

1 BRIAN M. BOYNTON
 Acting Assistant Attorney General
 2 Civil Division
 3 WILLIAM C. PEACHEY
 Director
 4 Office of Immigration Litigation
 5 District Court Section
 EREZ REUVENI
 6 Assistant Director
 ELISSA FUDIM
 7 Trial Attorney
 8 P.O. Box 868, Ben Franklin Station
 Washington, D.C. 20044
 9 Tel.: (202) 598-6073
 10 Email: elissa.p.fudim@usdoj.gov

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 12 *Attorneys for Defendants*

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 14 **UNITED STATES DISTRICT COURT**
 15 **DISTRICT OF ARIZONA**

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 17 _____
 17 Mark Brnovich, in his official capacity as
 Attorney General of Arizona, *et. al*,
 18 *Plaintiffs,*

19 v.

20
 21 Joseph R. Biden in his official capacity as
 22 President of the United States, *et. al*
 23 *Defendants.*

Civil Action No. 2:21-CV-1568-MTL

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 25
 26 **MEMORANDUM IN SUPPORT**
 27 **OF DEFENDANTS’ MOTION**
 28 **TO DISMISS THE COMPLAINT**

1 The “federal power to determine immigration policy is well settled.” *Arizona v.*
2 *United States*, 567 U.S. 387, 395 (2012). Because immigration policy has complex effects,
3 Congress constructed an immigration enforcement system whose “principal feature” is the
4 “broad discretion exercised by immigration officials.” *Id.* at 395-96. This reflects the
5 reality—embodied in every Presidential administration’s policies for decades—that
6 officials must deploy limited resources according to priorities set by policymakers.

7 Consistent with that reality, U.S. Customs and Border Protection (CBP), the
8 component of the Department of Homeland Security (DHS) responsible for enforcing
9 immigration laws at ports of entry and between ports of entry, authorized immigration
10 officers to take certain enforcement actions in specific circumstances to relieve
11 overcrowding in its congregate settings, to better protect its workforce and noncitizens in
12 CBP custody, and to prioritize its limited enforcement resources.

13 Plaintiffs, Mark Brnovich, in his official capacity as Attorney General of Arizona,
14 and the State of Arizona (Plaintiffs or Arizona), ask the Court to supervise the Executive’s
15 prosecutorial discretion and border enforcement decisions and curtail its discretion to
16 charge, detain, and/or release inadmissible noncitizens arriving at the Southwest border.
17 Arizona maintains that 8 U.S.C. § 1225(b) requires the government to initiate removal
18 proceedings against every noncitizen arriving at the southwest border and to detain them
19 for those proceedings, without exception. Arizona alleges that any contrary actions violate
20 the Administrative Procedure Act (APA), the Immigration and Nationality Act (INA), and
21 the Constitution, including the Separation of Powers Doctrine and the Take Care Clause.

22 Arizona misreads the law, which does not require DHS to detain all inadmissible
23 noncitizens arriving or encountered at the border or to limit its discretion to institute
24 removal proceedings. The INA demonstrates Congress’s intent to allow the Executive to
25 exercise its enforcement discretion in deciding what removal proceedings to initiate and
26 whom to detain for those proceedings. Nothing in the INA prohibits DHS from “declin[ing]
27 to institute proceedings.” *Reno v. Am.-Arab Anti-Discrimination Comm. (AADC)*, 525 U.S.
28 471, 484 (1999). Likewise, the INA grants DHS broad discretion to release such

1 individuals “temporarily ... on a case-by-case basis for urgent humanitarian reasons or
2 significant public benefit.” 8 U.S.C. § 1182(d)(5).

3 Arizona’s claims are non-justiciable and without merit. Arizona’s claims must be
4 dismissed because Arizona lacks standing, some of its claims are moot, and the actions it
5 challenges are committed to agency discretion, not final agency action, and precluded from
6 review by statute. Arizona also lacks a cognizable cause of action to enforce the INA, and
7 its immigration claims fail on the merits. The Court should dismiss counts 9 to 13 of the
8 Third Amended Complaint (TAC) pursuant to Rule 12(b)(1), and 12(b)(6).

