IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

SHERIFF BRAD COE in his official capacity and KINNEY COUNTY, TEXAS; SHERIFF J.W. GUTHRIE in official capacity and EDWARDS COUNTY, TEXAS; SHERIFF EMMETT SHELTON in his official capacity and MCMULLEN COUNTY, TEXAS; SHERIFF ARVIN WEST in his official capacity and HUDSPETH COUNTY, TEXAS; SHERIFF LARRY BUSBY in his official capacity and LIVE OAK COUNTY, TEXAS; THE FEDERAL POLICE FOUNDATION, ICE OFFICERS DIVISION, *Plaintiffs*, v. JOSEPH R. BIDEN, JR., President, in his official capacity; THE UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary of Homeland Security, in his official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; TAE JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement, in his official Capacity; IMMIGRATION AND CUSTOMS ENFORCEMENT; TROY MILLER, Senior Official Performing the Duties of Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION, *Defendants*.	)	Civil Action No. 3:21-CV-00168

PLAINTIFFS' REPLY BRIEF

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INTRODUCTION

On August 19, 2021, Judge Drew B. Tipton in the Victoria Division of this Court issued a preliminary injunction in the case of *Texas and Louisiana v. United States, et al*., No. 6:21-cv-00016, 2021 U.S. Dist. LEXIS 156642 (S.D. Tex. 2021) ("*Texas and Louisiana*"), a case involving several claims that are identical to claims in the instant matter and which Defendants previously sought to consolidate with this case. There, the Plaintiff States sought a preliminary injunction stopping implementation of the same sections of the January 20 and February 18 Memoranda at issue in this case. In a thorough 160-page opinion, Judge Tipton addressed those overlapping claims, ruled in favor of the States, and enjoined Defendants from further implementation of the Memoranda. The overlapping claims were: (1) that the Memoranda violated the procedural requirements of the Administrative Procedure Act (APA), and (2) that the Memoranda violated the mandatory detention requirement of 8 U.S.C. § 1226(c). Two statutory claims in this case, however, were not involved in the *Texas and Louisiana* case: (1) that the Memoranda violated the mandatory detention and removal requirements of 8 U.S.C. § 1225(b), and (2) that the Memoranda violated the mandatory removal requirement of 8 U.S.C. § 1231(a)(5).[1]

Rather than burdening this Court with redundant briefing that cannot improve upon Judge Tipton's analysis, with respect to those overlapping claims, Plaintiffs will simply direct this Court to the relevant sections of the *Texas and Louisiana* case. Plaintiffs will devote the bulk of this brief to responding to the jurisdictional challenges raised for the

[1] The *Texas and Louisiana* plaintiffs did raise the detention requirement of 8 U.S.C. § 1231(a)(2), which is closely related to the removal requirement of 8 U.S.C. § 1231(a)(5), but not identical.

first time in Defendants' Response, addressing the Defendants' arguments regarding the two statutory claims that are unique to this case, and addressing the additional injunctive relief (beyond enjoining the implementation of the Memoranda) that Plaintiffs are seeking.

ARGUMENT AND AUTHORITIES

I. The Sheriff and County Plaintiffs Possess Standing

A. Injury-in-Fact

Defendants challenge the constitutional standing of Plaintiff Texas sheriffs and counties. Defendants appear to concede, however, that Plaintiffs' increased detention costs and related criminal enforcement costs satisfy the injury-in-fact requirement of standing. *See* Resp. 12-15. Defendants would have difficulty disputing this point. As the Court in *Texas and Louisiana* observed, an "injury to state or local financial interests predicated on the actions of the federal government" may be sufficient to establish standing. 2021 U.S. Dist. LEXIS 156642, *35 (*citing Clinton v. City of N.Y.*, 524 U.S. 417, 430-32 (1998) and *Texas v. United States*, 809 F.3d 134, 152-53 (5th Cir. 2015)). In that case, Texas—like Plaintiffs here—alleged that "the Memoranda will lead to an unanticipated rise in criminal activity from aliens the federal government would otherwise detain." *Id.* at *37. The Court found Texas's claimed injury from unanticipated detention costs to be "sufficiently concrete and imminent," noting that "[i]f even one alien not detained due to the Memoranda recidivates, Texas's costs 'will increase' in accordance with its current cost per inmate." *Id.* at *38.

Similarly, in *Texas v. United States*, where Texas challenged the Biden Administration's attempted 100-day pause in removals, the Court held that "unanticipated

detention costs" constitute an injury-in-fact that is "sufficiently concrete and imminent" to establish standing. 2021 U.S. Dist. LEXIS 33890, *32 (S.D. Tex. Feb. 23, 2021).

The same analysis applies in the instant case. Plaintiff Texas sheriffs and counties suffer the same injury-in-fact due to the dramatically increased detention costs caused by Defendants' actions. These costs are significant and have been documented; in Kinney County alone, the amount of money spent on detention of inmates since February of 2021, as of July 1, 2021, was already $75,000 greater than it was in all of 2020. Coe Affidavit, ¶ 11. The cost to Kinney County to detain illegal alien criminals is $70.00 per person, per day. *Id*. at ¶ 4. In Edwards County, the daily number of inmates in the county jail since February 2018 has doubled and has cost the county an additional $90,000. Guthrie Affidavit, ¶¶ 7, 10. There, the detention costs are $50.80 per person, per day. *Id*. at ¶ 3. Plaintiffs have been harmed not only through the mounting detention costs imposed upon them, but also through crime response costs, criminal investigation costs, and the diversion of scarce law enforcement resources. There has been a dramatic increase in the number of illegal aliens and in criminal activity by illegal aliens—both stemming from the implementation of the February 18 Memorandum. In Kinney County, the number of crimes committed by illegal aliens rose from 180 in 2020 to 420 in the first six months of 2021. *Id*. at ¶ 7. That is a nearly five-fold increase. Plaintiff Federal Police Foundation has attested to the fact that the February 18 Memorandum (and its predecessor, the January 20 Memorandum) (1) caused ICE to release a massive number of illegal alien criminals onto the streets, (2) caused ICE to decline to take custody of illegal aliens who were arrested for state crimes, and (3) caused ICE to decline to take custody of and remove

criminal illegal aliens who completed their prison sentences. Federal Police Foundation Affidavit at ¶¶ 8, 13, 16, 18-20. The fiscal injuries to Plaintiff sheriffs and counties are consequently concrete, significant, and increasing. It should also be noted that, although Plaintiffs' injuries are substantial, they need not be so in order to establish standing. "[P]laintiffs must only show *some* injury, not substantial injury, to establish standing." *Texas v. United States*, 328 F. Supp. 3d 662, 701 (S.D. Tex 2018) (citing *OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (emphasis in original).

B. Traceability

Unable to deny that the fiscal costs imposed upon Plaintiff sheriffs and counties constitute sufficient injury-in-fact, Defendants instead argue that it is "speculation" that these costs are traceable to the standdown in enforcement stemming from the January 20 and February 18 Memoranda. Resp. 12. Defendants do not deny that there has been an increase in the number of illegal alien criminals arrested by Plaintiff sheriffs since the change in ICE policy, but they feebly suggest that perhaps something else is causing it: "[P]erhaps a recent change in criminal behavior is because of the ebbs and flows of crime rates completely unrelated to the priorities, including a possible impact from the pandemic." *Id*. at 14. How the pandemic might be causing an increase in the number of crimes committed by illegal aliens in Plaintiff counties, Defendant do not explain.

The traceability of the standdown in ICE removals to Plaintiffs' increased detention costs is direct, obvious, and confirmed by recent precedent in this Court. It happens in three ways. First, Defendants' release of criminal illegal aliens into Plaintiff counties and neighboring counties predictably results in the commission of additional crimes. Second,

Defendants' post-February 18 refusal to take custody of and remove criminal illegal aliens when Plaintiff sheriffs present them to ICE predictably results in the commission of additional crimes. Third, confronted by ICE's unwillingness to remove dangerous criminal aliens who have committed lower-level state crimes, Plaintiff counties must charge on the state crime, convict, and detain those criminal aliens as long as possible in order to protect the public. Prior to the February 18 Memorandum, ICE routinely removed such aliens. Coe Aff. ¶¶ 13-15; Fed. Police Found. Aff. ¶ 21.

Defendants do not deny that there has been a pronounced surge in the number of crimes committed by illegal aliens in Plaintiff counties, beginning in February 2021. Each crime consumes scarce county resources as law enforcement officers must respond to the crime, investigate the crime, and potentially detain the criminal. These costs are traceable to Defendants' actions. Had the February 18 Memorandum (or its predecessor January 20 Memorandum) not been implemented, many of the relevant aliens would have been detained and/or removed by ICE. In *Texas*, this Court found that the anticipated increase in detention costs was traceable to the defendants' conduct, *even though those detentions had not yet occurred*. This Court held that it was foreseeable that a reduction in removals would result in a larger number of criminal illegal aliens being present in the State. "[T]he Court finds that Texas has established by a preponderance of evidence that it could reasonably expect a 100-day pause to lead to a significant number of criminal aliens and unaccompanied children moving freely within and into Texas who would otherwise be removable." *Texas*, 2021 U.S. Dist. LEXIS 33890 at *43. The Northern District of Texas similarly held in a very recent decision that another DHS policy shift—the end of the

Migrant Protection Protocols ("MPP") on June 1, 2021—"necessarily increases the number of aliens released and paroled into the United States…." *Texas v. Biden*, No. 2:21-CV-00067-Z, 2021 U.S. Dist. LEXIS 152438, at *34 (N.D. Tex. Aug. 13, 2021) ("*Texas MPP*"). Therefore, that government action was fairly traceable to future "enforcement and correctional costs that [State] plaintiffs will suffer." *Id*. at *35.

