violation of the APA.

Furthermore, under the Permanent Guidance, DHS now considers statutorily mandated enforcement action discretionary. Congress has mandated enforcement against certain classes of aliens, including certain criminal aliens who attempt to enter the country illegally. *See* 8 U.S.C. § 1226(c) (making detention of certain criminal aliens pending removal mandatory). In fact, Congress made clear that the *only* requirement for such mandatory detention is the alien's conviction of a qualifying crime. *See* 8 U.S.C. § 1226(c)(1)(A), (B) (specifying criminal

convictions that require detention). *See also Zadvydas v. Davis*, 533 U.S. 678, 698 (2001) (explaining that "Congress explicitly expanded the group of aliens subject to mandatory detention."). Accordingly, this Court has repeatedly recognized the mandatory nature of detention under section 1226. *See, e.g., Usama Jamil Hamama*, 946 F.3d at 879 (describing "§ 1226(c) [as] another mandatory detention statute," because it "unequivocally mandate[s] that aliens falling within [its] scope *shall* be detained.") (emphasis added) (internal citation omitted); *Hamama v. Homan*, 912 F.3d 869, 873 (6th Cir. 2018) (describing detention under § 1226(c) as "mandatory"). By restricting enforcement, the Permanent Guidance "subvert[s] the plain meaning of the statute, making its mandatory language merely permissive." *Miller v. French*, 530 U.S. 327, 337 (2000).

Additionally, Congress determined that every alien subject to a final order of removal must be detained pending such removal. *See* 8 U.S.C. § 1231(a)(2) ("During the removal period, the Attorney General shall detain the alien."). *See also 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.' …. During the removal period, *detention is mandatory*.") (emphasis added) (internal citation omitted). The legislative history of the Illegal Immigration Reform and Immigrant Relief Act of 1996, Pub. L. No. 104-208 ("IIRIRA") indicates that Congress mandated detention of criminal aliens due to the

high number of criminal aliens disappearing into American communities. *See* S. Rep. No. 104–48, at 2 (1995) (explaining that detention was necessary because "[u]ndetained criminal aliens with deportation orders often abscond upon receiving a final notification from the INS that requires them to voluntarily report for removal."). With this motivation, Congress made clear in IIRIRA that DHS does not have discretion with respect to certain classes of criminal aliens. 8 U.S.C. § 1231(a)(2) ("*Under no circumstances* during the removal period shall the Attorney General release an alien who has been found inadmissible under section 212(a)(2) or 212(a)(3)(B) . . . or deportable under section 237(a)(2) or 237(a)(4)(B)" of the INA.) (emphasis added). Yet, in the Permanent Guidance, DHS states it will not "rely on the fact of conviction or the result of a database search alone" when making enforcement decisions. R.4-1 at PageID# 101. DHS is thus treating the conditions Congress made the basis of mandatory action as insufficient to trigger any such action. Therefore, this procedurally invalid rule is also contrary to law.

Congress also mandated similar enforcement actions be taken against aliens who illegally enter the United States. The INA provides that "an alien present in the United States who has not been admitted or who arrives in the United States . . . shall be deemed for purposes of this chapter an applicant for admission." 8 U.S.C. § 1225(a)(1). Designation as an applicant for admission triggers section 1225(a)(3), which instructs that all applicants for admission "shall be inspected by immigration

officers." 8 U.S.C. § 1225(a)(3). This inspection of applicants for admission mandates expedited removal of aliens who do not have proper entry documents as well as aliens who attempt to gain admission through fraud or misrepresentation. 8 U.S.C. § 1225(b)(1)(A)(i). Although such aliens may petition for asylum, the INA mandates their detention during the application process. 8 U.S.C. § 1225(b)(1)(B)(ii), (iii)(IV). Furthermore, "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall* be detained for a proceeding under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(A) (emphasis added).

Congress also deemed removal mandatory in certain cases. For example, a Texas district court recently noted the mandatory nature of removal under § 1231(a)(1)(A), stating that use of "shall" compels the government where "the statute's manifest purpose is to protect the public or private interests of innocent third parties." *Texas v. United States*, 524 F. Supp. 3d 598, 646-47 (S.D. Tex. 2021) (citing *Richbourg Motor Co.*, 281 U.S. 528, 533-34 (1930)). The legislative history of IIRIRA indicates that Congress implemented mandatory detention to protect the interests of American communities as it was a solution to the "high percentage of aliens [who] abscond" due to the existing "lax procedures." H.R. Rep. No. 104-469, at 161 (1996).