9 BACKGROUND

10 Legal Background. The Executive Branch has broad constitutional and statutory
11 power over the administration and enforcement of the nation’s immigration laws. *Knauff*
12 *v. Shaughnessy*, 338 U.S. 537, 543 (1950); **Error! Bookmark not defined.** *see e.g.* 6
13 U.S.C. § 202(5), 8 U.S.C § 1103(a)(3). For decades, the Executive has exercised its
14 discretionary authority to determine who to prioritize for removal and through what type
15 of proceedings.

16 Congress has provided DHS with various overlapping tools, including authority in
17 8 U.S.C. § 1225(b)(1) to initiate expedited removal proceedings against certain applicants
18 for admission.¹ The Secretary may also place a noncitizen seeking admission into full
19 removal proceedings held before an immigration judge under 8 U.S.C. § 1229a if the
20 noncitizen is not “clearly and beyond a doubt entitled to be admitted,” *id.* § 1225(b)(2)(A),
21 by filing a “Notice to Appear” (NTA), the charging document that initiates removal
22 proceedings under section 1229a. The statute leaves to DHS’s discretion whether to use
23 expedited or full removal proceedings for noncitizens amenable to both. *See Matter of E-*
24 *R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011). Settled law also authorizes DHS to
25 decline to initiate proceedings for individuals. *Reno*, 525 U.S. at 484. Further, within
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27 ¹ References to the Attorney General in § 1225 now mean the DHS Secretary. 6
28 U.S.C. §§ 251, 552(d). “Noncitizen” is the equivalent of the statutory term “alien.”
Nasrallah v. Barr, 140 S. Ct. 1683, 1689 n.2 (2020).

1 certain limits, DHS may either detain or release applicants for admission pending their
2 removal proceedings. 8 U.S.C. §§ 1182(d)(5), 1225(b)(2)(A), 1226(a).² DHS may at its
3 “discretion parole noncitizens into the United States temporarily”. . . “on a case-by-case
4 basis for urgent humanitarian reasons or significant public benefit any alien applying for
5 admission to the United States.” *Id.* § 1182(d)(5). DHS may also release on bond or
6 conditional parole certain noncitizens arrested within the United States. 8 U.S.C. § 1226(a).

7 Procedural Background. Beginning in March 2021, CBP temporarily authorized the
8 use of “notices to report” (NTRs) to relieve overcrowding in congregate settings and to
9 better protect its workforce and noncitizens in CBP custody “when [noncitizen] encounters
10 were consistently high, operational capacity strained, and COVID-19 acute.” Ex. A, Parole
11 Plus Alternatives to Detention (Nov. 2, 2021), available at 3:21-cv-01066, ECF No. 62,
12 at 1.³ CBP authorized issuance of NTRs to individuals and family units who were processed
13 at operationally strained border sectors on a case-by-case basis after initial processing and
14 biometric screening. *Id.* NTRs were permitted in place of NTAs, the issuance of which are
15 considerably more time consuming due to the necessary interagency coordination for
16 initiating removal proceedings and creating an administrative record for the proceeding.
17 *Id.* Substituting NTRs for NTAs decreased processing time substantially, especially for
18 family units. *Id.* And, ICE later issued NTAs to those noncitizens who initially received
19 NTRs.⁴ *Id.*

20
21 ² An applicant for admission is a noncitizen “present in the United States who has
not been admitted or who arrives in the United States.” 8 U.S.C. § 1225(a)(1).

22 ³ Factual challenges to subject-matter jurisdiction may rely upon material outside
23 the pleadings. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The
24 Court can therefore consider Exhibit A in connection with the government’s challenge to
25 subject matter jurisdiction. The Court can also consider Exhibit A in connection with the
26 government’s motion to dismiss under Rule 12(b)(6) without converting the motion into
one for summary judgment because it is a public document and is incorporated by reference
in the complaint as Plaintiff challenges the policy set forth in this document. *See infra*, FN
8.

