FAULT LINES OF IMMIGRATION FEDERALISM: *UNITED STATES V. TEXAS* AND THE REVERSE-COMMANDEERING OF IMMIGRATION ENFORCEMENT POWER

by
*Kristine Quint**

Federal supremacy over immigration enforcement is a primary tenet of U.S. immigration law. Despite this, states are now routinely, and often successfully, blocking executive immigration policy in federal court. One such case is United States v. Texas*, in which the states argue that the Biden administration's enforcement priority guidelines inflict significant injury on the states while also violating statutory mandates and the Administrative Procedure Act. This Note analyzes* United States v. Texas *and concludes that the states' arguments constitute an act of reverse-commandeering that usurps executive enforcement and policymaking power. The result is a state-held de facto veto, wielded through the courts, over federal immigration policy.*

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* J.D. Candidate, Lewis & Clark Law School, 2024; Notes & Comments Editor, 2022–2023, Lewis & Clark Law Review. With deepest gratitude to Professor Juliet Stumpf for her feedback and mentorship, and to Amanda Ray and Beth Sethi, whose friendship and camaraderie have been a guiding light. I am especially thankful to my family, my partner, and my friends for their unflagging support, patience, and encouragement. Finally, thank you to the staff of the *Lewis & Clark Law Review* for their thoughtful editing, particularly because this Note was in the last stages of the publication process when the Supreme Court released its decision in *United States v. Texas* on June 23, 2023. This Note reflects the legal landscape prior to that decision.

INTRODUCTION

> "*An unprecedented historical movement is underway: a hostile takeover of federal immigration law and policy by state and local governments.*"[1]

On November 11, 2021, Ken Cuccinelli and Russell Vought—acting Deputy Director of the Department of Homeland Security (DHS) and Director of the Office of Management and Budget, respectively, under former President Donald Trump—sent an email to then-Arizona Governor Doug Ducey with the subject line: "How States Can Secure the Border."[2] In their email, Vought and Cuccinelli urged Ducey to "cite state war powers and activate and deploy all units to the southern border with specific orders to the commanding officers of the National Guard to detain and return illegal immigrants . . . to Mexico at the border . . . ."[3] Citing to the U.S. Constitution,[4] Vought and Cuccinelli claim that the states have the legal ability to declare an "invasion,"[5] which would permit states to override any federal supremacy over immigration enforcement in order to take control of and respond to "an invasion of the southern border," including by detaining and deporting noncitizens.[6]

Despite this "dubious" constitutional interpretation,[7] invasion theory is gaining traction among anti-immigrant figures. In February 2022, Arizona Attorney General Mark Brnovich issued a legal opinion concluding that Arizona was experiencing an "invasion" due to human, drug, and sex trafficking, and other

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[1] Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535, 542 (2012).

[2] E-mail from Russell Vought, Pres., Ctr. for Renewing Am., to Daniel Ruiz, Chief of Staff for Gov. Doug Ducey of Ariz., & Arthur Harding, Chief Operating Officer for Gov. Doug Ducey of Ariz. (Nov. 11, 2021, 9:44 AM), https://www.documentcloud.org/documents/21397574-arizona-office-of-the-governors-office-communications-with-center-for-renewing-america [hereinafter Vought Email]; *Emails Show Former Trump Officials Suggesting Arizona Governor Use 'War Powers' to Address Border Issues*, AMERICAN OVERSIGHT (Mar. 10, 2022), https://www.americanoversight.org/emails-show-former-trump-officials-suggesting-arizona-governor-use-war-powers-to-address-border-issues [hereinafter *Former Trump Officials Suggest 'War Powers'*].

[3] Vought Email, *supra* note 2.

[4] U.S. CONST. art. I, § 10, cl. 3.

[5] Vought Email, *supra* note 2; Ken Cuccinelli, *Policy Brief: How States Can Secure the Border*, CTR. FOR RENEWING AM. (Oct. 26, 2021), https://americarenewing.com/issues/policy-brief-how-states-can-secure-the-border/.

[6] Vought Email, *supra* note 2; Cuccinelli, *supra* note 5.

[7] *Former Trump Officials Suggest 'War Powers'*, *supra* note 2 ("The idea relies on a dubious interpretation of the Constitution, which says that individual states may not go to war on their own 'unless actually invaded.'"); ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 133 (2020) ("Constitutional doctrines dating back more than a century prohibit states from adopting their own exclusion and deportation policies.").

harmful activity at the hands of gangs, cartels, and other "potential terrorists."[8] Arizona's failed Republican gubernatorial candidate, Kari Lake, campaigned on the promise to "issue a declaration of invasion, finish President Trump's wall . . . and deploy the Arizona National Guard to stop illegals from entering."[9] Texas judges, congresspeople, mayors, sheriffs, and other local officials held a press conference in July 2022 to denounce the "invasion" of Texas border counties by noncitizens.[10] Texas Lieutenant Governor Dan Patrick said in an interview in August 2022 that Texas was being invaded and attacked, "as we were on Pearl Harbor."[11] Just days after reelection in November 2022, Texas Governor Greg Abbott declared an invasion of the state.[12] According to one NPR poll, a majority of Americans now say "there is an 'invasion' at the southern border."[13]

At the core of this far-right theory is the idea that the declaration of a so-called invasion would legally justify state enforcement of federal immigration law. This is irreconcilable with hundreds of years of jurisprudence that emphasizes the federal government's plenary power over immigration law.[14] In the context of fear-

[8] Office of the Attorney General of Ariz., No. I22-001 (R21-015), Opinion Letter on the Federal Government's Duty to Protect the States and the States' Sovereign Power of Self Defense When Invaded (Feb. 7, 2022) at 13–25, https://www.courthousenews.com/wp-content/uploads/2022/02/arizona-self-defense-opinion.pdf; Ryan Devereaux, *Arizona Attorney General Manufactured an "Invasion" at the Southern Border*, THE INTERCEPT (Feb. 23, 2022, 8:34 AM), https://theintercept.com/2022/02/23/arizona-mark-brnovich-invasion-border-immigraton/; *Former Trump Officials Suggest 'War Powers'*, *supra* note 2.

[9] Matt Rinaldi, Opinion, *Arizona Will Declare Invasion in January; Texas Should Today*, NEWSWEEK (Aug. 9, 2022, 6:30 AM), https://www.newsweek.com/arizona-will-declare-invasion-january-texas-should-today-opinion-1731811.

[10] Matt Stringer, *Texas Border County Officials Declare Invasion, Call on Abbott to Follow Suit*, THE TEXAN (July 6, 2022), https://thetexan.news/texas-border-county-officials-declare-invasion-call-on-abbott-to-follow-suit/.

[11] Martha Pskowski, *As El Paso Struggles to Heal, Walmart Shooter's Rhetoric Builds in GOP*, EL PASO TIMES (Aug. 4, 2022, 3:12 PM), https://www.elpasotimes.com/story/news/2022/08/04/el-paso-walmart-shooting-patrick-crusius-gop-rhetoric-invasion/7585100001/.

[12] Ariana Garcia, *Gov. Greg Abbott Declares Formal Invasion Underway at Texas-Mexico Border*, CHRON (Nov. 15, 2022, 3:08 PM), https://www.chron.com/politics/article/greg-abbott-texas-border-invasion-17586611.php.

[13] Joel Rose, *A Majority of Americans See an 'Invasion' at the Southern Border, NPR Poll Finds*, NPR (Aug. 18, 2022, 5:00 AM), https://www.npr.org/2022/08/18/1117953720/a-majority-of-americans-see-an-invasion-at-the-southern-border-npr-poll-finds.

[14] *See, e.g.*, Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 392 (2006) [hereinafter Stumpf, *The Crimmigration Crisis*] ("Immigration law is governed primarily by the plenary power doctrine, which grants vast power to Congress and the President over foreign policy, including immigration, and limits the reach of the Constitution and the scope of judicial review."); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984) ("In an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review even

mongering over an "invasion" of immigrants from China in the late 1800s,[15] Justice Stephen Field wrote for the majority in *Chae Chan Ping v. United States*:

> While under our constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. . . . For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.[16]

Nearly 125 years later, Justice Field's decision echoed through Justice Anthony Kennedy's majority opinion in *Arizona v. United States*:

> The Government of the United States has broad, *undoubted* power over the subject of immigration and the status of aliens. This authority rests, in part, on the National Government's constitutional power to "establish an uniform Rule of Naturalization," and its inherent power as sovereign to control and conduct relations with foreign nations.[17]

Such is the long and largely uninterrupted line of cases finding that the power to enforce immigration law is plenary and lies with the political branches of the federal government.[18]

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those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy.").

[15] Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 595 (1889); *see also* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 22–32 (1998) (describing the history of *Chae Chan Ping* and the other Chinese Exclusion cases); Matthew J. Lindsay, *The Perpetual "Invasion": Past as Prologue in Constitutional Immigration Law*, 23 ROGER WILLIAMS U. L. REV. 369, 370–73 (2018) (describing the invasion rhetoric behind Justice Field's opinion in *Chae Chan Ping*); ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943, at 20 (2003) ("Explicit in the arguments for Chinese exclusion were several elements that would become the foundation of American gatekeeping ideology: racializing Chinese immigrants as permanently alien and even inferior on the basis of their race, class, culture, and gender relation . . . .").

[16] *Chae Chan Ping*, 130 U.S. at 604, 606.

[17] Arizona v. United States, 567 U.S. 387, 394–95 (2012) (citations omitted) (emphasis added) (quoting U.S. CONST. art I, § 8, cl. 4).

[18] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893); Harisiades v. Shaughnessy, 342 U.S. 580, 588–90 (1952); Mathews v. Diaz, 426 U.S. 67, 81 (1976); Trump v. Hawaii, 138 S. Ct. 2392, 2418–19 (2018); Kerry v. Din, 135 S. Ct. 2128, 2136 (2015); Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020); *see also* Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1571–73 (2008) [hereinafter Stumpf, *States of Confusion*]; Stumpf, *The Crimmigration Crisis*, *supra* note 14, at 392 ("Immigration law is governed primarily by the plenary power doctrine, which grants vast power to Congress and the President over foreign policy, including immigration, and limits the

Despite near-total federal supremacy, states have long sought to carve out a greater role for themselves in immigration law, and particularly in enforcement of immigration law, including by enacting state-level legislation, "political mobilization," cooperating with and resisting federal policies, and challenging immigration policies in court.[19] And while state litigation over immigration issues is not new, the quantity of immigration-related lawsuits brought by states against the federal government has inflated since 2016.[20] Like former Presidents Barack Obama and Donald Trump, President Joseph Biden and his administration have certainly not been immune to state challenges over immigration policy.[21] Indeed, many of the blockbuster executive actions related to immigration that the Biden administration has tried to execute have been swiftly enjoined by the courts—from the setting of enforcement priorities,[22] to rescinding Migrant Protection Protocols

reach of the Constitution and the scope of judicial review."); Legomsky, *supra* note 14, at 255 ("In an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy."); Chin, *supra* note 15, at 5 ("*Fong Yue Ting* and *Chae Chan Ping* are the foundation for what has come to be known as the plenary power doctrine, the rule that 'the power of Congress over the admission of aliens to this country is absolute.' The Court is fond of saying that "'[o]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens," a sobering claim in a regime in which some powers of Congress are simply beyond judicial review." (quoting RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW—SUBSTANCE AND PROCEDURE § 22.2(a), Westlaw (June 2023 Update); then quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

[19] *See* Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President and Immigration Federalism*, 68 FLA. L. REV. 101, 119–23, 129–31, 156–57 (2016) (describing state reactions to the Burlingame Treaty of 1868, "exercises of mass parole" of Haitian and Cuban migrants in the 1970s and 1980s, and state resistance to federal immigration enforcement efforts); COX & RODRÍGUEZ, *supra* note 7, at 134–35; *see infra* Section I.C.

[20] *See* Jasmine Aguilera, *Why Judges Are Basically in Charge of U.S. Immigration Policy Now*, TIME (May 4, 2022, 5:26 PM), https://time.com/6172684/judges-us-immigration-policy/; Jacob Hamburger & Stephen Yale-Loehr, Opinion, *On Immigration, Do Feds or States Rule?*, N.Y. DAILY NEWS (Dec. 19, 2022, 5:00 AM), https://www.nydailynews.com/opinion/ny-oped-immigration-federalism-20221219-haoe6hs6ajedbo2joe5nz6itxq-story.html. For example, the Trump Administration was sued 110 times by California alone. Aguilera, *supra*.