The traceability of Plaintiff sheriffs' and counties' injuries is further supported by the fact that illegal alien criminals are likely to recidivate. Therefore, refusing to remove such criminal aliens will necessarily increase state and local detention costs. In *Texas v. United States*, this Court recently addressed this very question, holding that "[n]o matter how one looks at it, a significant portion of criminal aliens and state offenders 'historically' recidivate." *Texas*, 2021 U.S. Dist. LEXIS 33890, *45 (citing *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019)). As the Supreme Court held, there is a traceable link between government actions and aliens' future unlawful behavior when the evidence establishes that aliens have "historically" behaved in a particular manner. *Dep't of Commerce v. New York*, 139 S. Ct. at 2566. Traceability in such cases is not "mere speculation;" instead it stems from a "predictable effect of the Government action on the decisions of third parties." *Id*. This Court therefore summarized its holding with respect to the traceability of the criminal alien detention costs as follows:

> The Court therefore finds that Texas has established a traceable link between its detention costs and the 100-day pause. The 100-day pause will lead to a significant number of criminal aliens moving freely within and into Texas who otherwise would have been removed. *Criminal aliens and state offenders have a demonstrable propensity to recidivate*. Therefore, the 100-day pause will cause Texas unanticipated detention facility costs.

Texas, 2021 U.S. Dist. LEXIS 33890, *46 (emphasis added). Not surprisingly, Defendants fail to even mention, much less distinguish, this holding when challenging Plaintiffs' standing.

The same holding applies with even more force in the instant case. A dramatic reduction in the removal of illegal aliens by ICE brought about by the January 20 and February 18 Memoranda is not merely expected; it has already occurred. Am. Complt. ¶ 6, Fed. Police Found. Aff. ¶¶ 8, 13, 16-19. An increase in the number of criminal aliens moving freely within and into the Texas resulted. The surge in crime in Plaintiff counties followed immediately thereafter. Coe Affidavit ¶ 7. Defendants strangely suggest that perhaps this crime wave has been limited to only Kinney County, since Plaintiffs offered an affidavit from the Kinney County Sheriff. *See* Resp. 13. To further support the (obvious) fact that the increase in crimes committed by illegal aliens after the February 18 Memorandum extends throughout the southern part of Texas, Plaintiffs also offer the affidavits of Sheriff J.W. Guthrie of Edwards County and Sheriff Emmett Shelton of McMullen County, attached.[2] Edwards County has seen a 62 percent increase in criminal

[2] Plaintiffs preemptively rebut the anticipated objection that one cannot submit evidence in a reply. That general rule is, however, subject to two strands of authority that allow reply evidence here. First, Local Rule 7.8 allows the Court to consider reply evidence generally. S.D. Tex. R. 7.8 (Court has discretion "on its own motion or upon application" to "request or permit additional authority or supporting material"). Where a party submits rebuttal evidence, the Court should—and certainly *may*—consider it. *Tex. All. for Retired Ams. v. Hughes*, 489 F.Supp.3d 667, 694-95 (S.D. Tex. 2020). Second, because the evidence here concerns the Court's Article III jurisdiction, Congress has addressed the issue specifically: "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. §1653. Because Plaintiffs' standing existed when Plaintiffs filed their complaint, 28 U.S.C. §1653 authorizes curing any defect in the allegation of that existing jurisdiction, even on appeal. A third factor,

(footnote continued on next page …)

arrests and doubling of its inmate population. Guthrie Aff. ¶¶ 5, 7. McMullen County has seen an eightfold increase in the number of criminal arrests. Shelton Aff. ¶ 6.

As explained above, this Court already held a few months ago that "[c]riminal aliens and state offenders have a demonstrable propensity to recidivate." *Texas*, 2021 U.S. Dist. LEXIS 33890, *46. This Court reiterated that conclusion once again on August 19, 2021, with respect to the same Memoranda at issue in this case: "If even one alien not detained due to the Memoranda recidivates, Texas's costs 'will increase' in accordance with its current costs per inmate." *Texas and Louisiana*, 2021 U.S. Dist. LEXIS 156642, *38. That holding is applicable to the instant case as well. It is also supported by factual evidence presented to this court. Of the eight cases of illegal alien criminals described in the Federal Police Foundation Affidavit, seven were cases of recidivism following prior violations of state criminal laws or federal immigration laws. Fed. Police Found. Aff. ¶ 18.

In addition to the thousands of illegal criminal aliens who have been released (or whose detention was denied) pursuant to the February 18 Memorandum, this standdown in enforcement by ICE has contributed to the massive surge in new illegal alien arrivals at the border. At the time this litigation commenced, Plaintiffs pointed to the 21-year high of 180,034 illegal alien apprehensions by CBP in May 2021. That staggering number now pales in comparison to the July 2021 total of 212,672 apprehensions. (Official statistics available at https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters.) As

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which is particularly relevant here, is that Defendants raised these jurisdictional challenges in their Response Brief rather than in an independent motion challenging Plaintiffs' standing. Therefore, this Reply Brief *is functionally a response brief* with respect to the jurisdictional challenges presented.

long as ICE and CBP officers are not permitted to remove the vast majority of illegal aliens they encounter, that fact will be communicated to migrants in other countries, and the border surge will continue. Mixed in with the hundreds of thousands of arriving illegal aliens each month are a large number of criminals. Those criminals will predictably commit crimes in Plaintiff counties and elsewhere in the United States. As this Court held previously, the resulting detention costs are also traceable to illegal aliens "moving … *into* Texas." *Texas*, 2021 U.S. Dist. LEXIS 33890, *46 (emphasis added).

Finally, Defendants suggest implausibly that perhaps the Memoranda are actually saving Plaintiff counties money because ICE has merely substituted the arrest and removal of some aliens for the arrest and removal of other aliens. Resp. 13. Defendants provide no support whatsoever for their implicit assertion that ICE arrest numbers have therefore remained constant or increased. That is because it is false.[3] There has been a steep decline in ICE arrests. As was pointed out at the beginning this litigation, the number of ICE arrests per month dropped precipitously following the February 18 Memorandum to fewer than 3,000 in April 2021, the lowest level on record. Am. Compl. ¶ 6. The monthly arrest number continues to hover at approximately the 3,000 level, with only 3,308 ICE arrests in July 2021. *Immigration Detention Quick Facts*, TRACImmigration, available at https://trac.syr.edu/immigration/quickfacts/ (last visited Aug. 13, 2021). That compares to an average of 8,634 arrests per month by ICE in FY 2020. *ICE Annual Report, FY 2020*

[3] Defendants' own declarant from ICE, Peter Berg, contradicts Defendants on this point. Berg acknowledges that there were 13,191 fewer ICE arrests from February 18, 2021, to July 31, 2021, than during the same period in 2020. *See* Berg Decl. ¶ 14.

at 4 (showing 103,603 administrative arrests for the year) (available at: https://www.ice.gov/doclib/news/library/reports/annual-report/iceReportFY2020.pdf). And FY 2020 was an unusually low year in ICE activity due to the arrival of the COVID pandemic and the initial lockdowns across the country. In FY 2019, ICE was arresting an average of 11,424 aliens per month (137,084 arrests for the year). *Id*. at 7. So, depending on which year the current rates are compared to, ICE arrest numbers are either at 29% of their normal rate or 38% of their normal rate. The implementation of Defendants' Memoranda has consequently resulted in a larger number of criminal illegal aliens on the streets not just in Plaintiff counties, but throughout the country.

Moreover, on August 19, 2021, this Court rejected the identical argument, holding that Defendants' "offset" argument is of no moment even if it could be proven to be factually true. "[E]ven if the Government could demonstrate that increased enforcement in the prioritized categories might displace a drop in the total number of detained aliens resulting from the deprioritized categories, this 'offset' would be irrelevant as a matter of law." *Texas and Louisiana*, 2021 U.S. Dist. LEXIS 156642, *57-*58.

C. Redressability

Defendants finally argue that Plaintiffs' injury-in-fact cannot be redressed because an injunction against the January 20 and February 18 Memoranda would leave ICE with only "very general guidance" on whom to detain and remove. Defendants' argument ignores the fact that the federal statutes Defendants have been violating provide ample guidance. Indeed, those federal statutes mandate very specifically which illegal aliens *must* be detained and removed. 8 U.S.C. § 1225(b); 8 U.S.C. § 1226(c); 8 U.S.C. § 1231(a).

"When considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim." *N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, 781 F.3d 182, 191 (5th Cir. 2015) (quoting *Cole v. General Motors Corp*., 484 F.3d 717, 723 (5th Cir. 2007)). If Defendants are enjoined to comply with those federal statutes, that will ensure that additional criminal aliens are detained and removed in Plaintiff counties. This Court agreed on August 19, 2021, when it rejected the same argument raised by the same Defendants: "[C]onformance with the strictures set by Congress in Sections 1226(c) or 1231(a)(2) as practiced prior to the issuance of the Memoranda would result in a reduction of the volume of criminal aliens moving freely within the interior of the States." *Texas and Louisiana*, 2021 U.S. Dist. LEXIS 156642, *63. Moreover, if this Court determines that it possesses the authority to enjoin Defendants to restore the detainers that were lifted pursuant to the Memoranda, that would give *additional* specific guidance to ICE, ensuring redressability. *See id*. at *61.