27 ⁴ DHS commences removal proceedings against non-citizens who received NTRs
28 or were released under Parole Plus. Under the current policy, those non-citizens must still
report to ICE within fifteen days to be issued NTAs, *see* Ex. A, and under the prior policy
by a date certain. The decision whether to commence removal proceedings, as well as the

1 On November 2, 2021, CBP issued a memorandum ceasing the use of NTRs, *id.*
2 stating that, “[g]oing forward, CBP will prioritize resources to issue NTAs to noncitizens
3 who are processed for release”. *Id.* The memorandum outlines a narrow set of
4 circumstances, applying exclusively to family units processed at the Del Rio or Rio Grande
5 Valley sectors, in which alternative processing may be permitted by using parole in
6 connection with ICE’s Alternatives to Detention (ATD) program. *Id.* at 2. The availability
7 of this process is triggered when (a) “the temporary staffing support to the sector is
8 maximized, [(b)] the seven-day average of encounters is greater than the sector’s Fiscal
9 Year 2019 May daily average,” (c) the number of subjects who were taken into custody in
10 the last 48 hours exceeds the number of individuals booked out in the same period, and (d)
11 at least one of the following is true: (1) the average time in custody in the sector exceeds
12 72 hours or (2) the sector exceeds 100% of the total non-COVID detention capacity. *Id.*
13 Under this process, a U.S. Border Patrol agent may exercise discretion to release a family
14 unit on parole prior to the issuance of an NTA, enroll them in ICE ATD, and, as a condition
15 of their parole, require them to report to ICE within 15 days for issuing an NTA. *Id.* at 1-
16 2. This alternative processing is not available to individuals determined to be a national
17 security risk or public safety threat, or covered by the U.S. Centers for Disease Control and
18 Prevention’s Title 42 Order. *Id.* at 3.

19 This Lawsuit. Arizona alleges that CBP’s use of NTRs, and its release on parole of
20 noncitizens on a case-by-case basis violate the APA (Counts 9-12) and the Constitution
21 (Count 13). TAC at ¶¶ 216-234. Plaintiffs ask the Court to hold unlawful and set aside
22 Defendants’ alleged “policy of releasing arriving aliens subject to mandatory detention, of
23 paroling aliens without engaging in case-by-case adjudication or abiding by the other limits
24 on that authority, and of failing to serve charging documents or initiate removal
25 proceedings” and permanently enjoin Defendants “from releasing arriving aliens subject
26 to mandatory detention, [] paroling aliens without engaging in case-by-case adjudication
27 or abiding by the other limits on that authority, and [] failing to serve charging documents
28 _____
timing of such proceedings, are covered by Section 1252(g).

1 or initiate removal proceedings against plainly inadmissible aliens who are being released
2 into the interior of the United States.” TAC at 68-69, ¶¶ F, I.

3 **ARGUMENT**

4 The Court should dismiss claims 9 to 13 under Rule 12(b)(1) because the NTR
5 allegations are moot, Arizona lacks standing, the APA’s threshold requirements are not
6 satisfied, and the INA precludes jurisdiction. Alternatively, they should be dismissed under
7 Rule 12(b)(6) because none of Plaintiffs’ claims states a plausible claim for relief.⁵

8 **I. Arizona’s Challenges to NTRs are Moot.**

9 Plaintiffs’ challenge to CBP’s use of NTRs is moot because CBP has ended the use
10 of NTRs. Ex. A; *U.S. v. Alder Creek Water Co.*, 823 F.2d 343, 345 (9th Cir. 1987) (“A case
11 becomes moot when interim relief or events have deprived the court of the ability to redress
12 the party’s injuries.”). CBP’s November 2021 memorandum superseded the NTR
13 guidance, such that any decision on the merits regarding NTRs “would be an impermissible
14 advisory opinion.” *Akina v. Hawaii*, 835 F.3d 1003, 1011 (9th Cir. 2016).