[21] Aguilera, *supra* note 20. According to Professor Stephen Yale-Loehr, "Today, almost every executive action on immigration is being challenged in the courts." *Id.* As of writing, Texas alone has instigated roughly a dozen lawsuits over President Biden's immigration policies. Hamburger & Yale-Loehr, *supra* note 20.

[22] United States v. Texas, 143 S. Ct. 1964 (2023); Amy Howe, *Divided Court Declines to Reinstate Biden's Immigration Guidelines, Sets Case for Argument This Fall*, SCOTUSBLOG (July 21, 2022, 8:47 PM), https://www.scotusblog.com/2022/07/divided-court-declines-to-reinstate-bidens-immigration-guidelines-sets-case-for-argument-this-fall/.

(MPP) [23] and Title 42,[24] to the codification of Deferred Action for Childhood Arrivals (DACA).[25]

But if the federal government has plenary power over immigration law, how are the states now so effectively convincing the courts to enjoin federal—and particularly executive—policies? How can a state have standing when the policy it seeks to enjoin implicates foreign relations and the implementation and enforcement of immigration law, the "zenith of federal power"?[26] How are separation of powers principles, which are so fundamental to our federalist system of government, implicated when states are able to utilize litigation to block policy in an area of law that has long been recognized as the sole prerogative of the federal government?

These questions lie at the heart of *United States v. Texas*, which the Supreme Court decided in the 2022 term.[27] The case disputes the Biden administration's immigration enforcement priority guidelines, which "guide rank and file officers' inevitable exercise of prosecutorial discretion" in the enforcement of immigration law.[28] Prosecutorial discretion and the decision whether or not to enforce implicates concerns as to resource allocation, likelihood of success if enforcement is taken, and

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[23] Texas v. Biden, 554 F. Supp. 3d 818, 857 (N.D. Tex.), *aff'd*, 20 F.4th 928 (5th Cir. 2021), *rev'd* 142 S. Ct. 2528 (2022).

[24] *See, e.g.*, Arizona v. Mayorkas, 143 S. Ct. 478, 478 (2022) (granting stay of the rescission of Title 42). By time of publication, Title 42 was rescinded and the Supreme Court dismissed the case as moot. Arizona v. Mayorkas, 143 S. Ct. 1312 (2023).

[25] *See* Texas v. United States, 50 F.4th 498, 508 (5th Cir. 2022); 8 C.F.R. §§ 106, 236, 274 (2022).

[26] Transcript of Oral Argument at 90, United States v. Texas, 143 S. Ct. 51 (2022) (No. 22-58) [hereinafter Transcript of U.S. v. Tex.].

[27] *United States v. Texas*, 143 S. Ct. at 1964. Due to the timing of publication, this Note analyzes the litigation prior to the Supreme Court's June 23, 2023 decision that allowed the Biden administration to implement the enforcement priority guidelines. *See also* Ian Millhiser, *A Trump Judge Seized Control of ICE, and the Supreme Court Will Decide Whether to Stop Him*, VOX (Nov. 27, 2022, 8:00 AM), https://www.vox.com/policy-and-politics/2022/11/27/23464741/supreme-court-ice-drew-tipton-texas-united-states-immigration; Amy Howe, *In* U.S. v. Texas*, Broad Questions Over Immigration Enforcement and States' Ability to Challenge Federal Policies*, SCOTUSBLOG (Nov. 28, 2022, 3:43 PM) https://www.scotusblog.com/2022/11/in-u-s-v-texas-broad-questions-over-immigration-enforcement-and-states-ability-to-challenge-federal-policies/; Suzanne Monyak, *Supreme Court to Hear Arguments over Biden Immigration Priorities*, ROLL CALL (Nov. 28, 2022, 10:50 AM), https://rollcall.com/2022/11/28/supreme-court-to-hear-argument-over-biden-immigration-priorities/; Amanda Frost, *In Major Immigration Case, Both Sides Look to Academia to Untangle Three Knotty Questions*, SCOTUSBLOG (Nov. 23, 2022, 1:16 PM), https://www.scotusblog.com/2022/11/in-major-immigration-case-both-sides-look-to-academia-to-untangle-three-knotty-questions/; Hamburger and Yale-Loehr, *supra* note 20; Aguilera, *supra* note 20.

[28] Shalini Bhargava Ray, *Abdication Through Enforcement*, 96 IND. L. J. 1325, 1326 (2021).

whether enforcement "best fits the agency's overall policies."[29] Agency non-enforcement decisions are generally not reviewable.[30] Nonetheless, state litigation over the enforcement priorities not only earned review, it blocked the implementation of the enforcement priorities for nearly two years.[31]

This Note analyzes *United States v. Texas* and concludes that the states are seeking to assert through litigation a right to federal enforcement resources and enforcement action, an act of reverse-commandeering[32] that usurps federal executive enforcement and policymaking power. The result is a sort of de facto veto power wielded by the states, through the courts, over executive immigration enforcement power. *United States v. Texas*, if decided in the states' favor, would dramatically shift the boundaries of executive immigration power as we know it and give the states unprecedented leverage over immigration enforcement.

Part I of this article describes the scope of the roles of the Executive and the states in immigration law, and particularly with regards to immigration enforcement. Part II analyzes *United States v. Texas* and describes the ways in which the case represents an attempt by the states to commandeer federal immigration enforcement resources, and by extension federal enforcement policy. Part III briefly surveys other immigration-related litigation brought by states that implicates reverse-commandeering concerns. Part IV concludes.

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[29] Heckler v. Chaney, 470 U.S. 821, 831 (1985); Ray, *supra* note 28, at 1342–48 (describing the history of prosecutorial discretion); Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L. J. 1, 6 (2016) [hereinafter Motomura, *The President's Dilemma*] (describing the exercise of prosecutorial discretion in the immigration context as the decision "whether to prioritize, delay, or stop enforcement proceedings against an individual noncitizen who might be removable from the United States").

[30] *See, e.g.*, *Heckler*, 470 U.S. at 831.

[31] HILLEL R. SMITH, CONG. RSCH. SERV., LSB10578, THE BIDEN ADMINISTRATION'S IMMIGRATION ENFORCEMENT PRIORITIES: BACKGROUND AND LEGAL CONSIDERATIONS 4–5 (2022).

[32] Reverse-commandeering is a little-explored concept in legal scholarship generally and has most substantially been applied in the immigration context by Margaret Hu. Hu, *supra* note 1. Hu describes reverse-commandeering "as a doctrine [that] simply means reversing—without, of course, undoing—the protections that the anti-commandeering doctrine provides to the state sovereign." *Id.* at 538. Reverse-commandeering "institutes judicially-enforced constitutional limits on state and local governments in the name of preserving federal sovereignty." *Id.* at 538. There are a few other articles that have explored reverse-commandeering in other contexts. *See* James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91 (2000); Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012); Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109 (2012); Joseph Zelasko, Note, *The Reverse-Commandeering System: A Better Way to Distribute State and Local Authority*, 112 NW. U. L. REV. 83 (2017).

I. STATE VS. EXECUTIVE ROLES IN IMMIGRATION ENFORCEMENT

An analysis of the shifting landscape of power over immigration enforcement requires first an overview of the general scope of federal executive power and state power in this area.

A. Root of Federal Power Over Immigration

For centuries, courts have recognized the federal government's power and authority over immigration. Although states initially were responsible for control of immigration, the passage of several federal laws and subsequent Supreme Court cases in the latter half of the 19th century affirmed that power over immigration resided with the federal government, not the states.[33]

The locus of federal authority in immigration has been identified in several sources, including in the Constitution—in the foreign affairs powers explicitly delegated to Congress and the Executive,[34] and in the power to establish a uniform rule of naturalization[35]—and in international law concepts of state sovereignty, including in the existence and recognition of sovereign power as inherent, rooted in the country itself as a sovereign nation, as well as the need of a sovereign state to protect itself from outside aggressors.[36] These polices, taken together, constitute the plenary power doctrine.[37] The plenary power doctrine has been used to justify highly deferential judicial review of federal action in immigration[38] and supremacy of immigration law by the federal government.[39]

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[33] *See, e.g.*, Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943); Fong Yue Ting v. United States, 149 U.S. 698, 711–12 (1893); Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889); *see also* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L. J. 458, 466–69 (2009); Stumpf, *States of Confusion*, *supra* note 18, at 1571–73; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545, 550–54 (1990) [hereinafter Motomura, *Immigration Law After a Century of Plenary Power*].

[34] Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 602 (2013); Legomsky, *supra* note 14, at 261–69.

[35] Abrams, *supra* note 34, at 602–03.

[36] *See* Legomsky, *supra* note 14, at 273–75.

[37] These are not the only sources of the plenary power doctrine, but they are the most immediately relevant to an analysis of executive and state power in immigration. For a discussion of other policies justifying the plenary power doctrine, see Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (2000) [hereinafter Legomsky, *Fear and Loathing*].

[38] *See id.* at 1616–23.

[39] *E.g.*, Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 958–60 (1995); Stumpf, *States of Confusion*, *supra* note 18, at 1571–73; Motomura, *Immigration Law After a Century of Plenary Power*, *supra* note 33, at 550–54; Cox & Rodríguez, *supra* note 33, at 467–69.

Despite the absolutism of the doctrine, power over immigration has in reality been divvied up between the sovereigns and amongst the different branches of government.[40] While the divisions are not always well-defined, there are three generally accepted prongs of the power structure over immigration law: the Executive and Congress;[41] the judiciary and the Executive or Congress;[42] and states and the federal government.[43] This Note will most closely examine the division of power between the Executive and the states, and specifically the division of power between these two entities over immigration enforcement.

B. Executive Power

While federal plenary power over immigration is well-established as a core tenet of immigration law, the scope of executive power in this area is far from settled.[44] To complicate matters, the administrative bodies that actually enforce immigration law on the ground derive power both as administrative bodies whose power is delegated to them by Congress and as executive bodies responsible for enforcement of law.[45] Nonetheless, the breadth of executive power can be sketched out by understanding the originating sources of that power, the way executive power influences the states, and the extent to which executive power has thus far been permitted to extend.

One theory as to the source of executive authority over immigration is that it arises out of Congressional delegation.[46] This theory is reflective of both the development of the "modern administrative state" as well as Congress's development of a comprehensive statutory scheme over immigration.[47] It places Congress at the heart, with delegation of power to agencies and the Executive flowing from Congress itself. For example, Professors Adam Cox and Cristina

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[40] David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 97–102 (2013).

[41] *See, e.g.*, Cox & Rodríguez, *supra* note 33, at 460–62; Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control Over Immigration Policy*, 59 DUKE L. J. 1787 (2010).

[42] *See, e.g.*, Legomsky, *Fear and Loathing*, *supra* note 37, at 1616–19; Motomura, *Immigration Law After a Century of Plenary Power*, *supra* note 33, at 580–83.

[43] *See, e.g.*, Gulasekaram & Ramakrishnan, *supra* note 19, at 106–07; Stumpf, *States of Confusion*, *supra* note 18, at 1582–87.

[44] Cox & Rodríguez, *supra* note 33, at 460–62.

[45] *See* Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 1285, 1296–97 (2015). This means the agencies may receive potentially conflicting direction from Congress and the executive branch and be held accountable by both branches.

[46] Cox & Rodríguez, *supra* note 33, at 462; Gulasekaram & Ramakrishnan, *supra* note 19, at 116–18.

[47] Cox & Rodríguez, *supra* note 33, at 476.

Rodríguez describe the Haitian and Cuban refugee crises of the 1970s, 80s, and 90s, and the Executive's "primary leadership role in handling each of these crises," as an example of the Executive's reliance on "powers formally delegated to it by Congress."[48] Specifically, the powers that the Executive exercised in response to these crises include parole power[49] and "the power to exclude aliens to prevent harm to the United States."[50] The Executive continues to assert these delegated powers today. For example, President Biden utilized the parole power to admit thousands of Afghans following the withdrawal of U.S. troops from Afghanistan in August 2021.[51] In the context of exclusion, former President Trump relied on the express delegation at Immigration and Nationality Act (INA) Section 212(f) to impose the infamous "Muslim Ban" in 2017.[52] A federal statute also authorizes DHS to set "national immigration enforcement policies and priorities."[53]

A second theory of executive immigration power identifies at least some inherent power rooted in the separation of powers doctrine and the Executive itself. As the head of the executive branch, the president's power to enforce immigration law can be understood as part and parcel of a more general responsibility to ensure the faithful execution of the law.[54] This "claim[ ] of inherent executive authority"[55]

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[48] *Id.* at 492–509 ("The Executive relied primarily on . . . inherent authority claims only as a backstop against potential arguments that it had exceeded its statutory authority. But the Executive ultimately wielded its delegated powers with a breadth that prompted reactions by both Congress and the courts, though the courts, in some instances . . . blessed the Executive's interpretation of its authority by invoking the President's inherent authority.").