Congress included one possible alternative to expedited removal or detention—return to contiguous territory—which is available for inadmissible aliens who arrive in the U.S. on land from contiguous foreign territory. 8 U.S.C. § 1225(b)(2)(C). The INA grants immigration officials the discretion to return such aliens to the contiguous foreign territory from which they arrived pending their removal proceedings with a limited ability to parole, on a case-by-case basis, such aliens temporarily. *See* 8 U.S.C. § 1182(d)(5) (granting discretion where such temporary admission would serve "urgent humanitarian reasons or significant public benefit"). The INA does not, however, grant officials the authority to disregard its commands.

Despite the clear mandates of the INA, DHS declared that while aliens who illegally cross the border will be treated as enforcement priorities, "there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement action." R.4-1 at PageID# at 101. The INA does not grant DHS the power to consider such circumstances. Therefore, the Permanent Guidance is contrary to law because it subjects the actions Congress made mandatory to DHS's discretion.

The Permanent Guidance eschews "bright lines or categories" despite the fact that Congress established such "bright lines" and "categories" when it defined the classes of removable aliens and classes of aliens against whom enforcement action

is required. R.4-1 at PageID# 100. This Court must reject DHS's attempt to change these congressionally mandated categories into options.

II. Defendants Violate the Take Care Clause by Actively Opposing the Law.

Affirming the decision of the District Court is necessary to reinforce the rule of law and the constitutional separation of powers. The Take Care Clause instructs that the President "shall take care that the laws be faithfully executed." U.S. Const. art. II, § 3. According to separation of powers principles, Congress makes the laws, the executive faithfully enforces the laws, and the judiciary interprets the laws. This division of authority entails that DHS's active opposition to the enforcement of mandatory detention and removal statutes be rejected:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and the law be made by parliamentary deliberations.
>
> Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson, J., concurring). Justice Jackson explained that *Youngstown* was part of a "judicial tradition" that sovereigns are "under God and the Law." *Id*. at 655 n.27 (internal quotation marks omitted). The Framers squarely rejected the idea that the executive should be vested with the authority to suspend or dispose of congressionally enacted laws by imposing the Take Care Clause as a duty.

Judicial precedent on how to apply the Take Care Clause is scant. Importantly, however, it has been suggested by the Supreme Court that nonenforcement of the law may violate the Take Care Clause "where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).[2] Thus, while single instances of agency nonenforcement are not subject to judicial review, "generalized non-enforcement policies . . . are more likely to be direct interpretations of the commands of the substantive statute," and thus more amenable to review by the courts. *Medinatura, Inc. v. FDA*, 496 F. Supp. 3d 416, 447-48 (D.D.C. 2020) (citing *Crowley Caribbean Transport, Inc. v. Pena,* 37 F.3d 671 (D.C. Cir. 1994)). Further, the D.C. Circuit has held that the Take Care Clause "does not permit the President to refrain from executing the laws duly enacted by the Congress as those laws are construed by the judiciary." *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974). The D.C. Circuit further observed that "the judicial

[2] The Supreme Court indicated a willingness to address the Take Care Clause when it granted *certiorari* in *United States v. Texas*, 577 U.S. 1101 (2016), and ordered the parties to brief "[w]hether the [Deferred Action for Parents of Americans and Lawful Permanent Residents] Guidance violates the Take Care Clause of the constitution, Art. II, § 4." The Fifth Circuit had declined to address the question. *See Texas v. United States*, 809 F.3d 134, 146 n.3 (5th Cir. 2015) (as revised). The Supreme Court affirmed that decision by an equally divided Court. *See United States v. Texas*, 136 S. Ct. 2271 (2016).

branch of the Federal Government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch." *Id*.

Recently, a district court in Texas addressed the Take Care Clause and ruled that the executive branch, including its agencies, "must exercise any discretion accorded to it by statute in the manner which Congress has prescribed" and "may not dispense with a clear congressional mandate under the guise of exercising 'discretion.'" *Texas v. United States*, 2021 U.S. Dist. LEXIS 156642, *138-39 (S.D. Tex. Aug. 19, 2021); *see also Texas v. United States*, 524 F. Supp. 3d 598, 649 (S.D. Tex. 2021) (holding that the executive's inherent authority over immigration "does not include the authority to 'suspend' or 'dispense with' Congress's exercise of legislative Powers in enacting immigration laws") (citing *United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915) (Day, J., dissenting); *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)).