Finally, if Defendants simply resumed pre-Memoranda removal policies and practices, thereby increasing removal numbers to pre-Memoranda levels, that too would redress Plaintiffs' injury-in-fact. In FY 2018, ICE removed 256,085 aliens; in FY 2019, ICE removed 267,258 aliens; and in FY 2020, ICE removed 185,884 aliens. *ICE Annual Report, FY 2020* at 20. Because of the Memoranda, ICE is now removing aliens at a pace that is far below what it was prior to January 20, 2021, with the *majority* of removals that would previously have occurred being prevented. Fed. Police Found. Aff., ¶ 8. This Court has already held that redressability may be deduced by looking at the publicly-available removal numbers prior to the challenged ICE policy. If removal levels return to the normal,

pre-January 20, 2021, levels, then Plaintiffs' detention-cost injuries would be redressed. *Texas v. United States*, 2021 U.S. Dist. LEXIS 33890, *46. Once again, Defendants fail to mention this precedent. For all of these reasons, Plaintiffs' injuries would be redressed.

II. The Federal Police Foundation Possesses Standing

The injury-in-fact suffered by Plaintiff Federal Police Foundation is principally the diversion of resources caused by Defendants' actions. Defendants challenge the Federal Police Foundation's standing in this regard. Resp. 10-12. While Plaintiffs do not dispute the rough contours of Defendants' summary of Fifth Circuit precedents on diverted-resource standing, Plaintiffs do dispute Defendants' application of those precedents *to the Foundation in this case*. Specifically, as is made clear in the Supplemental Federal Police Foundation Affidavit, the Foundation has expended significant resources in addressing the February 18 Memorandum and its consequences for its ICE officer members. *See* Fed. Police Found. Supp. Aff. at ¶¶ 9, 11 (Foundation devoted more than 50 percent of its time in the wake of the February 18 Memorandum to the Memorandum and its impact on members' ability to comply with the requirements of federal law, and is spending $1,017.48 per year in communications with members regarding the Memorandum.

In addition, because of this diversion of resources for non-routine actions, the Foundation had to forgo planned efforts in public education campaigns to educate the public on issues faced by federal law enforcement officers, in negotiating with third-party venders to obtain product discounts and insurance discounts for members, and in taking other actions related to the operation of the organization, and. *Id.* at ¶ 10. These facts easily satisfy Fifth Circuit precedent on diverted-resource standing.

Ample Fifth Circuit precedent recognizes that the diversion of resource constitutes injury-in-fact where the diverting of "significant resources" has "perceptibly impaired" an association's mission. *Tenth St. Residential Ass'n v. City of Dallas*, 968 F.3d 492, 500 (5th Cir. 2020); *El Paso Cty. v. Trump*, 982 F.3d 332, 343-45 (5th Cir. 2020); *NAACP v. City of Kyle*, 626 F.3d 233, 238-39 (5th Cir. 2010); *Louisiana ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 304-06 (5th Cir. 2000). Here, the Foundation's non-routine actions taken in order to respond to Defendants' unlawful actions that affected the Foundation's members compelled it to forgo planned activities.

III. The Federal Police Foundation Claims Are Not Precluded by the CSRA

Defendants next argue that the Foundation's claims are precluded from judicial review by the Civil Service Reform Act ("CSRA"). Resp. 15-18. Here too, their argument falls short. Defendants are trying to fit a square peg into a round hole. The CSRA has nothing to do with this court's jurisdiction over a claim brought by a non-profit association. Rather, the CSRA governs employer-employee workplace claims, and, as the Supreme Court has described it, establishes a "system for reviewing personnel action taken against federal employees." *United States v. Fausto*, 484 U.S. 439, 455 (1988). That system is completely inapposite to the instant case. The Foundation *is not an employee*; as such, it could not possibly bring any claim before the Merit Systems Protection Board created by the CSRA. *Nor has there been any personnel action* that could be reviewed under the CSRA. Defendants' effort to draw support from the preclusion holding of *Crane v. Napolitano*, 2013 U.S. Dist. LEXIS 187005 (N.D. Tex. July 31, 2013), is unavailing for the same reason. That case involved a claim brought by individual ICE officers who feared

termination or other adverse employment action. One of the individual officers had already suffered disciplinary action, and the others faced the threat of disciplinary action. *Id*. at *7-*8. In contrast, the Foundation cannot possibly face adverse employment action, because it is not an employee.

Realizing that their CSRA preclusion argument is a weak one, Defendants resort to mischaracterizing what the Foundation is. They declare that "the Foundation is serving a function of a union by advising its members concerning the terms of their federal employment." Resp. 17. Defendants even suggest that the Foundation might be involved in collective bargaining, noting that "collective bargaining procedures are part of the CSRA's comprehensive scheme." *Id*. Once again, Defendants are well off the mark. *The Foundation is not a union, it does not represent employs in workplace disputes or grievances, and it engages in no collective bargaining whatsoever*. Fed. Police Found. Supp. Aff. ¶ 12. Moreover, the ICE officers who are in the Foundation are already represented by a union—the National ICE Council 118. To liken the Foundation to a union is absurd. Under 5 U.S.C. § 7103(a)(4), a "labor organization" is "an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment." Because the Foundation does not collect dues from employees and does not deal with any agency concerning grievances and conditions of employment, it is not a "labor organization." For these reasons, Defendants' CSRA preclusion claim must fail.

IV. Venue is Proper in this Court

Defendants briefly raise their venue challenge, which is the subject of a different motion, in their Response Brief. Resp. 18-19. Although Plaintiffs will respond in full to Defendants' motion in a separate filing, it is worth pointing out the central flaw in Defendants' position as it relates to the pending Motion for Preliminary Injunction. Defendants theorize that the only Plaintiffs who could possibly possess standing are Kinney County and its sheriff, since statistics from that county were presented by Plaintiffs via the Coe Affidavit. Kinney County is not in the Southern District. Defendants then imagine that none of the injuries-in-fact occurring in Kinney County are also occurring in those counties that *are* part of the Southern District. *Id*. The problem with Defendants fanciful theory is that *all* of the Texas counties and sheriffs in this litigation face similar detention costs and related injuries-in-fact. Nor should this be surprising to anyone familiar with the crisis that is unfolding in the State of Texas as a result of the Memoranda. The Coe Affidavit was merely offered as one illustrative example. In response to Defendants' theory, Plaintiffs offer affidavits from other sheriffs, including the sheriff of McMullen County, which is in the Southern District. McMullen County has seen a more-than-eightfold increase in criminal arrests during February-July 2021, as compared to the same period in 2020. *See* Shelton Aff. ¶ 6. Plaintiffs will present additional arguments regarding venue in Plaintiffs' forthcoming response to that motion.

V. The Plaintiffs Are Likely to Succeed on the Merits

A. The February 18 Memorandum Violates 8 U.S.C. § 1225(b)

The mandatory nature of 8 U.S.C. § 1225(b) is plain on the face of the statute: "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). The proceedings under 8 U.S.C. § 1229a are removal proceedings in United States Immigration Courts. By enacting this statute, Congress removed any executive discretion that existed beforehand. At the core of Plaintiffs' claim is the fact that Congress knows what the word "shall" means, and Congress intended to create a mandatory requirement. Defendants offer various responses to this plain statutory command, addressed below. It is important to note at the outset, however, that *Defendants have not identified a single decision of an Article III court interpreting 8 U.S.C. § 1225(b) that supports their strained reading* of the statute. That stands in stark contrast to the multiple decisions specifically interpreting 8 U.S.C. § 1225(b) that Plaintiffs rely upon.

1. Congress Intentionally Circumscribed Defendants' Discretion

Defendants begin by mischaracterizing Plaintiffs' position. Defendants state that "Plaintiffs contend that Congress has imposed an unconditional, judicially enforceable mandate on DHS to remove *all* noncitizens unlawfully in the country…." Resp. 34 (emphasis added). That is incorrect. It would be impossible to remove all noncitizens unlawfully in the country, because it would be impossible to locate them all and because more would continue to come through the porous border undetected. Rather, Plaintiffs' position is the same as the position taken by the Northern District of Texas when it interpreted this statutory language. "The Court finds that Congress's use of the word 'shall' in Section 1225(b)(2)(A) imposes a mandatory obligation on immigration officers to

initiate removal proceedings against *aliens they encounter* who are not 'clearly and beyond a doubt entitled to be admitted.'" *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 U.S. Dist. LEXIS 57788, at *28 (N.D. Tex. Apr. 23, 2013), *aff'd sub nom. Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015) (emphasis added). This statutory requirement only comes into play when an immigration officer "encounters" an illegal alien.