[49] *Id.* at 501–05 (describing the historical use of the parole power in INA § 212(d)(5) and Congress's pushback to some instances of the Executive's use of the parole power).

[50] *Id.* at 497–501 (describing President Ronald Reagan's reliance on INA § 212(f) to exclude Haitians on the basis that their unauthorized entry posed a "security risk," or that it was "illegal for them to enter" because their ability to enter the United States had already been suspended).

[51] Camilo Montoya-Galvez, *U.S. to Discontinue Quick Humanitarian Entry for Afghans and Focus on Permanent Resettlement Programs*, CBS NEWS (Sept. 2, 2022, 6:27 PM), https://www.cbsnews.com/news/afghan-parole-humanitarian-entry-process-to-end-in-october-focus-on-permanent-resettlement-programs. The humanitarian parole program for Afghans was terminated October 1, 2022. *Id.*

[52] Exec. Order No. 13,769, 3 C.F.R. 272 (2017).

[53] 6 U.S.C. § 202(5); Motomura, *The President's Dilemma*, *supra* note 29, at 11.

[54] *E.g.*, Ray, *supra* note 28, at 1326; Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 673 (2014); KATE M. MANUEL & TODD GARVEY, CONG. RSCH. SERV., R42924, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES (2013) (from the report summary: "the authority to exercise prosecutorial or enforcement discretion has traditionally been understood to arise from the Constitution, not from any congressional delegation of power").

[55] Cox & Rodríguez, *supra* note 33, at 462. In addition to inherent and delegated authority, Cox & Rodríguez also argue that "a third paradigm of de facto delegation" exists, in which Congress "has delegated screening authority to the Executive" by expanding deportation grounds

is grounded in the Constitution, including the Take Care Clause, "the Vesting Clause, the Oath Clause, and the Opinions Clause."[56] It is also implicitly rooted in the separation of powers framework, under which Congress has the power to enact laws, and the president the power and duty to execute and enforce them.[57] The discretion as to when and how to enforce the law is intertwined with enforcement power itself, including in civil and administrative contexts such as immigration law.[58] Executive power to enforce immigration law is generally perceived as arising out of these broader enforcement powers,[59] as well as an "inevitable" need to exercise prosecutorial discretion due to the high number of potentially removable noncitizens in the United States and the comparative lack of funding and resources available to immigration officials.[60]

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and by leaving the president with "primary control" over the millions of unauthorized people living in the U.S. *Id.* at 463.

[56] Ray, *supra* note 28, at 1329; U.S. CONST. art. II, § 1, cl. 1, 8; *id.* art. II, § 2, cl. 1; *id.* art. II, § 3.

[57] Price, *supra* note 54, at 689–90 ("Under our constitutional scheme, Congress's role is to enact laws. The President's role, in turn, is to execute those laws . . . ."); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1925 (2015); Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 356, 367–69 (2017); *see also* Ray, *supra* note 28, at 1329.

[58] *See, e.g.*, Price, *supra* note 54, at 681–85 ("[C]ourts and executive-branch lawyers have come to see prosecutorial discretion as a central constitutional function of the executive branch. Courts, indeed, have disclaimed virtually any authority to review executive charging decisions."). Immigration law is formally administrative but has become closely intertwined with criminal law. Stumpf, *The Crimmigration Crisis*, *supra* note 14, at 379–81.

[59] *See, e.g.*, Ray, *supra* note 28, at 1326 ("Although scholars sharply debate the scope of presidential power and its textual foundations, on any leading theory of presidential power, the President plays an important supervisory role, especially in immigration enforcement."); Cox & Rodríguez, *supra* note 33, at 460–65; COX & RODRÍGUEZ, *supra* note 7, at 3.

[60] Ray, *supra* note 28, at 1326–27; Motomura, *The President's Dilemma*, *supra* note 29, at 11 ("Congress . . . provide[s] funds for immigration law enforcement at a level that is insufficient to effect the removal of all of the approximately eleven million unauthorized migrants in the United States, and which therefore makes necessary some exercise of prosecutorial discretion."). Even so, immigration enforcement is highly prioritized and well-funded by Congress. A 2019 report by the Migration Policy Institute found that "immigration enforcement agencies have become the top recipients of federal law enforcement dollars. In fiscal year (FY) 2018, Congress appointed $24 billion to fund the principal immigration enforcement agencies . . . 34 percent more than the $17.9 billion allocated for *all* other principal federal criminal law enforcement agencies combined," including the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), the Secret Service, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives. DORIS MEISSNER & JULIA GELATT, MIGRATION POL'Y INST., EIGHT KEY U.S. IMMIGRATION POLICY ISSUES: STATE OF PLAY AND UNANSWERED QUESTIONS 3–4 (2019).

The Executive's immigration enforcement power has also been recognized by the Supreme Court.[61] Early Supreme Court jurisprudence in the Chinese Exclusion era appears to recognize that there may be some independent executive authority over immigration law.[62] Later decisions in the modern era expound on this separate and inherent executive authority over immigration. As Professors Cox and Rodríguez observe, the Supreme Court recognized explicitly in *United States ex rel. Knauff v. Shaughnessy* that the Executive may "possess[ ] inherent power to regulate immigration."[63] *Reno v. American-Arab Anti-Discrimination* also recognizes the "special province" of prosecutorial discretion, noting that concerns of judicial review of prosecutorial discretion are "greatly magnified in the deportation context."[64] In *Arizona v. United States*, the Supreme Court again affirmed the Executive's "broad, undoubted power" over immigration and immigration enforcement.[65] The Court indicated that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials."[66] The Executive has therefore been recognized by the Court as having independent power over immigration, which is closely intertwined with the ability and power to exercise prosecutorial discretion.

Indeed, one of the primary modes of enforcement in "presidential immigration law" has been the setting of enforcement priorities,[67] which inherently involves the

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[61] Wadhia, *supra* note 45, at 1295–97; Cox & Rodríguez, *supra* note 33, at 482 ("In short, for over a century the Supreme Court's doctrine has envisioned two quite different congressional-executive relationships in the immigration context.").

[62] Chae Chan Ping v. United States, 130 U.S. 581, 606–07 (1889) ("The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments."); Fong Yue Ting v. United States, 149 U.S. 698, 711–12 (1893) ("The constitution of the United States speaks with no uncertain sound upon this subject. That instrument, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power . . . and has made it his duty to take care that the laws be faithfully executed."); Cox & Rodríguez, *supra* note 33, at 469–74 (citing *Chae Chan Ping* and *Fong Yue Ting*).

[63] Cox & Rodríguez, *supra* note 33, at 474–76 ("The Court's statement . . . could be dismissed as an oddity . . . . Still, the statement represents perhaps the most explicit articulation of the view of inherent executive authority over immigration . . . ."); United States *ex rel.* Knauff v. Shaughnessy, 338 US 537, 543 (1950).

[64] Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489–90 (1999) (discussing concerns such as obstacles to routine enforcement and infringement of the Executive's foreign affairs); Motomura, *The President's Dilemma*, *supra* note 29, at 13.

[65] Arizona v. United States, 567 U.S. 387, 394 (2012); Motomura, *The President's Dilemma*, *supra* note 29, at 11–12; COX & RODRÍGUEZ, *supra* note 7, at 10 (The Supreme Court has "invalidat[ed] aggressive state enforcement efforts and affirm[ed] the centrality of federally dictated enforcement discretion to the construction of immigration policy.").

[66] *Arizona*, 567 U.S. at 396.

[67] COX & RODRÍGUEZ, *supra* note 7, at 115–19; Motomura, *The President's Dilemma*, *supra* note 29, at 6–7; Muzaffar Chishti & Randy Capps, *Biden Immigration Enforcement Priorities*

exercise of prosecutorial discretion at some level.[68] Because these priorities generally change from administration to administration, enforcement priorities tend to reflect the political and public perceptions that a president may be attempting to manage, as well as the state of current migration trends.[69] The exercise of prosecutorial discretion in the immigration context is grounded in at least three general theories: first, that the government has limited resources and must allocate resources and enforcement selectively; second, that "compelling equities" warrant prosecutorial mercy; and third, that prosecutorial discretion serves as a pressure-release valve for the tension caused by Congressional inaction and public demand for policy change.[70]

Examples of prosecutorial discretion in the immigration context include enforcement decisions made as to individuals, such as when an officer "chooses not to bring legally valid charges against a person because of the person's family ties in the United States or other equities."[71] That the Executive may exercise prosecutorial discretion in individual cases is "uncontroverted."[72] Prosecutorial discretion has also been exercised as to groups or classes of people, though there are "residual uncertainties" about the permissible scope of such discretion.[73] Broader policies that call for different treatment of certain categories of noncitizens or offences on the basis of prioritizing limited resources may be more permissible than policies that make similar classifications on the basis of political or policy preference, as executive discretion is still restricted in its role as enforcer of law, rather than maker of law.[74]

Emphasize a Multi-Dimensional View of Migrants, MIGRATION POL'Y INST. (Oct. 28, 2021), https://www.migrationpolicy.
org/article/biden-immigration-enforcement-priorities ("[P]residential administrations since 1976 have recognized the need to establish priorities for immigration enforcement.").

[68] *See* Ray, *supra* note 28, at 1326–28 ("Discretion does not disappear; rather, it migrates . . . ."); Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1273–75 (2015) [hereinafter Stumpf, *D(e)volving Discretion*] (describing how Secured Communities "devolved discretion to state and local criminal justice actors from federal immigration authorities"); Motomura, *The President's Dilemma*, *supra* note 29, at 6–7; HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 27 (2014).

[69] *See* Chishti & Capps, *supra* note 67 (describing the historical span of enforcement priorities as a "seesaw"); Ray, *supra* note 28, at 1329 ("The President heads the immigration bureaucracy and serves as its face and as a focal point for public accountability.").

[70] Wadhia, *supra* note 45, at 1291–92.

[71] *Id.* at 1286.

[72] Rubenstein, *supra* note 40, at 104–05.

[73] *Id.* at 106–07; Wadhia, *supra* note 45, at 1288–89 (also identifying DACA and the now-defunct Deferred Action for Parents of American and Lawful Permanent Residents (DAPA) program as further examples of the use of prosecutorial discretion under the Obama administration).

[74] Rubenstein, *supra* note 40, at 104–07; Wadhia, *supra* note 45, at 1291.

The exercise of prosecutorial discretion—when and how to enforce—is "a decision generally committed to an agency's absolute discretion."[75] The presumption of nonreviewability of agency enforcement decisions specifically in the immigration enforcement context has been recognized by the Supreme Court on multiple occasions.[76] However, this presumption may be rebutted; there is a narrow exception to reviewability of enforcement decisions when the exercise of discretion is done "in contravention of congressional will."[77] Executive enforcement power, and the discretion that accompanies it, is therefore not unlimited.

C. State Power

The president's "extraordinary power" in immigration law, in conjunction with the federal government's general plenary power, appears to leave little room for states to maneuver. Yet states have long been permitted to serve some role in the regulation of immigration,[78] including in the cooperation (or non-cooperation) of states with federal immigration agencies and officers,[79] and in the regulation of noncitizens within states, especially with regards to rights and access to resources such as education, drivers' licenses, health care, and public benefits.[80] This distinction—laws governing the entry and removal of noncitizens, versus the regulation of noncitizens once they are physically present in the United States—has been classified as immigration law and alienage law, respectively.[81] States generally

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[75] Heckler v. Chaney, 470 U.S. 821, 831 (1985); Motomura, *The President's Dilemma*, *supra* note 29, at 12.