The executive may not rely on political opposition to enforcement of immigration law—much less on political opposition to that law itself—as justification for the cancellation of constitutionally mandated enforcement actions. As Justice Kagan stated, the executive's duty under the Take Care Clause requires "fidelity to the law itself, not to every presidential policy preference." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2228 (2020) (Kagan, J., dissenting). The Supreme Court has rejected the proposition that the Take Care

Clause is consistent with the President's power to dispense with laws, holding that recognizing such a power "would be clothing the President with a power to control the legislation of [C]ongress." *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 613 (1838). *See also FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 547 (2009) (explaining that although an agency has "broad authority to determine relevant policy . . . it does not [have the authority] to make policy choices for purely political reasons") (Breyer, J., dissenting). Political opposition is also not justification for the executive to frustrate Congress's objective of secure borders.

The administration's conscious policy of refusal to enforce the laws as enacted by Congress is extreme, as seen in its effects. Removal statistics from this year show that the Permanent Guidance is having its intended impact. April 2021 represented the lowest monthly total of ICE arrests on record, with fewer than 3,000 arrests. (*Washington Post*, "Biden administration reins in street-level enforcement by ICE as officials try to refocus agency mission," May 25, 2021, available at: https://archive.is/NeSHE#selection-33.0-333.104). Not surprisingly, it was recently reported that immigration arrests in FY 2021 were the lowest they have been in over a decade. (*Washington Post*, "Immigration arrests fell to lowest level in more than a decade during fiscal 2021, ICE data shows," Oct. 26, 2021, available at: https://www.washingtonpost.com/national/ice-arrests-biden-trump/2021/10/25/f33130b8-35b5-11ec-9a5d-93a89c74e76d_story.html). In fact,

"curbing civil immigration arrests within the United States allows the Biden administration to shield millions of longtime undocumented immigrants from deportation[.]" *Id*. Additionally, the number of "illegal crossings skyrocketed in the months after President Biden took office." (*Washington Post*, "Border arrests have soared to an all-time high, new CBP data shows," Oct. 20, 2021, available at: https://www.washingtonpost.com/national/border-arrests-record-levels-2021/2021/10/19/289dce64-3115-11ec-a880-a9d8c009a0b1_story.html).

Since the District Court enjoined the Permanent Guidance, moreover, the number of aliens attempting illegally to cross the border has continued to rise to record levels. *See, e.g., ABC News*, "Migrant arrivals at southern border soared to 22-year high in March," Apr. 16, 2022, available at: https://abcnews.go.com/US/migrant-arrivals-southern-border-soared-22-year-high/story?id=84126036); *NBC News*, "More than 234,000 migrants tried to cross southern U.S. border in April, a new high," May 16, 2022, available at: https://www.nbcnews.com/politics/immigration/us-officials-encountered-234000-migrants-southern-border-april-new-hig-rcna29124. This continued rise in migrant encounters has been fueled by the announcement from the Centers for Disease Control ("CDC") that it intended to lift the policy, known as "Title 42," that allowed immigration officials to turn migrants away at the border due to the COVID-19 pandemic. Public Health Determination and Order Regarding Suspending the Right

To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 87 Fed. Reg. 19, 941 (Apr. 6, 2022). *See also AZ Mirror*, "Border numbers hit highest level in 20 years, as end of Title 42 looms," Apr. 21, 2022, available at: https://www.azmirror.com/2022/04/21/border-numbers-hit-highest-level-in-20-years-as-end-of-title-42-looms/; *National Review*, "Illegal Migrant Encounters Hit Record High in April as Biden Administration Pushes to Rescind Title 42," available at: https://www.nationalreview.com/news/illegal-migrant-encounters-hit-record-high-in-april-as-biden-administration-pushes-to-rescind-title-42/. The impact of Title 42's end is so great, in fact, that a District Court in Louisiana just issued an injunction barring the CDC from terminating policy. *Louisiana, et al. v. Ctrs. for Disease Control & Prevention*, No. 6:22-CV-00885, 2022 U.S. Dist. LEXIS 91296, at *14-15 (W.D. La. May 20, 2022) (finding that "the record supports the Plaintiff States' position that the Termination Order will result in increased border crossings and that, based on the government's estimates, the increase may be as high as three-fold.").