That encounter may occur at the border when aliens are apprehended attempting to enter illegally; it may occur when ICE officers review the roster of a jail's inmates and discover illegal aliens (a procedure that happened regularly prior to the February 18 Memorandum but has all but ceased since); or it may occur when local police make an arrest on a state crime and notify ICE that the arrestee appears to be an alien unlawfully present in the country. Indeed, in 1994, Congress created and began appropriating funds for the Law Enforcement Support Center (LESC) so that state and local officers could verify the immigration status of particular aliens and deliver or report those aliens who are unlawfully in the country to federal immigration officers.[4]

Defendants next claim with respect to the statutory mandates at issue in this case, that "none of these sections displaces DHS's traditional prosecutorial discretion." Resp. 34. Defendants offer no case support whatsoever for their novel theory that supposed DHS "traditions" cannot be overruled by federal statutory commands. It is beyond cavil that

[4] "The primary mission of the LESC is to support other law enforcement agencies by helping them determine if a person they have contact with, or have in custody, is an illegal, criminal, or fugitive alien. The LESC provides a 24/7 link between federal, state, and local officers and the databases maintained by the INS." Testimony of Joseph R. Green, Acting Dep. Exec. Assoc. Comm'r for Field Operations, INS, before Subcommittees of the House Comm. on Gov. Reform, 107th Cong., 1st Sess. 97 (2001).

Congress can statutorily eliminate discretion: "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985).

By enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-546 (IIRIRA), Congress circumscribed the executive branch's discretion *not* to detain and remove illegal aliens who are encountered by immigration officers. The interlocking provisions of 8 U.S.C. § 1225(a)(1), (a)(3), (b)(1), and (b)(2)(A) provide clear statutory direction to DHS. If an alien is encountered by an ICE or CBP officer, an inspection *must* occur, and if that alien is not entitled to be admitted to the United States, he or she *must* be either removed expeditiously, detained and placed in removal proceedings, or detained pending consideration of an asylum application in a removal proceeding. A fourth option, which the Trump Administration utilized in 2018 with the MPP, is that when an alien arrives on land "from a foreign territory contiguous to the United States," DHS "may return the alien to that territory pending a proceeding under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(C). This option illustrates how Congress specifically removed most executive discretion, but allowed DHS to retain the discretion to return an alien to a neighboring country to await a removal proceeding if DHS preferred that option to the mandatory detention described in 8 U.S.C. § 1225(b)(2)(A).

On August 13, 2021, the Northern District of Texas reaffirmed that 8 U.S.C. § 1225(b) makes detention or return of inadmissible arriving aliens mandatory:

101. Section 1225 provides that if an immigration officer determines that an

> alien subject to expedited removal does not have a credible fear of persecution, the alien "*shall be detained* pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (emphasis added).
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> 102. An alien subject to expedited removal and determined by an immigration officer to have a credible fear of persecution "*shall be detained* for further consideration of the application for asylum." § 1225(b)(1)(B)(ii) (emphasis added).
>
> 103. An alien seeking admission and not subject to expedited removal, whom an examining immigration officer determines is not clearly and beyond a doubt entitled to be admitted, "*shall be detained*" for removal proceedings. § 1225(b)(2)(A) (emphasis added).
>
> 104. Aliens who are not subject to expedited removal and arrive on land from a foreign territory contiguous to the United States may be returned by the government to that territory pending asylum proceedings as an alternative to detention. § 1225(b)(2)(C).
>
> 105. MPP used this statutory authority to return aliens to Mexico pending their removal proceedings.
>
> 106. Accordingly, Section 1225 provides the government two options vis-à-vis aliens seeking asylum: (1) mandatory detention; or (2) return to a contiguous territory. Failing to detain or return aliens pending their immigration proceedings violates Section 1225.

Texas MPP, 2021 U.S. Dist. LEXIS 152438, *62-63 (internal record citations omitted).

Defendants next offer passing references to "discretion" in immigration enforcement in a small number of cases. Resp. 35, 39. Based on these irrelevant references, Defendants claim that since some discretion remains in various aspects of immigration enforcement, Plaintiffs cannot argue that other discretion has been taken away. But the statutes at issue do precisely that: eliminating some discretion, while allowing discretion to exist elsewhere. "Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction." Ronald Dworkin,

The Model of Rules, 35 U. Chi. L. Rev 14, 32 (1967). Unfettered discretion ceases to exist where federal law "not only requires the agency to enforce the Act, but also sets forth specific enforcement procedures." *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (*en banc*).

A few examples of retained discretion illustrate the point. As explained above, Congress permits DHS to decide whether to return an illegal alien to a neighboring country to await removal proceedings instead of detaining the alien in the United States. 8 U.S.C. § 1225(b)(2)(C). Congress also provided discretionary off-ramps if DHS does not want to pursue a removal proceeding to the end, through the cancellation of removal or the withholding of removal. 8 U.S.C. §§ 1229b, 1231(b)(3). This discretion can only be exercised *after* removal proceedings have been initiated, and only in the manner authorized by law. DHS also retains the discretion to parole certain aliens "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A).

Indeed, Defendants' own examples illustrate the point that Congress has removed discretion regarding some aspects of immigration enforcement, while allowing discretion to remain in place regarding others. Defendants offer a brief mention of discretion in the immigration context in a "see" citation to *Crane v. Johnson*, which quotes in passing *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490 (1999) ("*AADC*") ("These concerns are greatly magnified in the deportation context."). Resp. 35. But Defendants fail to point out what sort of "concerns" were being discussed in *AADC*. The very next sentence explains it: "Regarding, for example, the potential for delay: Whereas in criminal proceedings the consequence of delay is merely to postpone the criminal's

receipt of his just deserts, in deportation proceedings the consequence is to permit and prolong a continuing violation of United States law." *Id*. Here too, Plaintiffs agree that this is an area where DHS retains discretion—to weigh the consequences of delay and to act accordingly. ICE attorneys retain the power to ask immigration judges to delay immigration court proceedings or to accelerate them. But the mere fact that discretion exists in some aspects of immigration enforcement does not imply that it exists in all aspects of immigration enforcement—especially when Congress has so clearly removed it.

2. Shall Means Shall

In order for Defendants to prevail on Plaintiffs' 8 U.S.C. § 1225(b) claim, they must show that when Congress used the word "shall" in that statute, it really intended to say "may." Defendants face an uphill climb in this task, especially when Article III courts in multiple cases have reached the opposite conclusion. As noted above, in 2013, the Northern District of Texas interpreted 8 U.S.C. § 1225(b)(2)(A) and concluded that shall means shall and that ICE officers are under a mandatory duty to initiate removal proceedings when they encounter such illegal aliens. *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 U.S. Dist. LEXIS 57788, at *28 (N.D. Tex. 2013). In that case, the attorneys representing DHS cited *the exact same cases* that Defendants now cite in support of their argument that shall really means may. The Northern District was not persuaded:

> Defendants also assert that the word "shall" does not impose a mandatory duty on immigration officers to initiate removal proceedings. *Id.* at 19, 19 n.17 (citing *In re E-R-M & L-R-M*, 25 I. & N. Dec. 520, 522 (B.I.A. 2011), *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-62 (2005), and *City of Chi. v. Morales*, 527 U.S. 41, 62 n.32 (1999)). The Court finds that Congress's use of the word "shall" in Section 1225(b)(2)(A) imposes a mandatory obligation on immigration officers to initiate removal

> proceedings against aliens they encounter who are not "clearly and beyond a doubt entitled to be admitted."

Crane v. Napolitano, 2013 U.S. Dist. LEXIS 57788, at *28.

More recently, after this Motion for Preliminary Injunction was filed, the Northern District of Texas returned to the very same statutory language in 8 U.S.C. § 1225(b)(2)(A) to determine if the word "shall" also imposes a mandatory duty on DHS to detain the alien, in addition to the duty to initiate removal proceedings. The court concluded that, once again, shall means shall. "[W]hen DHS place an applicant for admission into a full removal proceeding under Section 1229a, the alien is subject to *mandatory* detention during that proceeding. § 1225(b)(2)(A)." *Texas MPP*, 2021 U.S. Dist. LEXIS 152438, at *9-10 (emphasis in original). In that case, the Northern District was addressing the question of whether or not the Biden Administration had the option of releasing asylum applicants into the United States to await their asylum determination in a Section 1229a proceeding. The Northern District held that the answer was no; the statutory language made detention mandatory if aliens were not returned to a contiguous country: "Section 1225 provides the government two options vis-à-vis aliens seeking asylum: (1) mandatory detention; or (2) return to a contiguous territory. Failing to detain or return aliens pending their immigration proceedings violates Section 1225." *Id*. at *63.

The only specific support that Defendants can offer for their contention that "shall" in 8 U.S.C. § 1225(b) is not mandatory is not an Article III decision at all. Rather it is an opinion by one of the Justice Department's own divisions—the Board of Immigration Appeals (BIA). Resp. 39. In *In re E-R-M & L-R-M*, 25 I. & N. Dec. 520 (BIA 2011), the

BIA considered a completely different situation, in which an alien was subject to expedited removal proceedings "without further hearing or review" under 8 U.S.C. § 1225(b)(1)(A)(i), and was also subject to normal removal proceedings under 8 U.S.C. § 1229a. ICE personnel elected to pursue normal removal proceedings, which arguably violated the "shall" phrasing that required expedited removal under 8 U.S.C. § 1225(b)(1)(A)(i). The BIA reasoned that where there is a choice between two avenues of removal proceedings (both of which contain the word "shall"), the "shall" concerning expedited removals can be interpreted as "may." 25 I. & N. at 522-23.