[76] *See, e.g.*, Arizona v. United States, 567 U.S. 387, 396 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials."); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 490 (1999) (finding that concerns such as enforcement priorities and plans, strength of a case, deterrence value, and "prosecutorial effectiveness" are "greatly magnified in the deportation context"); Motomura, *The President's Dilemma*, *supra* note 29, at 11–14.

[77] Rubenstein, *supra* note 40, at 104–05; *Heckler*, 470 U.S. at 832–33.

[78] Stumpf, *States of Confusion*, *supra* note 18, at 1566–71 (describing the early history of state regulation of noncitizens and immigration); COX & RODRÍGUEZ, *supra* note 7, at 134 ("Despite their limited legal authority, however, the states long have been sites for political mobilization around immigration.").

[79] Manheim, *supra* note 39, at 974–75; Gulasekaram & Ramakrishnan, *supra* note 19, at 164–68; *see also* Ming H. Chen, *Immigration and Cooperative Federalism: Toward a Doctrinal Framework*, 85 U. COLO. L. REV. 1087, 1092–94 (2014) (proposing a model of "cooperative federalism" that would clarify the role of states and the federal government regarding regulation related to immigration).

[80] Manheim, *supra* note 39, at 1004–06; Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 202–03 (1994) [hereinafter Motomura, *Immigration and Alienage*]; Chen, *supra* note 79, at 1091.

[81] Motomura, *Immigration and Alienage*, *supra* note 80, at 202–03 ("As traditionally understood, 'immigration law' concerns the admission and expulsion of aliens, and 'alienage law'

have been permitted to enact alienage law.[82] Whether in-state regulations are less or more restrictive depends on the politics and policies of each individual state itself, resulting in a patchwork of law and policy from state to state, and even within municipalities.[83] State alienage law is generally subject to strict scrutiny when challenged as violating the Equal Protection Clause of the U.S. Constitution.[84]

Preemption is the Achilles heel of many state laws or policies that stray from alienage law and into immigration law.[85] The one-two punch of structural preemption and plenary power makes it even more difficult for states to capture some role in immigration enforcement due to the exclusivity of federal power in that function.[86] Even when states ostensibly are exercising state police power over alienage and not over immigration, they still may be preempted due to the sheer breadth of federal plenary power.[87]

Despite the seemingly clean lines between state and federal power over alienage law and immigration law, the reality on the ground is much murkier, particularly in the context of immigration enforcement. Since the 1980s, Congress and the Executive have sought to use states in different ways to further their immigration enforcement agendas.[88] For example, the Immigration Reform and Control Act of 1986 (IRCA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) granted states a larger role in enforcement of federal

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embraces other matters relating to their legal status. . . . The line between 'immigration' and 'alienage' is elusive."); Stumpf, *States of Confusion*, *supra* note 18, at 1581–82; Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. U. L. REV. 879, 888–92 (2015).

[82] Motomura, *Immigration and Alienage*, *supra* note 80, at 202–03; Stumpf, *States of Confusion*, *supra* note 18, at 1581–82.

[83] Monica W. Varsanyi, Paul G. Lewis, Doris Marie Provine & Scott Decker, *A Multilayered Jurisdictional Patchwork: Immigration Federalism in the United States*, 34 LAW & POL'Y 138, 140–47 (2012).

[84] Stumpf, *States of Confusion*, *supra* note 18, at 1581–82. In contrast, equal protection claims in the immigration context against the federal government are by and large subject to something resembling rational basis review. *Id.*; Trump v. Hawaii, 138 S. Ct. 2392, 2419–20 (2018) (assuming without deciding to apply rational basis review to former President Trump's proclamation banning entry of noncitizens from certain Muslim-majority countries).

[85] *See* Abrams, *supra* note 34, at 604, 606.

[86] *Id.* at 615–18 ("The core immigration functions of admission and removal, then, are exclusively federal, and will *always* preempt state efforts to legislate in the area. . . .") (emphasis added).

[87] *Id.* at 618–26 ("[I]n most of the preemption cases challenging state alienage statutes that the Supreme Court has heard, the Court has applied an analysis that folds in the national sovereignty concerns . . . by construing the specific alienage regulation as regulations of immigration in disguise."). Abrams notes that this jurisprudence, however, was "muddled" until the decision in *Arizona*, which Abrams argues was decided under a "plenary power preemption" doctrine. *Id.* at 626–34. Margaret Hu writes that the preemption doctrine in immigration cases is being weakened if not displaced by "mirror-image theory." Hu, *supra* note 1, at 574–79.

[88] Stumpf, *States of Confusion*, *supra* note 18, at 1565.

immigration law.[89] Secure Communities, established by the administration of former President George W. Bush, and its descendant, the Priority Enforcement Program, established by the administration of former President Obama, "leverage[d] state and local arrests of noncitizens by using technology to increase federal removals."[90] The result has been the "domestication of immigration law" and the close intertwining of state and federal roles in immigration enforcement.[91]

But the states have not been passive recipients of enforcement power, nor have they always been cooperative partners in federal enforcement initiatives or policies. Rather, the states and the Executive operate in a feedback loop due to their unique powers of policymaking and regulation. For example, IIRIRA was inspired by a state law in California[92] and serves as an example of state policymaking inspiring federal law. "Sanctuary" jurisdictions demonstrate subfederal-level resistance and non-cooperation with federal immigration policies.[93] Additionally, despite the breadth of the federal government's plenary power and preemption doctrine, states have legislated in immigration enforcement with some success; for example, the Arizona laws at issue in *Arizona v. United States* are an example of state legislation that was

[89] Hu, *supra* note 1, at 562–65. IRCA imposed "federal civil and criminal penalties for knowingly hiring undocumented workers if the employers failed to adequately screen the identity and immigration documents of new hires." *Id.* at 564 (citing Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 274A(e), (f), 100 Stat. 3359, 3366–68 (1986) (codified as amended at 8 U.S.C. § 1324a)). IIRIRA "required states to screen the identity and immigration status of those receiving federal benefits." *Id.* at 565 (citing Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, tit. V, 110 Stat. 3009-546 (1996) (codified as amended in sections of 8 U.S.C. and 18 U.S.C.)).

[90] Stumpf, *D(e)volving Discretion*, *supra* note 68, at 1260, 1265–71, 1281–84 (describing Secure Communities and the Priority Enforcement Program).

[91] Stumpf, *States of Confusion*, *supra* note 18, at 1565 ("The rise of crimmigration law has transformed immigration law from something the federal government is uniquely competent to control—foreign policy—to something states are experts in—law enforcement."); Hu, *supra* note 1, at 562–66.

[92] Stumpf, *States of Confusion*, *supra* note 18, at 1590–91 ("IIRIRA shared Proposition 187's strong restrictionist direction and mirrored its use of criminal law to implement immigration policy. For the first time, it defined certain immigration-related conduct as criminal or increased existing criminal penalties, increased resources for enforcement, and expanded the grounds for exclusion and deportation." (citations omitted)); *see also* IIRIRA, 110 Stat. 3009-546; *Proposition 187: Illegal Aliens. Ineligibility for Public Services. Verification & Reporting. Initiative Statute.*, CALIFORNIA BALLOT PAMPHLET, NOV. 8, 1994 GENERAL ELECTION, at 50–55, 91–92, http://repository.uchastings.edu/ca_ballot_props/1091.

[93] Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding "Sanctuary Cities"*, 59 B.C. L. REV. 1703, 1709–18 (2018) (defining "sanctuary" jurisdictions and describing their resistance to former President Trump's immigration policies).

preempted by federal law[94] and state legislation that survived judicial review because it mirrored or parroted federal law.[95]

Immigration "detainers" are a prime example of subfederal cooperation and resistance to executive policymaking that seeks—or mandates—state cooperation, as well as the limits of federal power over states. Detainers are issued by federal officers to request that state officials continue to detain a noncitizen who is already in local custody so that immigration officials may take them into federal custody.[96] Detainers have existed in some form as far back as 1950, but were not officially codified into the INA until 1986.[97] There was "considerable uncertainty" for decades as to whether detainers required state cooperation or were simply a "request for notice" to federal authorities before the local entity released the noncitizen.[98] For instance, the detainer forms used different language over the years, sometimes suggesting the detainer was optional, sometimes suggesting the detainer was mandatory, and the federal government itself never was consistent as to its interpretation of whether detainers were mandatory or optional.[99] Detainers were a primary tool of Secure Communities, which fashioned the detainer as mandatory.[100] "This seemingly cooperative federalism allowed the federal government to reap the harvest of police arrests of noncitizens and detainer decisions of line-level immigration agents."[101]

But the apparent mandatory nature of detainers raised serious questions as to their constitutionality. The Supreme Court has held "in no uncertain terms" that the anti-commandeering doctrine implicit in the Tenth Amendment prohibits the federal government from compelling local officials to implement or enforce federal law.[102] For example, in *New York v. United States*, the Supreme Court found that

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[94] Arizona v. United States, 567 U.S. 387, 400–10 (2012); Abrams, *supra* note 34, at 626–34.

[95] *Arizona*, 567 U.S. at 411–15; Hu, *supra* note 1, at 539–42.

[96] Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 173–85 (2008) (describing the issuance of detainers in practice).

[97] Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 203 (2013) [hereinafter Lasch, *Rendition Resistance*]; Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1751(d)(3), 100 Stat. 3207, 3207–47 to 3207–48 (codified at 8 U.S.C. § 1357(d)).

[98] Lasch, *Rendition Resistance*, *supra* note 97, at 205–06.

[99] *Id.* at 205–09.

[100] Stumpf, *D(e)volving Discretion*, *supra* note 68, at 1270. The impact of Secure Communities on immigration enforcement due in part to the issuance of mandatory detainers was profound, "operat[ing] during a period that saw the highest rates of deportation in U.S. history. . . . ICE reported that by August 31, 2012, the government had deported over 166,000 noncitizens identified by Secure Communities." *Id.* at 1270–71. Secure Communities was dogged with criticism and subfederal resistance. *Id.* at 1271–75.

[101] *Id.* at 1271.

[102] New York v. United States, 505 U.S. 144, 160–62 (1992) ("While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the

federal commandeering of state officials was unconstitutional because it threatened the power balance between the states and the federal government, allowing the federal government to "evade accountability," utilize state resources, and usurp state- and local-level policymaking.[103] By 2018, a series of court decisions affirmed that mandatory detainers violated the anti-commandeering doctrine and were therefore unconstitutional.[104] Many jurisdictions now no longer respect detainers as mandatory, though other jurisdictions have passed laws requiring their officers to comply with detainers.[105]

In sum, the Executive has long played a significant role in immigration policymaking, but executive power and the exercise of prosecutorial discretion is constrained by the Constitution and by Congress. The states can play a significant role in immigration enforcement, oftentimes at the invitation of the federal government, but also as resistors of executive immigration policies and enforcement initiatives. However, the states' abilities to "resist presidential action on immigration" has generally been "limited."[106]

Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."); Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."); Lasch, *Rendition Resistance*, *supra* note 97, at 209–10.

[103] Hu, *supra* note 1, at 553–54; *New York*, 505 U.S. at 168–69; *Printz*, 521 U.S. at 928 ("It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority.").

[104] *See* Galarza v. Szalczyk, 745 F.3d 634, 643–45 (3d Cir. 2014); Miranda-Olivares v. Clackamas County, No. 12-cv-02317, 2014 WL 1414305, at *4–8 (D. Or. Apr. 11, 2014); Mercado v. Dallas County, Texas, 229 F. Supp. 3d 501, 514–15 (N.D. Tex. 2017); Lasch et al., *supra* note 93, at 1730–33 (describing the court decisions that found that mandatory detainers violated the Tenth Amendment, as well as the Fourth Amendment).

[105] Lasch et al., *supra* note 93, at 1732; *National Map of Local Entanglement with ICE*, IMMIGRANT LEGAL RES. CTR. (Nov. 13, 2019), https://www.ilrc.org/local-enforcement-map; Kate Evans, *Immigration Detainers, Local Discretion, and State Law's Historical Constraints*, 84 BROOK. L. REV. 1085, 1090 (2019) ("State law is thus a key source for local resistance or cooperation, and states take different approaches to detainer enforcement. For instance, Texas and California provide a recent example with Texas passing a law to facilitate the participation of local officers in federal immigration enforcement and California doing the opposite."). Even in sanctuary jurisdictions, however, there are signs of ongoing communication and collaboration with ICE. *See, e.g.*, Troy Brynelson, *Clark County Jail's Communications with ICE Raise Legal Questions*, OR. PUB. BROAD. (July 2, 2021, 1:01 PM), https://www.opb.org/article/2021/07/01/clark-county-jail-communications-with-ice-raise-legal-questions/; *Protecting Immigrant Rights: Is Washington's Law Working?*, UNIV. WASH.: CTR. FOR HUM. RTS. (Sept. 2, 2021, 2:10 PM), https://jsis.washington.edu/humanrights/2021/08/11/protecting-immigrant-rights-is-washingtons-law-working.