DHS's refusal to enforce detention and removal statutes frustrates congressional objectives regarding border control and the removal of certain criminal aliens. Defendants' actions annul the comprehensive framework of immigration laws enacted by Congress, in particular the Illegal Immigration Reform and Immigrant Relief Act of 1996. With IIRIRA, Congress "made sweeping

revisions of immigration policy[,]" *Bartoszewska-Zajac v. INS*, 237 F.3d 710, 712 (6th Cir. 2001), in order "to improve deterrence of illegal immigration to the United States[.]" 104 H.R. Rep. No. 104-828. These actions reflect Congress's "legitimate governmental objective of lessening the incentive for illegal entry and residence in the United States." *Boe v. Wright*, 648 F.2d 432, 438 (5th Cir. 1981) (Reavley, C.J., concurring). Defendants cannot dispense with IIRIRA and its objective of restricting agency discretion in the fields of admission and removal.

The executive must defer to the supremacy of Congress's legislative enactments; it does not have the authority to override Congress. *See Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004) ("There is a basic difference between filling a gap left by Congress'[s] silence and rewriting rules that Congress has affirmatively and specifically enacted."). *See also Medellin v. Texas*, 552 U.S. 491, 523 (2008) (explaining that executive authority "must stem either from an act of Congress or from the Constitution itself."). IIRIRA commands enforcement—reflecting Congress's objective that certain classes of removable aliens are detained and removed—and the executive must obey.

Despite the clear commands of Congress, the Permanent Guidance states that an alien's removability status "should not alone be the basis of an enforcement action against them." R.4-1 at PageID# 99. Additionally, the Permanent Guidance gives immigration officials discretion with respect to the very enforcement actions

Congress deemed mandatory for certain classes of aliens. Should this Court overturn the District Court's injunction, there will be no immigration enforcement or removal proceedings for a vast number of removable aliens, and a likelihood of increased nonenforcement toward other aliens in the future.[3]

This severe reduction in enforcement suspends the law and incentivizes more illegal border crossings. As Justice Scalia expressed: "What I do fear—and what Arizona and the States that support it fear—is that 'federal policies' of nonenforcement will leave the States helpless before those evil effects of illegal immigration." *Arizona*, 567 U.S. at 431 (Scalia, J., concurring and dissenting). The Permanent Guidance is an effort calculated to frustrate congressional objectives in immigration law—including a secure border—and to create a situation diametrically opposed to those purposes: a porous, chaotic, unsecure border. *See, e.g., Texas v. Biden*, 10 F.4th 538, 553 (5th Cir. 2021) (explaining that the termination of an immigration enforcement program "has and will continue to increase the number of aliens being released into the United States."). This drastic reduction in enforcement constitutes not only a failure, or even refusal, to fulfill the constitutional duty to "take

[3] In fact, a subsequent memo emphasizes prosecutorial discretion based on the Permanent Guidance and requires "[d]eterminations that a noncitizen" falls within a priority category "warranting enforcement action must also be approved by the Chief Counsel." U.S. Immigration and Customs Enforcement, Office of the Principal Legal Advisor, "Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion," Apr. 3, 2022, available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf.

Care that the Laws be faithfully executed," but active opposition to those laws. When executive policies of non-enforcement go to the "extreme" of drastically frustrating and thwarting the very purposes of the law the executive is charged with administering, those policies, *a fortiori*, amount to the "abdication" of the administration's statutory responsibilities, and thus a violation of the Take Care Clause, under *Heckler*, 470 U.S. 821.

III. The Take Care Clause Supplies a Cause of Action.

Unconstitutional agency action or inaction violates the APA and can be enjoined on such basis. *See* 5 U.S.C. § 706. Take Care Clause violations, moreover, are actionable independently of the APA. Thus, courts can enjoin the Defendants' violations of their Take Care obligations under their inherent equitable powers. *See Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327–28 (2015) (discussing "a long history of judicial review of illegal executive action, tracing back to England"); *Davis v. Passman*, 442 U.S. 228, 241-44 (1979) (holding that the Constitution itself, coupled with 28 U.S.C. § 1331, provides a cause of action to challenge federal officials who violate the Constitution). Furthermore, the Constitution provides anyone with standing to raise equitable claims (and injunctive relief) against federal officers who act unconstitutionally. *Larson v. Domestic & Foreign Comm. Crop.*, 337 U.S. 682, 698-99 (1949); *cf. Ex parte Young*, 209 U.S. 123 (1908). Thus, even if the States' claims fail under the APA, the Take Care

Clause provides a cause of action to challenge DHS's actions blocking enforcement of detention and removal statutes.

CONCLUSION

For the foregoing reasons, this Court should affirm the injunction issued by the District Court.

Dated: May 25, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2022, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Gina M. D'Andrea

CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this brief complies with the type-volume requirements and contains 5,403 words. *See* Fed. R. App. P. 29(a)(5)m, 32(a)(7).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32 (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Gina M. D'Andrea