There are three problems with applying this line of reasoning here. First, it concerns a different section of federal law; the BIA did not offer any interpretation of the word "shall" in the provisions at issue here. Second and more importantly, it involved a *choice between two mandatory enforcement actions* (expedited removal proceedings versus regular removal proceedings), whereas Defendants in this case seek to choose a course of non-enforcement. Third, the basis of the BIA's opinion—an analogy to prosecutorial discretion to choose a criminal charge—does not remotely apply in the instant case.[5]

Unable to offer a specific Article III holding that supports their strained reading of the word "shall" in 8 U.S.C. § 1225(b), Defendants attempt to create a generic rule for

[5] The BIA reached its conclusion by looking at *United States v. Batchelder*, 442 U.S. 114, 118 (1979), which concerned a prosecutor's decision regarding which crime to charge a defendant who had committed two crimes "that are identical except for their penalty provisions." *Id*. at 117. The Court reached the unremarkable holding that a prosecutor retains discretion concerning which charge to file "when an act violates more than one criminal statute." *Id*. at 123. The Court did not even consider the meaning of the word "shall" in the relevant statutes. *See id*. at 118-26. Nor could it have, because the word "shall" in the penalty section of a criminal statute is directed at the sentencing judge, not at the prosecutor's decision to charge in the first place.

when "shall" really means "may." They do so by misconstruing the decision in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). Defendants claim that *Castle Rock* stands for the notion that "shall" is only mandatory when there is also proof of legislative intent to impose a mandatory duty. Resp. 35. That is not what the *Castle Rock* Court held. In that case, a Colorado statute used the term "shall" in several places in a manner that appeared to be *inconsistent* with the Colorado Legislature's intent. The Court held that under those circumstances, shall might not impose a mandatory duty:

> Against that backdrop, a true mandate of police action would require some stronger indication from the Colorado Legislature than "shall use every reasonable means to enforce a restraining order" (or even "shall arrest … or … seek a warrant"), §§ 18-6-803.5(3)(a), (b). That language is not perceptibly more mandatory than the Colorado statute which has long told municipal chiefs of police that they "shall pursue and arrest any person fleeing from justice in any part of the state" ….

545 U.S. at 761. That is a far cry from the case at hand.

But even if Defendant's imaginary rule did exist, and shall did not mean shall unless there was supporting evidence of legislative intent, Plaintiffs have provided it. Frustrated with executive non-enforcement of federal immigration laws, in 1996 Congress enacted IIRIRA. Congress enacted multiple statutory provisions to restrict the discretion available to the executive branch. As a conference committee report in 1996 stated: "[I]mmigration law enforcement is as high a priority as other aspects of Federal law enforcement, and illegal aliens do not have the right to remain in the United States undetected and unapprehended." H.R. Rep. 104-725 (1996), at 383 (Conf. Rep.). To achieve its objective of maximizing the removal efforts of the executive branch, Congress enacted the mandatory provisions of 8 U.S.C. §§ 1225(a)(1), 1225(a)(3), 1225(b)(1)(A)(i),

1225(b)(1)(A)(ii) and 1225(b)(2)(A), using "shall" to indicate that discretion was to be removed; but Congress also used the term "may" where discretion was to be preserved, as in 8 U.S.C. §§ 1225(b)(1)(A)(iii)(I) and 1225(b)(2)(C). The construction of 8 U.S.C. § 1225 as a whole indicates that Congress was particularly intentional about where it used the term "shall" and where it used the term "may."

3. The Cases Cited by Defendants Offer them Little Support

Unable to find Article III court holdings that interpret 8 U.S.C. §1225(b)(2) in the manner they wish, Defendants resort to misconstruing two Supreme Court decisions. First, they claim that the Supreme Court in *Arizona v. United States* recognized vast and extraordinary powers of executive discretion in the enforcement of immigration laws– powers so expansive that they even trump the terms of federal statutes. Defendants rest this bizarre argument on vague language in the introductory section of the *Arizona* opinion, in which the Court mentions in passing the "broad discretion exercised by immigration officials." *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012); Resp. 2, 15, 23, 40.

What Defendants fail to mention is that the Supreme Court in *Arizona* also recognized that any discretion not to remove an alien *can only be exercised where federal statute permits*: "Congress has specified which aliens may be removed from the United States and the procedures for doing so." *Arizona*, 132 U.S. at 2499 (*citing* 8 U.S.C. § 1227). "The federal statutory structure instructs when it is appropriate to arrest an alien during the removal process." *Id.* at 2505. Thus, discretion in initiating removal proceedings is constrained by the provisions of 8 U.S.C. § 1225. Contrary to Defendants' mischaracterization, the *Arizona* Court never even remotely suggested that DHS has the

power to override a statutory constraint on its discretion. Nor does it mention any of the statutory provisions at issue in the instant matter.

Defendants also attempt to draw support from the Supreme Court's decision in *AADC*. Resp. 40. But, here too, Defendant cannot squeeze the support they seek from this decision. Defendants fundamentally misunderstand what Congress did when it enacted IIRIRA. Congress restricted immigration officer discretion at the initial phase of the removal process, but preserved discretion later in the removal process through specific statutory channels. This understanding is perfectly consistent with *AADC*, which Defendants cite out of context. The *AADC* Court noted that deferred action was occurring without any statutory constraints *prior* to the enactment of IIRIRA. "[A]t the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as 'deferred action') …." *Id*. at 483-84. The Court recognized that it was for this very reason that Congress imposed constraints on the practice. In addition, "Congress … focus[ed] special attention on, and ma[d]e special provision for, judicial review of the Attorney General's discrete acts of 'commenc[ing] proceedings, adjudicating cases, [and] executing removal orders.'" *Id*. at 483. Thus, following the enactment of IIRIRA, those previously unconstrained decisions *were now circumscribed* by federal statute.

4. CBP Defendants Are Violating 8 U.S.C. § 1225(b) in Two Ways

The manner in which ICE Defendants are violating 8 U.S.C. § 1225(b) has been explained at length and should be clear. Plaintiffs also contend that "Defendants have ordered CBP officers to release aliens into the United States without taking steps to initiate removal proceedings." Am. Complt. ¶ 66. The way that this has been carried out may not

be immediately obvious and warrants further explanation here. Prior to the Biden Administration, CBP complied with its statutory obligation under 8 U.S.C. § 1225(b)(2)(A) to initiate removal proceedings with respect to all aliens who were not immediately returned to Mexico under 8 U.S.C. § 1225(b)(2)(C) or removed expeditiously without a hearing under 8 U.S.C. § 1225(b)(1). CBP officers are required by statute to initiate "a proceeding under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(A). CBP officers do so by issuing a "Notice to Appear" (NTA), which commences a removal proceeding with a specified immigration court on a specified date.

In March 2021, however, CBP Defendants ordered CBP officers in some of the sectors on the southwest border to change course. Those CBP officers were directed to stop issuing NTAs to illegal aliens. Instead, the NTAs were replaced with a new document, referred to as a "Notice to Report" (NTR). Fed. Police Found. Supp. Aff. at ¶¶ 15-16. The NTR does not commence a removal proceeding. Rather it merely requests that the illegal alien show up at an ICE office within 60 days, at which point the relevant ICE officer will decide whether to take further enforcement actions. *Id*.

Regardless of whatever future enforcement action an ICE officer may take, 8 U.S.C. § 1225(b) requires CBP *itself* to initiate a removal proceeding against each alien in its custody, not to release the aliens in the faint hope that they will report to ICE on their own. Through this maneuver, CBP Defendants are violating 8 U.S.C. § 1225(b) where they are issuing NTRs rather than NTAs. Although they are still handing a document to the illegal aliens they release, the document is not an NTA that actually commences a removal proceeding. It is merely a request that the illegal alien report to a specified ICE office.

And it is an empty request because only a small percentage of illegal aliens will actually show up at an ICE office.[6]

There is an additional problem that flows from CBP's change of course: a failure to comply with an NTA results in an order of removal, whereas a failure to comply with an NTR does not. If an illegal alien disobeys an NTA and fails to show up at the designated immigration court, then "the alien shall be removed in absentia if the Service establishes … that the written notice was provided and that the alien is removable…." 8 U.S.C. § 1229a(b)(5)(A). Thus, by replacing NTAs with NTRs, Defendants have not only violated 8 U.S.C. § 1225(b), they have also ensured that tens of thousands of such removal orders in absentia do not occur. Plaintiffs accordingly request that this Court, in enjoining all Defendants to comply with 8 U.S.C. § 1225(b), specifically enjoin CBP Defendants to resume the issuance of NTAs in all border sectors.

The second way in which CBP defendants are violating 8 U.S.C. § 1225(b)(2)(A) was the subject of the recent ruling by the Northern District of Texas regarding the Biden Administration's unlawful termination of the MPP. That court held that if CBP declines to exercise the option that Congress provided in 8 U.S.C. § 1225(b)(2)(C)—returning illegal aliens arriving by land to a contiguous territory for them to await their 1229a hearings—and CBP instead releases such aliens into the United States rather than detaining them as required by law, the result is a "systemic violation of Section 1225 as aliens are released into the United States…." *Texas v. Biden*, 2021 U.S. Dist. LEXIS 152438, at *63.