[106] Gulasekaram & Ramakrishnan, *supra* note 19, at 169 ("[T]he more powerful trend appears to be the way in which the President can use states to help entrench his policy vision on immigration, thereby gaining a stronger position vis-a-vis Congress."); Hu, *supra* note 1,

Yet these tenets of state and executive immigration enforcement power may be on the cusp of a tectonic shift thanks in part to state challenges to the Biden administration's enforcement priorities. *United States v. Texas* is distinguishable from prior state lawsuits to executive action because it directly targets the ability of the Executive to create policies guiding the exercise of prosecutorial discretion.[107] Even the litigation over the DACA and DAPA programs, also led by Texas, did not attack the ability of the Executive to exercise prosecutorial discretion, or the Executive's ability to establish enforcement priorities.[108] The states have thus far not been able to actually legislate in ways that interfere with executive power or, more broadly, federal power in immigration law. Rather, *United States v. Texas* is a prime example of the ways in which states are using litigation to reverse-commandeer federal resources for immigration enforcement, essentially allowing them to usurp federal immigration enforcement policy.

II. *UNITED STATES V. TEXAS* AND THE REVERSE-COMMANDEERING OF IMMIGRATION ENFORCEMENT POWER

In the months following President Biden's inauguration, the administration issued two memoranda regarding immigration enforcement priorities. The first, issued January 20, 2021, called for DHS to complete a review of "policies and practices concerning immigration enforcement" and institute "interim enforcement priorities."[109] The enforcement priorities included individuals who threaten

at 620–21 ("States may not be able to force the federal government to do anything in [the] realm of immigration policy, but the same cannot be said about the ability of states to pressure the federal government and to effect policy changes through such pressure.").

[107] *See* Shoba Sivaprasad Wadhia, *Oral Arguments in* U.S. v. Texas *and the Challenge to Prosecutorial Discretion in Immigration*, AM. CONST. SOC'Y (Dec. 1, 2022), https://www.acslaw.org/expertforum/oral-arguments-in-u-s-v-texas-and-the-challenge-to-prosecutorial-discretion-in-immigration/.

[108] Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship & Immigr. Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't, and R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot. (Nov. 20, 2014), https://www.dhs.gov/publication/exercising-prosecutorial-discretion-respect-individuals-who-came-united-states-children. *See* Texas v. United States, 809 F.3d 134, 166 (5th Cir. 2015) (noting the general exception to reviewability of enforcement decisions under the Administrative Procedure Act (APA) and distinguishing deferred action programs from the Obama administration's enforcement priorities); Motomura, *The President's Dilemma*, *supra* note 29, at 7–8.

[109] Memorandum from David Pekoske, Acting Sec'y, Dep't of Homeland Sec., to Troy Miller, Senior Off., U.S. Customs & Border Prot., Tae Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, and Tracey Renaud, Senior Off., U.S. Citizenship & Immigr. Servs. (Jan. 20, 2021), https://www.dhs.gov/publication/memorandum-acting-secretary-pekoske-immigration-enforcement-policies [hereinafter January 2021 Memo]. *See* SMITH, *supra* note 31, at 1 (discussing Biden administration immigration policies and legal challenges).

national security, border security, and public safety, and explicitly did not "prohibit[ ] the apprehension or detention" of noncitizens who did not qualify as priorities.[110] The January 2021 memo also ordered a 100-day moratorium on removals due to "limited resources" that needed to be allocated and "prioritized," in part to "enhance border security and conduct immigration and asylum processing," as well as to ensure that the department's resources were directed at the "highest enforcement priorities."[111] The second memorandum was issued February 18, 2021. It implemented the enforcement priorities identified in the January 2021 memo and required "approval, coordination, and data collection" of "enforcement and removal actions" taken.[112]

DHS issued a third and final enforcement priority memorandum on September 30, 2021.[113] The Final Memo identified the same three categories of noncitizens who should be prioritized for enforcement as those identified in the January and February 2021 Memos: national security threats, public safety threats, and border security threats.[114] The Final Memo also allowed for consideration of aggravating and mitigating factors that could "militate" for or against enforcement action.[115] The Final Memo also put in place a review process to ensure "quality and consistency in decision-making" in enforcement actions across the agency.[116] The enforcement priority guidelines embodied in the Final Memo represented a

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[110] January 2021 Memo, *supra* note 109, at 3. *See* SMITH, *supra* note 31, at 3.

[111] January 2021 Memo, *supra* note 109, at 3.

[112] Memorandum from Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't. to All ICE Employees 5 (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf [hereinafter February 2021 Memo].

[113] Memorandum from Alejandro N. Mayorkas, Sec'y, Dep't of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, Troy Miller, Acting Comm'r, U.S. Customs & Border Prot., Ur Jaddou, Dir., U.S. Citizenship & Immigr. Servs., Robert Silvers, Under Sec., Off. of Strategy, Pol'y, & Plans, Katherine Culliton-Gonzalez, Officer for C.R. & C.L., Off. for C.R. & C.L., and Lynn Parker Dupree, Chief Priv. Officer, Priv. Off. 1 (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [hereinafter Final Memo]; *see also* Eileen Sullivan, *Biden Guidelines Direct ICE to Focus on Immigrants Who Pose Safety Threat*, N.Y. TIMES (Oct. 27, 2021), https://www.nytimes.com/2021/09/30/us/politics/biden-ice-immigration.html. The courts, parties, news media, and advocacy community refer to the Final Memo as the Mayorkas Memo, the Final Memo, the Enforcement Priority Guidelines, or simply the guidelines. For simplicity, this article calls it the Final Memo, which has most pervasively been used in the analyzed court decisions.

[114] Final Memo, *supra* note 113, at 3; *accord* Texas v. United States, 606 F. Supp. 3d 437, 454–55 (S.D. Tex.), *aff'd*, 40 F.4th 205 (5th Cir.), *rev'd*, 143 S. Ct. 1964 (2023); Rebekah Wolf, *Supreme Court Refuses to Restore Biden's Immigration Enforcement Priorities for Now*, AM. IMMIGR. COUNCIL: IMMIGR. IMPACT (July 25, 2022), https://immigrationimpact.com/2022/07/25/supreme-court-blocks-biden-enforcement-priorities/.

[115] Final Memo, *supra* note 113, at 3–4.

[116] *Id.* at 6.

dramatic departure from the enforcement guidelines of the Trump administration and more closely resembled the enforcement priorities of the Obama administration.[117] The Trump guidelines effectively did away with any priorities, making all deportable noncitizens in the nation potential targets for arrest and removal regardless of their circumstances, backgrounds, or criminal histories.[118] In contrast, the Final Memo represented a more holistic approach to enforcement, taking into account not only a noncitizen's immigration status and criminal history, but also factors such as age; length of presence in the United States; physical or mental condition; military service; the length of time since any existing offense, evidence of rehabilitation, and the vacation or expungement of a conviction; and the impact of a noncitizen's removal on family in the United States.[119]

A. Procedural Posture

Texas and Louisiana promptly filed suit seeking to enjoin the implementation and enforcement of the January 2021 Memo, and subsequently the February 2021 Memo, on the grounds that the memoranda violated the APA and the Take Care Clause of the Constitution, as well as an agreement made between DHS, Texas, and Louisiana during the last days of the Trump presidency.[120] Ruling on an initial motion for a preliminary injunction in August 2021, the District Court of the Southern District of Texas found that Texas and Louisiana were substantially likely to succeed on the merits of their claims, enjoining the implementation of the enforcement priorities.[121]

After the filing of an amended complaint following the issuance of the Final Memo, the District Court of the Southern District of Texas vacated the Final Memo in June 2022.[122] That decision halted any implementation of the enforcement priorities. The Fifth Circuit denied a motion for stay pending appeal—effectively affirming the District Court's decision—but not before the Supreme Court granted

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[117] *Comparison of the Obama, Trump, and Biden Administration Immigration Enforcement Priorities*, LAW ENF'T IMMIGR. TASK FORCE (Oct. 27, 2021), https://leitf.org/2021/04/enforcement-priorities/; Chishti & Capps, *supra* note 67.

[118] Chishti & Capps, *supra* note 67.

[119] Final Memo, *supra* note 113, at 3–4; Chishti & Capps, *supra* note 67 ("[T]he Biden guidelines require thorough assessment of each case, instead of taking an approach that prioritizes entire categories of individuals for enforcement and excludes others.").

[120] Texas v. United States, 555 F. Supp. 3d 351, 371–72 (S.D. Tex. 2021) (citing 5 U.S.C. §§ 553, 706(2)(A) & (C); U.S. CONST. art. II, § 3); Anil Kalhan, *Immigration Enforcement, Strategic Entrenchment, and the Dead Hand of the Trump Presidency*, U. ILL. L. REV. ONLINE, Apr. 30, 2021, at 46, 48–49.

[121] *Texas*, 555 F. Supp. 3d at 371–72, 426.

[122] Texas v. United States, 606 F. Supp. 3d 437, 502 (S.D. Tex.), *aff'd*, 40 F.4th 205 (5th Cir.), *rev'd*, 143 S. Ct. 1964 (2023); SMITH, *supra* note 31, at 4.

certiorari before judgment on the District Court's decision.[123] Separately, Arizona, Ohio, and Montana also filed suit to enjoin implementation of the Final Memo.[124] A federal district court in Ohio preliminarily enjoined the Memo, but the Sixth Circuit stayed the injunction, finding that the Executive had the authority to set enforcement priorities, creating a split between the Sixth and Fifth Circuit.[125]

In granting certiorari, the Supreme Court denied the federal government's application for stay, preventing the Biden administration from implementing the enforcement priority guidelines.[126] The Supreme Court granted certiorari on the questions of whether the states have standing; whether the Final Memo violates 8 U.S.C. §§ 1226(c) and 1231(a)(2), which the plaintiff states argue mandate detention; and whether the jurisdiction-stripping statute at 8 U.S.C. § 1252(f)(1) prevents the vacatur of the memo by the lower courts.[127]

As of writing, the enforcement priorities remained enjoined.[128] The Supreme Court heard oral arguments on November 29, 2022.[129]

B. Standing and the Entitlement to Federal Resources

To have standing, plaintiffs must establish injury-in-fact; that the injury is traceable to the action or conduct at issue; and that the injury may be remedied by the reviewing court.[130] Plaintiff states may receive "special solicitude" in standing

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[123] Texas v. United States, 40 F.4th 205, 213 (5th Cir. 2022); Texas v. United States, 606 F. Supp. 3d 437 (S.D. Tex. 2022), *cert. granted*, 143 S. Ct. 51 (2022).

[124] Arizona v. Biden, 593 F. Supp.3d 676, 691–92 (S.D. Ohio), *rev'd*, 40 F.4th 375 (6th Cir. 2022).

[125] Arizona v. Biden, 40 F.4th 375, 380, 393–94 (6th Cir.), *rev'g* 593 F. Supp. 3d 676 (S.D. Ohio 2022). *See* SMITH, *supra* note 31, at 5.

[126] United States v. Texas, 143 S. Ct. 51 (2022); Adam Liptak, *Supreme Court Refuses for Now to Restore Biden Plan on Immigration Enforcement*, N.Y. TIMES (July 21, 2022), https://www.nytimes.com/2022/07/21/us/politics/supreme-court-biden-immigration.html.

[127] United States v. Texas, 143 S. Ct. at 51. *See generally* 8 U.S.C. §§ 1226(c), 1231(a)(2), 1252(f)(1) (2018). The challenges to the January Memo and February 2021 Memo are substantively similar to the challenges raised as to the Final Memo. *See* SMITH, *supra* note 31, at 4–5; Howe, *supra* note 22. Because of this, the fact that the Final Memo is the agency's final guidance with respect to enforcement priority guidelines, and that the Supreme Court ultimately granted certiorari on the District Court's decision regarding the Final Memo, this Note will primarily focus on the Final Memo.