[6] Indeed, according to ICE's own numbers, only a small percentage of aliens have complied with the NTRs and have shown up at ICE offices. Fed. Police Found. Supp. Aff. ¶ 16.

Immigration officers at CBP are not permitted to violate the clear command of 8 U.S.C. §1225 that they either detain inadmissible aliens or return them to a contiguous territory.

B. The February 18 Memorandum Violates 8 U.S.C. § 1226(c)

8 U.S.C. § 1226(c) makes the detention of large categories of criminal aliens mandatory pending adjudication of their removal proceedings. Judge Tipton on August 19, 2021, analyzed all of the relevant caselaw and held that the State plaintiffs were likely to prevail on their identical claim under § 1226(c). "[T]he Court applies the caselaw … and holds that the 'shall' found in Sections 1226(c) and 1231(a)(2) means 'must,' imposing on the Government a duty to detain certain criminal aliens…." *Texas and Louisiana*, 2021 U.S. Dist. LEXIS 156642, *98. Plaintiffs will not repeat his thorough analysis of the caselaw. Instead, a few of Defendants' other arguments will be addressed.

Defendants claim that the February 18 Memorandum does not violate the mandatory detention requirement of 8 U.S.C. § 1226(c), because in theory each and every pre-approval request to detain an alien covered by the statute *could* be granted. "Officials simply need to request preapproval." Resp. 44. However, Plaintiffs have already provided evidence that it has been denied not once, but on multiple occasions. The specific cases involving denials of preapproval described in the Federal Police Foundation affidavit show clear violations of 8 U.S.C. § 1226(c). Case B concerns an alien convicted of domestic violence—a crime of moral turpitude that triggers the mandatory detention requirement of 8 U.S.C. § 1226(c);[7] yet preapproval was denied. Fed. Police Found. Aff. ¶ 18. Case D

[7] *See Miresles-Zuniga v. Holder*, 743 F.3d 110,113 (5th Cir. 2014).

concerns an alien convicted of sexual battery against a child—another crime of moral turpitude that triggers 8 U.S.C. § 1226(c);[8] again preapproval was denied. *Id*. Case F concerns and alien convicted of sexual assault on a minor under 14—also a crime of moral turpitude triggering 8 U.S.C. § 1226(c); and again preapproval was denied. *Id*.

Defendants also claim that it would be impossible to comply with 8 U.S.C. § 1226(c) if it imposed a mandatory requirement "because DHS has never been able to arrest all noncitizens" due to resource constraints. Resp. 45. There are three problems with Defendants' argument. First, they once again misconstrue Plaintiffs' position. Plaintiffs do not contend that 8 U.S.C. § 1226(c) requires DHS "to arrest all noncitizens" in the country. Rather, DHS is required to detain only illegal aliens convicted of a qualifying offense who are still in DHS custody pursuant to 8 U.S.C. § 1225(b), who DHS encounters in another context, or who DHS can take custody of when the alien finishes his sentence for a state criminal conviction.

Second, Defendants have intentionally reduced their detention bed capacity. Their own witness admits that ICE has reduced its capacity to 34,000 beds, of which 25,856 are being used. Berg. Decl. ¶ 11. Yet according to ICE's own public report, in FY2019, by utilizing contracts with other detention facilities, *ICE was able to detain more than 56,000 aliens*, and the average daily detained population was 50,165. U.S. Immigration and Customs Enforcement, *ERO FY 2019 Achievements*, available at https://www.ice.gov/features/ERO-2019. That is more than *double* the current detained

[8] *See Mendoza v. INS*, 2010 U.S. Dist. LEXIS 135170 at *5, n.1 (D. Nev. 2010).

population. Defendants do not deny that fact. If complying with federal law required them to once again utilize that additional detention space, they could do so. Third, Congress has already provided an answer to any detention capacity questions. As noted above, any illegal aliens arriving by land may be issued an NTA and then returned to a contiguous territory in lieu of being detained. 8 U.S.C. § 1225(b)(2)(C). Returning such aliens to Mexico would free up a large number of detention beds.

Finally, Defendants argue that "Congress did not expect DHS to immediately arrest all noncitizens covered by that provision." Resp. 45. Defendants cite *Nielsen v. Preap*, 139 S. Ct. 954 (2019), in support of their theory; but it actually undermines their argument. The *Preap* Court recognized that the "when … released" language in 8 U.S.C. § 1226(c) means what it says: "it clarifies when the duty to arrest is triggered; upon release from criminal custody." *Preap*, 139 S. Ct. at 969. Of course, *Preap* held that if DHS failed to meet its obligation to detain immediately, the statute did not prohibit it from meeting its obligation later. *See id*. at 965. But *Preap* did not remotely suggest that DHS is free to disregard its statutory obligation to detain criminal aliens covered by 8 U.S.C. § 1226(c). Defendants' argument "confuses what the Secretary is obligated to do with the consequences that follow if the Secretary fails (for whatever reason) to fulfill that obligation." *Id*. at 969. In summary, none of Defendants' arguments come close to dislodging the statutory mandate imposed by 8 U.S.C. § 1226(c).

C. The February 18 Memorandum Violates 8 U.S.C. § 1231(a)

8 U.S.C. § 1231(a)(5) mandates the removal of an alien who has reentered the United States illegally after having been removed: "[T]he alien shall be removed under the

prior order at any time after the reentry." *Id*. Although Judge Tipton addressed the meaning of "shall" in § 1231(a)(2), not § 1231(a)(5) which is the focus of this case, he did conclude that "shall" is mandatory *throughout* § 1231. "These interpretations of 'shall' as mandatory in other parts of Section 1231 are yet further indication the 'shall' in Section 1231(a)(2) bears the same meaning, because 'a word or phrase is presumed to bear the same meaning throughout a text.'" *Texas and Louisiana*, 2021 U.S. Dist. LEXIS 156642, *109 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012)).

Defendants assert that "the word 'shall' does not constrain DHS's discretion in effectuating removals." Resp. 47. But they fail to address the fact that *this Court has held the opposite to be true*, regarding the use of the word "shall" in 8 U.S.C. § 1231(a). "[T]he Court has determined that 'shall' in section 1231(a)(1)(A) means *must*." *Texas*, 2021 U.S. Dist. LEXIS 33890, at *108 (S.D. Tex. Feb. 23, 2021) (emphasis in original). Plaintiffs pointed out that holding Mot. PI 13-14. But Defendants do not even mention it. *See* Resp. 45-47. Now this Court has reached that holding a second time, in *Texas and Louisiana*.

Defendants' principal argument on the subject is a surprising one. They say that "the statutory text directs only that '*if* [DHS] *finds*' that encountered noncitizens are in the country unlawfully after having been previously removed, then … the noncitizen 'shall be removed….'" Resp. 46 (emphasis added by Defendants). They continue: "[N]othing in the statute *requires* immigration officers to make that initial, conditional determination, much less to make it in the affirmative." *Id*. (emphasis by Defendants). Unbelievably, Defendants are actually arguing that they can *willfully disregard* the fact that an alien was

previously removed. This is not a difficult determination that involves discretion; the alien either has or has not been previously removed. A simple check of ICE's databases yields an immediate answer. The fact that Defendants are even making this argument is troubling.

Next, Defendants point out that 8 U.S.C. § 1231(a)(5) does not specify exactly *when* an alien with a prior removal order must be removed. Resp. 46. That is correct. But that does not remove the statutory requirement. The statute commands that "the alien *shall* be removed under the prior order…." 8 U.S.C. § 1231(a)(5) (emphasis added). The only way that DHS can obey that command is to either remove the alien promptly or detain the alien until a future date when removal is more convenient. It does *not* permit DHS to release the alien and hope that the alien decides to surrender himself to ICE in the future so that he can be removed, as Defendants seem to suggest. Such a reading of the statute makes a mockery of Congress's command that DHS "shall" remove the alien.

Finally, it must be remembered that the Supreme Court recently reiterated the mandatory nature of 8 U.S.C. § 1231(a)(5). "Those reinstated orders are not subject to reopening or review, nor are respondents eligible for discretionary relief under the INA. Instead, they 'shall be removed under the prior order at any time after the reentry.'" *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2284 (2021) (quoting 8 U.S.C. § 1231(a)(5)). Defendants are not permitted to "undermine Congress's judgment regarding the detention of different groups of aliens who posed different risks of flight…." *Id.* at 2290. The only discretion left to DHS is the timing of when the removal is executed. As Plaintiffs have already shown, Defendants are repeatedly and cavalierly ignoring the mandatory removal requirement of 8 U.S.C. § 1231(a)(5). They have already declined to deport numerous

illegal aliens who have prior orders of removal. Plaintiffs have seven identified seven specific cases in which this has occurred. Fed. Police Found. Aff. ¶ 18 (cases A, B, D, E, F, H); Coe Aff. ¶ 16. Defendants do not dispute this fact. The total number of such cases is likely in the hundreds, if not thousands. Preliminary injunctive relief is necessary to stop this flagrant disregard of 8 U.S.C. § 1231(a)(5) immediately.