[128] The Supreme Court's decision on June 23, 2023 reversed the Fifth Circuit's ruling, finding that the states lacked standing and allowing the Biden administration to implement the Final Memo. United States v. Texas, 143 S. Ct. 1964, 1976 (2023). Due to the timing of publication, this Note reflects the legal landscape as it existed prior to the Supreme Court's decision.

[129] Transcript of U.S. v. Tex., *supra* note 26, at 1.

[130] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992); Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 517 (2007).

analyses, whereby the standing analysis takes into account the impact of conduct or action on a state's "quasi-sovereign" interests.[131] The District Court's standing analysis rests largely on Texas's alleged interests and injuries.[132] The District Court found that Texas satisfied standing requirements, and this analysis was fully affirmed by the Fifth Circuit.[133]

First, the District Court found that Texas satisfied the injury-in-fact standing requirement on the basis that the Final Memo "harms Texas in two ways: financially and as *parens patriae*."[134] Texas's alleged costs rely on an assumption that the Final Memo will lead to fewer numbers of arrests and detainers, and therefore lead to greater numbers of noncitizens—specifically "criminal aliens" and "illegal aliens"—in Texas.[135] Texas's specific financial injuries due to the guidelines allegedly result in increased costs from "detention, mandatory supervision, or parole" of "criminal aliens" in the absence of federal detention of those noncitizens; the cost of future crimes committed by "criminal aliens" after their "release" into Texas, including the cost of the crimes themselves as well as the cost of investigation and prosecution; and the provision of healthcare and education costs to undocumented noncitizens, including education of children of noncitizens with criminal records who would allegedly not be deported under the new enforcement guidelines.[136] The District Court found that the harms to Texas were "substantial."[137]

Second, the District Court found that the Final Memo was traceable as the cause of Texas's injuries because "increases in the number of criminal aliens and

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[131] *Massachusetts*, 549 U.S. at 517–20.

[132] Texas v. United States, 606 F. Supp. 3d 437, 466–68 (S.D. Tex.), *aff'd*, 40 F.4th 205 (5th Cir.), *rev'd*, 143 S. Ct. 1964 (2023).

[133] *Id.*; Texas v. United States, 40 F.4th 205, 215–19 (5th Cir.), *aff'g* 606 F. Supp. 3d 437 (S.D. Tex. 2022).

[134] *Texas*, 606 F. Supp. 3d at 467.

[135] First Amended Complaint at 21, Texas v. United States, 606 F. Supp. 3d 437 (S.D. Tex. 2022) (No. 6:21-CV-00016). As discussed *infra*, Texas's claims also rely on an assumption that the statutes in question mandate detention. *See infra* Section II.C.

[136] First Amended Complaint, *supra* note 135, at 21–24 ("Texas spends hundreds of millions of dollars per year providing services to illegal aliens. Those services include education services and healthcare, as well as many other social services broadly available in Texas."). The INA does not distinguish between "grave or slight" offenses; unlike in criminal law, where punishment is generally thought to be proportionate to the crime, "[t]he INA almost invariably prescribes deportation as the sanction for an immigration violation." Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1690–93 (2009). In a country where a noncitizen is equally as deportable for murder as they are for "violating the terms of a visa by working without authorization," *id.* at 691, does the quantity of arrests rather than quality of arrests actually serve the states' interests? The states' complaint, and the decisions issued by the District Court and Fifth Circuit, do not address the impact of quantity of arrests as opposed to the quality of those arrests, nor do they seem to distinguish between the different convictions that can lead to deportation.

[137] *Texas*, 606 F. Supp. 3d at 467.

aliens with final orders of removal . . . has caused, and continues to cause, increases in Texas's expenditures on public services such as healthcare and education," in addition to increased custodial costs due to the federal government's purported failure to detain in contravention of Congressional mandates.[138]

Finally, the District Court found that a vacatur of the Final Memo would address Texas's injuries by decreasing the "number of criminal aliens in the States' prisons and the number of aliens who are subject to a final order of removal being released into the States."[139]

The District Court's standing analysis calls for some suspension of disbelief. Injury-in-fact requires a "legally-protected interest which is concrete and particularized" and that is "actual or imminent, not 'conjectural or hypothetical.'"[140] Yet many of Texas's claimed injuries are arguably conjectural *and* hypothetical. For example, the chain of events that would need to occur to link Texas's cost of educating children of deportable noncitizens to Immigration and Customs Enforcement's (ICE) *potential* forbearance of enforcement against a deportable noncitizen is arguably far more attenuated and hypothetical than the chain of events that were so attenuated as to bar standing to the respondents in *Clapper v. Amnesty International*.[141] Deportation of a noncitizen parent and their child would require not only that ICE choose to take enforcement action against the parent, but also would require a number of other events to occur, such as a finding that the noncitizen is in fact deportable; that the noncitizen is either ineligible for or is denied relief from removal; that the noncitizen is ineligible for some other immigration status that may help them avoid deportation; and ultimately for the noncitizen to be actually deported.[142] This also assumes that the child would accompany the

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[138] *Id.*

[139] *Id.* at 468. Of Texas's standing, the Fifth Circuit found that "Texas's injuries as a result of the Final Memo are difficult to deny . . . ." Texas v. United States, 40 F.4th 205, 216 (5th Cir.), *aff'g* 606 F. Supp. 3d 437 (S.D. Tex. 2022).

[140] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (citations omitted).

[141] Clapper v. Amnesty Int'l USA, 568 U.S. 398, 410–14 (2013) ("[R]espondents' theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending. . . . We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors."). In *Clapper*, the "highly attenuated chain of possibilities" included the government actually acting to surveil the respondents, the use of the statute at issue to authorize such surveillance, seeking and receiving authorization from the Foreign Intelligence Surveillance Court to conduct the surveillance, and the government then actually obtaining respondents' correspondence. *Id.*

[142] *See The Removal System of the United States: An Overview*, AM. IMMIGR. COUNCIL (Aug. 9, 2022), https://www.americanimmigrationcouncil.org/research/removal-system-united-states-overview; Em Puhl, *Overview of the Deportation Process: A Guide for Community Members & Advocates*, IMMIGRANT LEGAL RES. CTR. (Dec. 21, 2018), https://www.ilrc.org/sites/default/files/resources/overview_deport_process-20181221.pdf.

parent when they are deported; it is not uncommon for children whose parents are deported to remain behind in the United States.[143] Texas's alleged injuries stemming from the cost of educating children whose parents are eligible for removal under INA Section 236(c) may not even be resolved by deporting the noncitizen parent. Any injury Texas may incur from the cost of education is therefore quite attenuated if not outright conjectural. The District Court does not substantially analyze this or the other claimed injuries in the standing analysis, focusing primarily on alleged costs relating to crime and state detention.[144]

The closest Texas comes to any concrete and actual injury is the cost it allegedly would incur if the federal government were to detain fewer noncitizens, which is perhaps why the District Court's decision rests on these alleged injuries. Texas claims that the federal government's "failure to detain criminal aliens as required by federal law" increases the number of noncitizens Texas "must detain" in the state's own prisons,[145] and that the "release of criminal aliens into Texas communities" imposes costs such as "the effects of crimes they commit while free, the cost of investigating and prosecuting those crimes, the costs of monitoring or supervising criminal aliens, and the costs of social services . . . ."[146] The District Court found that this injury satisfied all constitutional standing requirements:

> [A]liens who are subject to mandatory detention, but that ICE declined to detain, have already committed, and are committing, more crimes in Texas. . . . This has led to aliens remaining in TDCJ custody longer than they

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[143] *See U.S. Citizen Children Impacted by Immigration Enforcement*, AM. IMMIGR. COUNCIL (June 24, 2021), https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement ("As many as half-a-million U.S.-citizen children experienced the deportation of at least one parent from 2011 through 2013."); Teresa Wiltz, *If Parents Get Deported, Who Gets Their Children?*, PEW: STATELINE (Oct. 25, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/25/if-parents-get-deported-who-gets-their-children ("Between 2009 and 2013, 5 million children were living in the United States with at least one undocumented parent . . . . Nearly 80 percent of those children were U.S. citizens . . . .").

[144] Texas v. United States, 606 F. Supp. 3d 437, 467 (S.D. Tex.), *aff'd*, 40 F.4th 205 (5th Cir.), *rev'd*, 143 S. Ct. 1964 (2023). In a prior decision earlier in the procedural history of the case, Judge Drew Tipton said of these claims: "Because the States have put forth sufficient evidence to demonstrate a concrete and imminent injury regarding Texas's detention costs and *parens patriae* . . . the Court need not address the States' alleged financial injuries arising from unanticipated education and healthcare-related expenses." Texas v. United States, 555 F. Supp. 3d 351, 376 n.18 (S.D. Tex. 2021).

[145] First Amended Complaint, *supra* note 135, at 21.

[146] *Id.* at 22. According to Texas's amended complaint, it paid more than $152 million to house 9,000 "undocumented criminal aliens" in 2019. *Id.* at 21. However, immigration detention is not equivalent to criminal incarceration, and detention is not to be used punitively. *See* Stumpf, *The Crimmigration Crisis*, *supra* note 14, at 392–94 (distinguishing criminal incarceration and immigration detention).

> otherwise would, which imposes additional costs on the State of Texas. . . . So vacatur of the Final Memorandum would directly contribute to the decrease in the number of criminal aliens in the States' prisons and the number of aliens who are subject to a final order of removal being released into the States.[147]

There are numerous holes in the District Court's analysis, many of which were addressed by the Supreme Court during oral arguments.[148] And if the Supreme Court finds that the states have satisfied standing requirements in this case, the implications for state power and states' ability to challenge federal action, even outside the context of immigration law, is profound.[149] But even beyond the implications of state standing, Texas's claimed injuries and the District Court's analysis of these injuries is also notable for the ways in which the decision permits Texas to establish a right to federal resources and enforcement, allowing the states to reverse-commandeer federal enforcement resources and, by extension, the power of the Executive to set enforcement priorities.

Reverse-commandeering is simply the anti-commandeering doctrine, which has been applied to protect states from an unconstitutional incursion by the federal government, reversed to protect the federal sovereign from an unconstitutional incursion by the states into federal power.[150] And the principle that lies beneath protecting state sovereignty applies equally to the protection of federal sovereignty: "The general principle remains that one sovereign may not commandeer another sovereign to the detriment of the latter sovereign's co-equal status under our federalist system of government."[151]

Reverse-commandeering may occur when a state requires federal resources "that would not otherwise be committed" to it.[152] In *United States v. Texas*, the state

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[147] *Texas*, 606 F. Supp. 3d at 467–68.

[148] Transcript of U.S. v. Tex., *supra* note 26, at 82–94. Justices Amy Coney Barrett, Ketanji Brown Jackson, Sonia Sotomayor, and Elena Kagan questioned Texas Solicitor General Judd E. Stone, II extensively regarding standing issues including: Texas's burden to establish standing; proving a causal relationship between the injury and the Final Memo; self-infliction of injury; and special solicitude. *Id.* The Sixth Circuit addressed similar standing issues in *Arizona v. Biden*, 40 F.4th 375, 383–87 (6th Cir.), *rev'g* 593 F. Supp. 3d 676 (S.D. Ohio 2022).

[149] *See* Ann Woolhandler & Michael G. Collins, *Reining in State Standing*, 94 NOTRE DAME L. REV. 2015, 2016 (2019); Millhiser, *supra* note 27; Howe, *supra* note 27; Monyak, *supra* note 27; Frost, *supra* note 27; Hamburger & Yale-Loehr, *supra* note 20.

[150] Hu, *supra* note 1, at 538.

[151] *Id.* at 549.