D. The Memoranda Violate the APA's Procedural Requirements

On August 19, 2021, Judge Tipton devoted nearly 100 pages of careful analysis to APA claims identical to those in the instant matter; he also explained why identical responses by the same Defendants were unavailing. *See Texas and Louisiana*, 2021 U.S. Dist. LEXIS 156642, *66-*201. He concluded that the procedural requirements of the APA were violated when Defendants issued the Memoranda:

> In sum, the Court finds that the Memoranda do not constitute a rule that is exempt from the notice and comment requirements of Section 553. The Memoranda are not general statements of policy because they have a binding effect insofar as they presently affect certain rights and obligations and do not afford sufficient discretion to DHS and its decisionmakers. Likewise, the Memoranda are not procedural rules because they have a significant impact on DHS, the states, and certain aliens. Therefore, the Court finds Texas has shown a substantial likelihood of success on the merits of its procedural APA claim.

Id. at *200-01. Plaintiffs defer to his analysis. Rather than taxing the Court's patience by restating his reasoning at length, Plaintiffs will direct this Court to the relevant sections of that opinion.

Judge Tipton also held that the Memoranda are arbitrary and capricious. He reviewed all of the Defendants' asserted justifications for the Memoranda and found them wanting: "the Government's failure to rationally explain and connect the basis for the new

guidance, along with the Government's failure to consider certain relevant factors and alternative policies, establish that there is a substantial likelihood that the reprioritization is an arbitrary and capricious policy." *Id.* at *176; *see id*. at *147-*176.

E. APA Exceptions Do Not Insulate the Memoranda from Judicial Review

The APA waives sovereign immunity, 5 U.S.C. § 702, but has several limits. *See* 5 U.S.C. §§ 701(a)(1)-(2) (instances where "statutes preclude judicial review" and where "agency action is committed to agency discretion by law"), 704 (requiring "final agency action"). Judge Tipton reviewed all applicable limits asserted by Defendants and rejected them as inapplicable regarding the Memoranda. He first evaluated each of the statutory bars to review asserted by Defendants and found that none applied to the Memoranda. "Accordingly, the Court concludes Sections 1252(a)(5) and (b)(9), 1231(h), and 1226(e) do not preclude the States' claims. There are no statutory bars to reviewing these claims." *Texas and Louisiana*, 2021 U.S. Dist. LEXIS 156642, *75; *see id.* at *67-*75. He then held that "the Memoranda are the consummation of DHS's decisionmaking process and determine certain rights and legal obligations. Therefore the Court concludes the Memoranda constitute final agency action under Section 704 of the APA." *Id.* at *86; *see id.* at *75-*86. The Court spent a great deal of time on the question of whether the agency is permitted to exercise any discretion—which also goes the claims that Defendants have violated the mandatory commands of the law—and concluded that the use of the word shall in each statute removed any agency discretion:

> In sum, the Court finds that Sections 1226(c) and 1231(a)(2) impose mandatory detention at specific points in time for certain aliens. The Executive Branch may neither alter these statutory obligations through

> reprioritization nor dispense with them. Accordingly, the Court concludes that the detention of certain aliens subject to Sections 1226(c) and 1231(a)(2) is not committed to agency discretion.

Id. at *139; *see id*. at *86-*139.

Defendants also make a fleeting effort to argue that the APA zone of interest test precludes review, but only with respect to 8 U.S.C. § 1231(h). Resp. 33-34. They attempted the same argument in *Texas and Louisiana*. "[T]he Government focuses its attention on Section 1231(h), in essence arguing that because Subsection (h) bars parties from enforcing Section 1231, any injury stemming from violations of the section does not fall within the statute's zone of interests. ... But, as explained earlier, Section 1231(h) does not bar the States' claims." 2021 U.S. Dist. LEXIS 156642 at *143-*144. The same conclusion applies here.[9]

F. The February 18 Memorandum Violates the Constitutional Obligation to Faithfully Execute the Law

[9] The APA does not preclude review. But even if the APA did preclude it, review would still lie with pre-APA equity review. Before the original APA provided a cause of action or the APA's 1976 amendments waived federal sovereign immunity, judicial review was available in equity suits against federal officers: "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *Ex parte Young*, 209 U.S. 123, 160 (1908); *United States v. Lee*, 106 U.S. 196, 213 (1882). Unlike the agencies for which they work, the individual Administration officials lack sovereign immunity here. "The acts of all [federal] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902). Significantly, the availability of declaratory relief against federal officers predates the APA, William J. Hughes, FEDERAL PRACTICE §25387 (1940 & Supp. 1945), and the APA did not displace that relief. *See* Administrative Procedure Act, Legislative History, 79th Cong., S.Doc. No. 248, 79th Cong., 2d Sess., at 37, 212, 276 (1946); *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958). Thus, provided that a plaintiff alleges an ongoing violation of federal law, longstanding equity practice allows suing federal officers who act beyond their lawful authority.

U.S. Const. art. II, § 3, requires that the President, by and through his executive branch officials, including Defendants, "shall take Care that the Laws be faithfully executed." Defendants argue that this claim amounts merely to an assertion that Defendants have exceeded their statutory authority. Resp. 54-55. On the contrary, Defendants have not merely exceeded their authority; they have deliberately created a roadblock to the execution of the law. Instead of allowing immigration officers to detain and remove aliens whom the law says must be detained and removed, Defendants have decreed that the vast majority of them may not be detained or removed unless officers go through an onerous process of preapproval that is rarely granted. *See* Pl. Mot. 11-14. This deliberate creation of a roadblock to the execution of the law is plainly inconsistent with the executive's obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3; instead of taking care that officers faithfully execute the law, Defendants have taken care to *prevent* officers from faithfully executing the law. Defendants attempt to appeal to the DHS Secretary's very general authority to "'issue instructions' and 'perform such other acts as he deems necessary to carrying out his authority.'" Resp. at 57 (quoting 8 U.S.C. § 1103(a)(3)). But since the Secretary is charged with enforcing the immigration laws, 8 U.S.C. § 1103(a)(1), it is absurd to say that he is "carrying out his authority" by frustrating their enforcement.

As for their claim that no cause of action lies under the Take Care Clause, Defendants reach too far. *See* Resp. 55. Hypothetical judicial "lack of the respect due coordinate branches of government," mentioned in *Baker v. Carr*, 369 U.S. 186, 217 (1962), a case not involving the Take Care Clause, is not implicated when the executive

acts not merely in disrespect, but in opposition, to the laws passed by Congress by frustrating their enforcement. And the "purely executive and political" nature of the duty, at issue in *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1866), to appoint generals and distribute military forces is very different from the duty here to see to it that officers execute specific statutory commands to detain and remove certain aliens. No doubt, opposition to immigration law enforcement within the Biden Administration is, in a broad sense, "political." But such opposition does not justify executive frustration of enforcement actions that a statute requires. As this Court has held, the executive's authority over immigration "does not include the authority to 'suspend' or 'dispense with' Congress's exercise of legislative powers in enacting immigration laws." *Texas v. United States*, 2021 U.S. Dist. LEXIS 33890, at *101-02 (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915) (Day, J., dissenting), *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)).

Although Judge Tipton did not directly address a Take Care Clause claim, per se, in *Texas and Louisiana*, he did devote many pages of relevant analysis to explaining why the executive does not possess a power to dispense with laws. *See Texas and Louisiana*, 2021 U.S. Dist. LEXIS 156642, *120-*139. "[T]he dispensing power conflicts with the Executive's *duty* to *faithfully* execute the laws." *Id*. at *131 (emphasis in original). "'To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.'" *Id*. at *134 (quoting *Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 612-13 (1838)). Although this Court need not reach this claim because of Defendants' violation of multiple statutes, discussed at length above, Plaintiffs are likely

to prevail on it.

VI. The Plaintiffs Will Suffer Irreparable Injury, and the Balancing of Harms Favors the Plaintiffs

The injuries suffered by Plaintiff are irreparable. Defendants do not dispute that fact. In a case that similarly involved increased law enforcement and detention costs caused by the presence of an increased number of criminal aliens, the Northern District of Texas held that "Texas and Missouri are unable to recover the additional expenditures from the federal government." *Texas MPP*, 2021 U.S. Dist. LEXIS 152438, at *71 (citing *Texas*, 2021 U.S. Dist. LEXIS 33890, *135).

The balancing of harms weighs strongly in favor of Plaintiffs in this matter, and Defendants' response does not help them. Defendants' principal argument is that "an injunction would inhibit ICE's ability to prioritize its use of limited resources." Resp. 57. What Defendants seem unwilling to recognize is that Congress itself, unhappy with the executive branch's abuse of discretion when setting priorities in the past, decided to set the priorities for them. 8 U.S.C. § 1225(b) established that there would be no more catch and release: every inadmissible alien encountered must either be expeditiously removed, or be detained and placed into a § 1229a hearing (with the option of having the alien wait in a contiguous territory under 8 U.S.C. § 1225(b)(2)(C)). Congress then established those categories that would be priorities by mandating their continuous detention pending removal in 8 U.S.C. § 1226(c) for aliens convicted of crimes of moral turpitude, drug offenses, gun offenses, and other serious crimes. Congress also established which aliens would highest priorities for removal by requiring removal for any alien issued a removal

order by an immigration court or any previously-removed alien who re-enters the United States. 8 U.S.C. § 1231(a). Defendants cannot assert that they are harmed by constraints on their discretion when Congress is the entity imposed those very constraints. If Defendants do not like the way Congress set the priorities through the statutory commands listed above, Defendants should make their case to Congress that those statutes be changed. Until that happens, Defendants do not have the authority to disobey them in the meantime.

Defendants' argument is also revealed to be hollow when one looks at the priority cases that they claim an injunction would allegedly interfere with: (1) sexual offenders and (2) aggravated felons. Resp. 58. But what Defendants fail to acknowledge is that *both of these categories are already included among the mandatory detention categories listed by Congress* in 8 U.S.C. § 1226(c)(1). Sexual offenders are guilty of crimes of moral turpitude referred to in 8 U.S.C. § 1226(c)(1)(C). And aggravated felons are listed in 8 U.S.C. § 1226(c)(1)(B) (referring to 8 U.S.C. § 1227(a)(2)(A)(iii)). Defendants will still be able to detain and remove such criminal aliens. What Defendants do not want to do is detain and remove a significant number of illegal aliens in the other mandatory categories. But Congress has denied them that option.

The balancing of harms in this context is clear. As the Northern District of Texas held: "[T]he ongoing and future injuries sustained by Plaintiffs outweigh any harms to Defendants as Defendants 'have no interest in the perpetuation of unlawful agency action.'" *Texas*, 2021 U.S. Dist. LEXIS 152438, at *72 (quoting *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)).

VII. Injunctive Relief is in the Public Interest

Defendants' response regarding the public interest is short and unavailing. They assert that the public interest is served by "allowing the federal government to prioritize" in the manner they wish to prioritize. Resp. 58-59. They are unable to provide case law supporting this particular assertion.

In contrast, there is abundant case law support Plaintiffs' characterization of the public interest. "[T]he public will be served if the Executive Branch is enjoined from implementing and enforcing a policy that instructs officials to violate a congressional command." *Texas and Louisiana*, 2021 U.S. Dist. LEXIS 156642, *209. "The public has interest in the enforcement of immigration laws, including Section 1225." *Texas MPP*, 2021 U.S. Dist. LEXIS 152438, at *72. This Court has recognized "the public interest in stemming the flow of illegal immigration." *United States v. Escobar*, No. 2:17-CR-529, 2017 U.S. Dist. LEXIS 194838, at *4 (S.D. Tex. 2017) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58, (1976)). In sum, "there is a 'public interest in having governmental agencies abide by the federal laws that govern their existence and operation.'" *Texas v. Biden*, 2021 U.S. Dist. LEXIS 152438, at *72 (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994).

VIII. Nationwide, Mandatory Injunctive Relief is Appropriate

Plaintiffs seek injunctive relief requiring Defendants to comply with the mandatory requirements of federal law. Defendants argue that a mandatory injunction is unwarranted and should be limited in scope. Both arguments are without merit.

Defendants contend that this Court lacks jurisdiction to issue an injunction under 8 U.S.C. § 1252(f). Response at 62 (citing *Hamama v. Adducci*, 946 F.3d 875, 877 (6th Cir. 2020)). But the *Hamama* litigation is not on point, in that it involved aliens challenging their detention under 8 U.S.C. §§ 1225, 1226, and 1231; and the injunctions at issue would have impermissibly caused federal statutes to be *violated*. 946 F.3d at 877; *see also Hamama v. Homan*, 912 F.3d 869, 877 (6th Cir. 2018). The Sixth Circuit vacated the district court's injunctions in those cases because they "prevented those statutes from operating, whether respect to mandatory or permissive detentions." *Hamama*, 946 F.3d at 877. Here, 8 U.S.C. § 1252(f)(1) does not preclude injunctive relief because Plaintiffs "are not seeking to restrain Defendants from enforcing Section[s] 1225[, 1226, or 1231]. Plaintiffs are attempting to make Defendants comply with Section[s] 1225[, 1226, and 1231]." *Texas*, 2021 U.S. Dist. LEXIS 152438, *43; *see also Texas*, 2021 U.S. Dist. LEXIS 33890, *83-84 (noting that jurisdiction-stripping statutes in the INA were aimed at aliens challenging their detention or removal and none were enacted to limit a State's right to challenge agency action contrary to the INA).

Because the Memoranda are contrary to law, were unlawfully issued without conforming to the APA's notice-and-comment rulemaking procedure, and are arbitrary and capricious, they must be declared unlawful and vacated. *See* 5 U.S.C. § 706(2)(A). Judge Tipton found that the Plaintiffs in that case were likely to succeed in making those showings and therefore enjoined the operation of the Memoranda. *Texas and Louisiana*, 2021 U.S. Dist. LEXIS 156642, *219-*220. This Court should reiterate that injunction. But because that case focused on the *detention* requirements of two federal statutes, Judge

Tipton added specific mandatory injunctive relief to ensure that Defendants comply with those detention requirements. *Id.* at *220-*222. This case involves statutes that command *removal* as well as detention, namely 8 U.S.C. §§ 1225(b) and 1231(a)(5). To ensure that Defendants comply, this Court should issue a mandatory injunction specifically requiring Defendants to do what the statutes command.

On this question, the Court in *Texas MPP* recently held that 8 U.S.C. § 1225 requires that inadmissible aliens encountered at the border must be removed without further hearing (expedited removal), detained for removal proceedings, or returned to contiguous territory from which they entered the United States. *See* 2021 U.S. Dist. LEXIS 152438, at *63. In that case, like this one, the same Defendants indicated that they did not believe they had an obligation to follow the law in same the manner that the Court interpreted it. The Court therefore concluded that a mandatory injunction was required: "[A]n injunction is warranted for two reasons. First, an injunction is needed to prevent the systemic violation of Section of 1255. Second, Defendants have indicated that, *even if* the June 1 Memorandum [which terminated the "remain in Mexico" policy] were declared invalid, they would not necessarily return any aliens to Mexico." *Texas MPP*, 2021 U.S. Dist. LEXIS 152438, at *72-*73 (emphasis in original). The same reasoning applies in the instant matter. Enjoining the relevant sections of the Memoranda is not enough; Defendants may not comply with the mandatory requirements of the federal statutes at issue in this case unless a mandatory injunction specifies exactly what that compliance entails.

Defendants also argue that it would be inappropriate for the Court to enjoin Defendants to "reinstate the detainers that were lifted pursuant to the February 18 Memorandum" because filing a detainer is an "informal" procedure. Resp. 60. This semantic distinction is irrelevant, however. Be they formal or informal, "detainers" are specifically referred to in federal statute at 8 U.S.C. § 1357(d), as Defendants concede. That statute clearly suggests that a detainer is the normal and appropriate method by which ICE should seek custody of an alien in the custody of another law enforcement agency. *Id*. In any event, Defendants are making a distinction without a difference. A detainer is simply a means of seeking to detain. Regardless of what it is called, Defendants are under a statutory obligation to detain such aliens when the other agency terminates its custody.

In their Motion, Plaintiffs sought three forms of mandatory injunctive relief. Each is commanded by the statutory language and is capable of being met by Defendants. More specifically, this is what each might entail, if this Court it appropriate:

(1) **Enjoining Defendants to fully comply with the statutory obligations imposed upon them by 8 U.S.C. §§ 1225(b), 1226(c), and 1231(a).** Specifically, (a) ICE and CBP should be required to issue NTAs (not NTRs) to every inadmissible alien they encounter and to initially detain them, as required by § 1225(b)(2), unless they expeditiously remove the aliens under § 1225(b)(1); and (b) they should be required to remove every previously deported alien they encounter, without exception, as required by § 1231(a)(5).

(2) **Enjoining Defendants to reinstate the detainers that were lifted pursuant to the February 18 Memorandum.** This violation of federal law can be

partially repaired. The EAGLE system operated by ICE keeps a record of every detainer issued, whether it was executed, was lifted, or remains pending. Fed. Police Found. Supp. Aff. ¶ 14, 18. ICE should be required to determine if the relevant aliens are still in state or local custody, and if so, reissue the detainers. This is something that ICE can accomplish, *id*. at 19, and should be required to do.

(3) **Enjoining Defendants to take custody of aliens arrested by local law enforcement when such aliens are unlawfully present in the United States, as required by 8 U.S.C. § 1225(b).** This was the routine practice of ICE prior to the Memoranda, whenever local law enforcement contacted ICE to request a detainer, and whenever taking custody was possible. See id. at ¶¶ 13, 18.

Finally, Defendants urge the Court to geographically limit any injunctive relief to "enforcement actions that take place in plaintiff counties." Resp. 63. But Fifth Circuit precedent dictates that in immigration-related cases such as this one, proper relief entails nationwide injunctions. "A geographically limited injunction would be improper because federal immigration law must be uniform." *Texas*, 2021 U.S. Dist. LEXIS 152438, *73-74; *Texas*, 809 F.3d at 187-88 ("[T]he Constitution requires 'an *uniform* Rule of Naturalization'; Congress has instructed that 'the immigration laws of the United States should be enforced vigorously and *uniformly.*'") (emphasis in original; citations omitted). This Court should fashion a nationwide injunction because it is necessary to afford Plaintiffs relief on their claims and because the Victoria Division has already enjoined enforcement of the Memoranda nationwide.

Respectfully submitted,

Dated: August 23, 2021

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CERTIFICATE OF SERVICE

I hereby certify that this Motion for Preliminary Injunctive Relief has been served on Defendants by operation of the Court CM/ECF system and by electronic mail to counsel for Defendants below on this 23rd day of August, 2021.

/s Kris W. Kobach
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