[152] *See id.* at 596. Hu writes about reverse-commandeering in the context of state cooperation, and the use of "mirror-image laws" that allow a state to commandeer federal resources. By contrast, the reverse-commandeering occurring in *United States v. Texas* occurs through litigation, not legislation, and is uncooperative with the federal government, not cooperative.

rests its injury theory on the argument that it is entitled to its reliance on federal detention resources and, by extension, federal enforcement action. Any decrease in the allocation of federal resources or enforcement action, as alleged by Texas, would lead to an increase in costs that Texas must bear.[153] By embracing this argument in its standing analysis, the District Court requires the federal government to allocate to Texas the amount of resources and a level of enforcement that Texas has come to rely on. The District Court writes: "The Memoranda have resulted in ICE officers rescinding detainers and declining to take aliens into custody. . . . [T]he average per-day cost of these programs for each inmate not detained or removed [by ICE] is . . . $11,068,994."[154] The court does recognize that "DHS has never apprehended and removed all removable aliens," but nonetheless asserts that the agency is abdicating its enforcement duties by requesting a "dramatic reduction in detention bed capacity" and "persistently underutilize[ing] its existing resources since 2021."[155]

Put another way, Texas's allegation is that ICE has resources it is not using because it is underenforcing, and that Texas is entitled to those federal resources lest it need to expend more of its own money and resources to detain noncitizens that potentially would have been detained by the federal immigration officers but for the enforcement guidelines. To permit Texas standing based on these claims would likely require the federal government to maintain certain levels of spending and enforcement, at least in the state of Texas, thereby allowing Texas to reverse-commandeer federal resources to save on its own expenditures.[156]

Enforcement resources run hand-in-hand with enforcement priorities, and the reverse-commandeering of federal resources can lead to the usurpation of federal policymaking. As Justice Antonin Scalia wrote for the majority in *Printz*: "Executive action that has utterly no policymaking component is rare, particularly at an executive level as high as a jurisdiction's chief law enforcement officer."[157] Though Texas may not literally be commandeering federal officers by, for example, requiring them to enforce state law rather than federal law, Texas's alleged right to federal resources leads to the usurpation of the Biden administration's enforcement

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[153] First Amended Complaint, *supra* note 135, at 21–24; Texas v. United States, 606 F. Supp. 3d 437, 491–92 (S.D. Tex.), *aff'd*, 40 F.4th 205 (5th Cir.), *rev'd*, 143 S. Ct. 1964 (2023).

[154] Texas v. United States, 606 F. Supp. 3d at 462–63.

[155] *Id.* at 452–53.

[156] *See* Transcript of U.S. v. Tex., *supra* note 26, at 81–82 (Justice Neil Gorsuch called attention to the fact that if the government were forced to enforce immigration laws differently as Texas interprets the statutes, then the federal government would "effectively [be] required to enforce the immigration laws differently than it otherwise would."); *id.* at 21–22 (Solicitor General Elizabeth B. Prelogar describes the fallout as "incredibly destabilizing on the ground" if the Supreme Court interprets the contested statutes as Texas argues. "[W]hile Congress and the executive try to figure it out, it would absolutely scramble immigration enforcement efforts on the ground.").

[157] Printz v. United States, 521 U.S. 898, 927 (1997).

priorities by barring the implementation of a broad, nationwide enforcement policy and preventing federal officers from abiding by that policy. In fact, this has happened already.[158] Even if the Supreme Court ultimately permits the enforcement priorities to go into effect, the states will have succeeded in "nullify[ing]" federal enforcement priorities for nearly two years.[159] When states have the power to nullify federal enforcement guidelines, "federal authorities have lost control of enforcement discretion."[160] Even assuming Texas seeks only to continue to rely on federal resources and not to usurp federal enforcement priorities for other, more political reasons, the end result is not just state commandeering of federal resources, but of federal immigration enforcement policymaking power.[161]

Reverse-commandeering is a blunt instrument. It does not allow Texas to impose its own enforcement priorities or to dictate to the federal government the particular noncitizens that Texas believes should be prioritized for enforcement. But the power to block federal enforcement priorities on the basis of "indirect fiscal burdens allegedly flowing from the Guidance"[162] essentially gives Texas the mighty power to veto federal enforcement policy.

It also seriously implicates separation of powers principles. If immigration power resides with the federal government and is indeed plenary, as hundreds of years of jurisprudence find, then allowing states to veto federal enforcement priorities is a serious imbalance to separation of powers principles.[163] If the Supreme Court finds that the states have standing, federal policy—over immigration or almost anything else—could be held captive by states through litigation, even if only

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[158] *See* Wolf, *supra* note 114 ("In both Texas and Ohio, the district court judges issued nationwide decisions prohibiting the federal government from implementing the enforcement priorities. Since June, ICE has not been guided by any enforcement priorities.").

[159] Hu, *supra* note 1, at 605. *See* SMITH, *supra* note 31, at 4. Hu provides an example of this scenario in the context of state legislation which would permit state officers to independently enforce immigration law according to their own priorities. "Decisions not to prosecute individuals of one national origin because of the politically sensitive nature of foreign relations with the relevant country . . . can be voided by state authorities seeking political leverage by heavily prosecuting against specific groups or regions in the state." Hu, *supra* note 1, at 605.

[160] Hu, *supra* note 1, at 605 ("That is precisely the reason why the Court has often enforced federal supremacy in the realm of immigration—because state immigration 'policies' may lead to foreign policy ramifications for which only the national government can be held accountable.").

[161] Professor Anil Kalhan describes the political motivations that may lie behind *United States v. Texas* and the other litigation over the Biden administration's immigration policies as an "entrenchment" of immigration restrictionism on the federal bench. Kalhan, *supra* note 120, at 66–67. These lawsuits "effectively deny the Biden administration's ability to implement its own immigration policies." *Id.*

[162] Arizona v. Biden, 40 F.4th 375, 386 (6th Cir.), *rev'g* 593 F. Supp. 3d 676 (S.D. Ohio 2022) ("But why would that humdrum feature of a regulation count as a uniquely sovereign harm? Most regulations have costs.").

[163] *See supra* notes 14–18 and accompanying text.

temporarily. This gravely threatens the "careful balance between the dual sovereigns" at the core of our "federalist system of governance."[164]

Such a ruling may also pose a threat to the plenary power doctrine. One of the primary tenets of the doctrine is federal supremacy over immigration.[165] If the Supreme Court permits state interference of federal policy, would the judiciary also have greater power to review immigration law and policy, as is now occurring in *United States v. Texas*? Time, and court opinions, will tell.

But what about the presumption of nonreviewability of agency enforcement decisions? If the "broad discretion" to enforce is "particularly ill-suited to judicial review," especially "in the deportation context,"[166] how are the states able to not only overcome the presumption of nonreviewability, but to convince the courts to block a policy guiding the exercise of prosecutorial discretion? The states rely on a narrow exception to the doctrine of nonreviewability of enforcement set out in *Heckler*: that the presumption of nonreviewability "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers."[167]

C. The Hook: Congressional Mandates

The states argue that two sections of the INA—sections 1226(c) and 1231(a)(2)—require detention of certain "criminal aliens," and that by not taking enforcement action against those noncitizens, the Biden administration is flouting congressional mandates.[168] The issue the states present is, in other words, ostensibly about the scope of Executive enforcement discretion running up against statutory requirements, not about state power over immigration enforcement.[169] But reverse-commandeering is threaded through Texas's arguments. Not only does Texas's interpretation fit neatly in the restrictionist political agenda,[170] it also provides the hook by which Texas establishes injury, rebuts the presumption of nonreviewability of prosecutorial discretion, and anchors the APA claims.

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[164] Hu, *supra* note 1, at 552.

[165] *See supra* note 39 and accompanying text.

[166] Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489–90 (1999); *see also* Heckler v. Chaney, 470 U.S. 821, 831 (1985).

[167] *Heckler*, 470 U.S. at 833 ("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.").

[168] Brief for Respondents at 24–26, United States v. Texas, 134 S. Ct. 51 (2022) (No. 22-58). The interpretation of the INA proposed by the states in this case are novel and have not been adopted by *any* prior presidential administration, DHS, or any other entity. Transcript of U.S. v. Tex., *supra* note 26, at 43–44.

[169] Transcript of U.S. v. Tex., *supra* note 26, at 98–99.

[170] *See* Kalhan, *supra* note 120, at 48.

If Texas's standing arguments represent the reverse-commandeering of federal resources, the Congressional mandate argument is the next link in the chain: the reverse-commandeering of federal enforcement policy. Enforcement resources are closely linked with policymaking. If the Supreme Court finds for the states on the merits, then the states will have effectively eliminated the Executive's exercise of prosecutorial discretion by preventing it from setting enforcement priorities. The Executive would be required to allocate whatever resources it has to satisfy the states, reducing if not eliminating the ability to set national-level enforcement priorities, allocate resources, or take any of the other actions that make exercises of prosecutorial discretion so difficult for the judiciary to review.[171] Indeed, it is not clear what independent power the Executive would have, if any, should the Supreme Court find for the states on this issue.[172]

Again, the reverse-commandeering occurring here is a blunt instrument. By usurping federal enforcement policy vis-a-vis federal resources, the states are not able to dictate the specifics of whatever their desired immigration agenda might be. Rather, reverse-commandeering serves as a tool to freeze or override federal enforcement policy. And this usurpation is not hypothetical. Both the District Court and the Fifth Circuit agreed with the states' interpretation of sections 1226(c) and 1231(a)(2), and the Supreme Court refused to stay the District Court's injunction pending their decision.[173] As of writing, the priorities have been enjoined on-and-off for nearly two years.[174] The Biden administration has been blocked from establishing enforcement guidelines for almost half of President Biden's term, stripping the Executive branch of a core function over immigration.[175]

As profound as the impacts of *United States v. Texas* may be on separation of powers principles and the division of power over immigration enforcement, it is also important to keep sight of the very real consequences for noncitizens and

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[171] *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 490–91; Transcript of U.S. v. Tex., *supra* note 26, at 135.

[172] *See* Transcript of U.S. v. Tex., *supra* note 26, at 81–82, 135.

[173] United States v. Texas, 143 S. Ct. 51 (2022).

[174] SMITH, *supra* note 31, at 4. As noted above, in June 2023 the Supreme Court held that the states lacked standing, allowing the Biden administration to implement the priority enforcement guidelines. United States v. Texas, 143 S. Ct. 1964, 1973 (2023) ("The States' novel standing argument, if accepted, would entail expansive judicial direction of the Department's arrest policies. If the Court green-lighted this suit, we could anticipate complaints in future years about alleged Executive Branch under-enforcement of any similarly worded laws—whether they be drug laws, gun laws, obstruction of justice laws, or the like. We decline to start the Federal Judiciary down that uncharted path.").

[175] *See supra* Section I.B.; COX & RODRÍGUEZ, *supra* note 7, at 115 ("Indeed, the historical patterns belie any notion that the Executive has ever behaved as though it had a legal obligation to treat all parts of the immigration code alike or pursue an enforcement strategy that maximized enforcement.").

immigration officers on the ground.[176] One immigration attorney, whose client—an undocumented noncitizen with a U.S. citizen spouse and child, a pending green card application, and who lived for nearly 30 years in the United States—was deported after the vacatur of the priority memos. The attorney believed her client would not have been a priority, and therefore likely would not have been deported, if the guidelines had been in place.[177] Former DHS officials said that "the lack of clear guidance from the top could make it harder to hold agents accountable for the quick decisions they make in the field on who to detain and deport, undermine a culture that has long focused first on public safety and potentially make enforcement of national immigration laws unequal and depend on where the migrant happens to live . . . ."[178] There are also indications that enforcement prioritization is still occurring, even if not pursuant to the Final Memo,[179] which likely leads to different priorities in different jurisdictions. This "Balkanization" of immigration enforcement is another indicator of the reverse-commandeering of executive authority in immigration law.[180]

One possible way that the federal government may be able to limit the extent of state commandeering is its argument that sections 1252 and 706 of the APA do not allow any court but the Supreme Court to issue a nationwide-vacatur.[181] In so doing, states would be prevented from using lawsuits such as *United States v. Texas* to temporarily vacate any rule falling under the scope of that statute until the issue made its way to the Supreme Court.[182] While the Supreme Court could still vacate a rule under the federal government's interpretation of section 1252—and therefore still effectively allow states to reverse-commandeer federal policy—this interpretation of sections 1252 and 706 would prevent the potentially years-long blockage of laws and policy, such as has occurred with the enforcement guidelines, by preventing lower federal courts from issuing such vacaturs.[183] While not an outright remedy to the issue of reverse-commandeering analyzed here, the federal

[176] Suzanne Monyak, *Lack of Immigration Guidance Set to Ripple Through Enforcement*, ROLLCALL (Aug. 4, 2022, 6:00 AM), https://rollcall.com/2022/08/04/lack-of-immigration-guidance-set-to-ripple-through-enforcement.

[177] *Id.* ("Thompson questioned what case would merit discretion if not her client's. 'The [ICE] office still has the authority to exercise their discretion. They've exercised their discretion in the past,' Thompson said. 'It just leaves me to wonder, in what case would they exercise discretion?'") (alteration in original).

[178] *Id.*

[179] *See New ICE Guidelines for Its Attorneys Prioritize Prosecutorial Discretion*, AM. IMMIGR. LAWS. ASS'N (Apr. 6, 2022), https://www.aila.org/advo-media/press-releases/2022/ice-guidelines-prioritize-prosecutorial-discretion.

[180] Hu, *supra* note 1, at 607–12.

[181] Transcript of U.S. v. Tex., *supra* note 26, at 4–5.

[182] *See id.* at 46.

[183] *Id.* at 45–46, 48.

government's interpretation could soften the initial impact of state lawsuits by preventing lower federal courts from vacating those rules, and also from issuing conflicting vacaturs.[184] There are, however, myriad concerns about this interpretation of sections 1252 and 706,[185] and multiple justices demonstrated particular skepticism if not alarm over the federal government's interpretation of section 706.[186]

The parties' arguments themselves belie the notion that *United States v. Texas* is only about Congressional and executive power, and not about the power of states to interfere with federal resource allocation and policymaking.[187] But concerns as to state power over immigration enforcement bolsters the parties' arguments and claims, and often breaks through the judicial opinions and the parties' briefs. For example, in finding that the Final Memo is arbitrary and capricious, the District Court found that DHS paid "lip service to the States' concerns" and "under[sold] the States' interests" regarding the costs of incarceration, recidivism, education for, and provision of healthcare to "criminal aliens."[188] At oral arguments, Solicitor General Elizabeth B. Prelogar called the states' standing theory "fundamentally incompatible with the constitutional structure and the separation of powers."[189] She continued, "This is about recognizing that when one sovereign is suing another sovereign under our constitutional structure, that implicates fundamental constitutional principles."[190]

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[184] *See, e.g.*, Texas v. United States, 606 F. Supp. 3d 437, 502 (S.D. Tex.), *aff'd*, 40 F.4th 205 (5th Cir.), *rev'd*, 143 S. Ct. 1964 (2023) (vacating the Final Memo); Arizona v. Biden, 40 F.4th 375, 393–94 (6th Cir.), *rev'g* 593 F. Supp. 3d 676 (S.D. Ohio 2022) (declining to vacate the Final Memo).

[185] *See* Brief for Public Citizen as Amicus Curiae Supporting Petitioners, Texas v. United States, 134 S. Ct. 51 (2022) (No. 22-58). *But see* Brief for Respondents at 38–47, United States v. Texas, 134 S. Ct. 51 (2022) (No. 22-58).

[186] Transcript of U.S. v. Tex., *supra* note 26, at 35 (Chief Justice Roberts called the interpretation "radical."); *Id.* at 54–55 (Justice Brett Kavanaugh: "[T]he government never has made this argument in all the years of the APA, at least not that I remember sitting [on the D.C. Circuit] for 12 years . . . . It's a pretty radical rewrite, as the Chief Justice says, of what's been standard administrative law practice."); *Id.* at 66, 68–69 (Justice Ketanji Brown Jackson, pushing back against the federal government's interpretation, said that the federal government's interpretation creates a "disconnect"; if a rule did not go through required APA procedures or is arbitrary and capricious, "the agency does not have a valid exercise of its discretion per Congress's requirements. The result then is that the agency doesn't have a rule that it can apply" to anyone, not only the plaintiff seeking relief.).

[187] COX & RODRÍGUEZ, *supra* note 7, at 141, 146, 148.

[188] Texas v. United States, 606 F. Supp. 3d 437, 463–64, 491 (S.D. Tex.), *aff'd*, 40 F.4th 205 (5th Cir.), *rev'd*, 143 S. Ct. 1964 (2023).

[189] Transcript of U.S. v. Tex., *supra* note 26, at 9.

[190] *Id.* at 13.

Further, if the Supreme Court finds for the states, even solely on standing if not the merits, the Executive would be deprived of a core function of immigration power, the very "flexibility of executive prioritization and agency guidance" that "allows for responsiveness to state-level resistance."[191] Even if the states are serving as a checking function, doing so has the potential to grant them great power. The Executive could be challenged in court any time a policy causes the states as little as one dollar of costs.[192] What policy does not indirectly result in costs to the states? What would be the limit of state standing, and what policy could the states never challenge?

United States v. Texas strikes at the heart of executive power over immigration enforcement. A finding for the states in this case would leave the Executive as a figurehead of immigration enforcement while depriving it of its primary tools to enforce immigration law, while the states run amuck with a de facto veto power that furthers their own policy interests and usurps power over immigration enforcement policymaking.

III. REVERSE-COMMANDEERING IN OTHER CASES

United States v. Texas is just one example of states attempting to reverse-commandeer federal resources, and therefore federal policymaking, over immigration through litigation.

For example, the states claimed injuries almost identical to those in *United States v. Texas* in *Louisiana v. Centers for Disease Control and Prevention*, the challenge to the Biden administration's attempt to rescind the Centers for Disease Control and Prevention (CDC) order prohibiting the entry of certain noncitizens due to the COVID-19 pandemic, also known as Title 42.[193] Twenty-four states—from Louisiana to Alaska, Georgia to Idaho—alleged injuries due to "increased law enforcement and healthcare costs" as a result of a potential increase of noncitizens if Title 42 was rescinded.[194] The District Court for the Western District of Louisiana found that the states' injuries satisfied Article III standing requirements,

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[191] Gulasekaram & Ramakrishnan, *supra* note 19, at 166.

[192] Justice Kagan found it hard to think of "any immigration policy" that the states could not challenge under Texas's standing arguments. "I mean, if all you need to do is to say we have a dollar's worth of costs . . . every immigration policy . . . is going to have some effect on a state's fiscal condition. . . . [W]e're just going to be . . . in a situation where every administration is confronted by suits by states that can, you know, bring a policy to a dead halt, to a dead stop, by just showing a dollar's worth of costs?" Transcript of U.S. v. Tex., *supra* note 26, at 88–89.

[193] Louisiana v. Ctrs. for Disease Control & Prevention, 603 F. Supp. 3d 406, 412 (W.D. La. 2022); KELSEY Y. SANTAMARIA, LSB10874, CONG. RSCH. SERV., COVID-RELATED RESTRICTIONS ON ENTRY INTO THE UNITED STATES UNDER TITLE 42: LITIGATION AND LEGAL CONSIDERATIONS 2–4 (2022); 42 U.S.C. § 265 (commonly referred to as "Title 42").

[194] Louisiana v. CDC, 603 F. Supp. 3d at 412, 418.

at least for "purposes of a preliminary injunction," and entered a preliminary injunction on behalf of the states, blocking the rescission of Title 42.[195] Like the litigation over the enforcement priority guidelines, the states' alleged financial injuries demonstrate a reliance on the immigration agencies' allocation of resources to expel noncitizens, rather than processing noncitizens as they did before the CDC order. Rescission of Title 42 is generally expected to lead to an increase of border crossings,[196] and the court found that this would "increase the fiscal burden of providing required healthcare and educational services for those immigrants."[197] Like *United States v. Texas*, the standing arguments allow the states to effectively commandeer federal resources to expel noncitizens, with the court requiring the Executive to maintain a policy that suits the states' interests. By extension, it ties the hands of the Executive by preventing the administration from rescinding a controversial and legally questionable policy.[198]

Similarly, the states in *Biden v. Texas*, the litigation over the Biden administration's attempts to rescind the Trump-era MPP program, relied on nearly identical financial injuries to establish standing—costs of the issuance of driver's licenses, education, healthcare, and law enforcement and custodial costs—which led to the District Court of the Northern District of Texas ordering the federal government to continue to implement MPP despite the Biden administration's

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[195] *Id.* at 423–31. Unlike *United States v. Texas*, the Louisiana District Court demonstrates some skepticism as to the states' standing claims, although it ultimately entered a preliminary injunction in the states' favor. *Id.*

[196] *See* Catherine E. Shoichet, *What is Title 42, and What Happens Now that the Supreme Court Has Stepped In?*, CNN: POLITICS (Dec. 27, 2022, 5:03 PM), https://www.cnn.com/2022/11/16/politics/title-42-blocked-whats-next-explainer-cec/index.html.

[197] *Louisiana*, 603 F. Supp. 3d at 430.

[198] *See* Arizona v. Mayorkas, 143 S. Ct. 478, 478–79 (2022) (Gorsuch, J., dissenting) *granting cert. and stay in* Huisha-Huisha v. Mayorkas, No. 21-100, 2022 WL 16948610 (D. D.C. 2022). Arizona, Louisiana, Missouri, Alabama, Alaska, Kansas, Kentucky, Mississippi, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Tennessee, Utah, Virginia, West Virginia, and Wyoming are seeking to intervene in *Huisha-Huisha*, making claims in that case that they made in *Louisiana v. CDC*, and explicitly relying on the standing arguments made in *United States v. Texas*. States' Reply in Support of Their Application for a Stay Pending Certiorari at 2–4, Arizona v. Mayorkas, 143 S. Ct. 478 (2022) (No. 22A544). The Supreme Court granted certiorari on the question of whether the states may intervene. *Arizona*, 143 S. Ct. at 478. As of writing, Title 42 remained in place. *Id.* By time of publication, Title 42 was rescinded, and the Supreme Court dismissed the case as moot. Arizona v. Mayorkas, 143 S. Ct. 1312 (2023); Andrew Chung, *U.S. Supreme Court Dismisses Dispute Over Title 42 Border Expulsions*, REUTERS (May 19, 2023, 7:35 AM), https://www.reuters.com/world/us/us-supreme-court-dismisses-dispute-over-title-42-border-expulsions-2023-05-18.

desire to end the program.[199] The Fifth Circuit affirmed.[200] These decisions forced the administration to continue directing resources to remove certain asylum-seekers to Mexico pending the adjudication of their cases. Although ultimately the Supreme Court permitted the Biden administration to proceed with terminating MPP, the states nonetheless managed to commandeer executive policymaking on this issue for an entire year.[201]

IV. CONCLUSION

Much ink has been spilled about the proper delegation of power over immigration law. After all, federal supremacy over immigration—or, at least, the myth of it—is not necessarily beneficial to noncitizens in the United States. It is a core tenet of the plenary power doctrine, a doctrine which arose out of anti-immigrant racism and which justifies a dearth of constitutional protections to noncitizens seeking to assert their rights.[202] Scholars have suggested that state influence over immigration may in fact be positive.[203]

But this Note is not concerned about where the power to enforce immigration law *ought* to lie. Rather, this Note argues that the structure of our immigration system, whether by accident or design, strongly emphasizes enforcement, with the Executive at the helm. By eliminating the Executive's prosecutorial discretion over immigration enforcement, the states are commandeering the ship and leaving it rudderless. This poses a grave threat to the federal government as co-equal sovereign to the states and raises at least as serious of concerns about commandeering as were raised in *Printz* and *New York*. It also poses a threat to millions of noncitizens and their communities who experience the very real effects of immigration enforcement. Should the Supreme Court decide for the states in *United States v. Texas*, it will be a sea-change not only in the constitutional balance of power over immigration enforcement, but in the day-to-day lives of those who must live with—and suffer the consequences of—the destabilization of immigration enforcement in the United States.

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[199] Texas v. Biden, 554 F. Supp. 3d 818, 838–39, 857 (N.D. Tex.), *aff'd*, 20 F.4th 928 (5th Cir. 2021), *rev'd*, 142 S. Ct. 2528 (2022).

[200] Texas v. Biden, 20 F.4th 928, 1004 (5th Cir.), *aff'g* Texas v. Biden, 554 F. Supp. 3d 818 (N.D. Tex. 2021).

[201] Biden v. Texas, 142 S. Ct. 2528, 2548 (2022), *rev'g* 20 F.4th 928 (5th Cir. 2021); HILLEL R. SMITH, CONG. RSCH. SERV., LSB10798, SUPREME COURT RULES THAT MIGRANT PROTECTION PROTOCOLS RESCISSION WAS NOT UNLAWFUL 3–5 (2022).

[202] *See supra* Section I.A.

[203] *See, e.g.*, Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1630 (1997) (posing the benefits of "steam-valve federalism in the realm of immigration lawmaking").