15 **II. Arizona Lacks Standing.**

16 Claims 9 to 13 fail because Arizona cannot demonstrate any actual or imminent
17 injury caused by the challenged policies. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560
18 (1992). Although Arizona fails to identify any specific challenged policy, the complaint
19 addresses: (1) the now-discontinued use of NTRs; and (2) the current limited use of parole
20 for recent entrants, including such use based on capacity and resource constraints. *See* TAC
21 at ¶¶ 133-143. Despite the narrowness of those challenged actions, Arizona alleges that
22 they result in generalized harms. *Id.* at ¶¶ 147-149. But no one has a legally protected
23 interest in the prosecution of another. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).
24 Further, the law already permits (and, in some instances, requires) the release of these

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27 ⁵ If the Court does not dismiss claims 9 to 13, all defendants except CBP should be
28 dismissed because claims 9 to 13 do not raise allegations against any of the other
components of DHS, which are not involved in making admission and release
determinations of noncitizens apprehended and inspected at or near the border.

1 individuals from immigration detention. Thus, none of the harms alleged is fairly traceable
2 to challenged policies, nor are they capable of being remedied by an order by this Court.

3 Arizona cannot show any actual or imminent harm from DHS's discontinued
4 practice of issuing NTRs. Even assuming Arizona's challenge were not moot, all
5 previously issued NTRs have expired and all individuals issued NTRs have been directed
6 to report for processing. Ex. A at 1. Thus, any alleged impact on Arizona caused by
7 noncitizens released on NTRs stems not from the policy but from individual
8 noncompliance, for which standing is "substantially more difficult to establish." *California*
9 *v. Texas*, 141 S. Ct. 2104, 2117 (2021). And Arizona has not alleged any facts to show that
10 the use of an NTR, rather than an NTA, meaningfully impacted an individual's decision
11 whether to abscond. *See Arpaio v. Obama*, 797 F.3d 11, 15-20 (D.C. Cir. 2015) (rejecting
12 injury as too attenuated where policy did not apply to current and future entrants).

13 Nor can Arizona plausibly allege any harm from DHS's limited practice of using
14 parole, at times in tandem with ICE's ATD program, for certain family units. Despite
15 calling detention under section 1225(b) "mandatory," Arizona concedes that DHS has the
16 authority to release individuals on parole on a case-by-case basis. TAC at ¶ 116. Indeed,
17 DHS is obligated by a longstanding court order to release noncitizen minors "without
18 unnecessary delay" or, in the case of an emergency or influx, if not released, to transfer
19 them to a licensed program "as expeditiously as possible." *See Flores v. Lynch*, 828 F.3d
20 898, 905 (9th Cir. 2016) (confirming settlement agreement applies to accompanied
21 minors); *Flores Settlement Agreement* ¶¶ 12.A, 14).

22 If Arizona is contending that individuals are paroled too often, this claim is similarly
23 non-justiciable. Simply alleging that a state provides social benefits to state residents who
24 are paroled—here, medical care (SAC at ¶¶ 148-149)—and speculating that costs will
25 increase if the population increases is insufficient to satisfy Article III standing, which
26 requires Plaintiffs show a "concrete and particularized" injury that is "fairly traceable" to
27 the challenged government action. *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*
28 *(TOC), Inc.*, 528 U.S. 167 (2000); *Crane v. Johnson*, 783 F.3d 244, 252 (5th Cir. 2015)

1 (merely alleging that a particular policy increases immigration, which will require the state
2 to spend money on social benefits does not confer Article III standing).

3 Plaintiffs allege that the policy will increase its noncitizen population, and that
4 Arizona will expend more resources on noncitizens than they otherwise would. TAC at
5 ¶¶ 146-149 (alleging costs associated with law enforcement activity and emergency
6 medical care). But a state “has not suffered an injury in fact to a legally cognizable interest”
7 when “a federal government program is anticipated to produce an increase in that state’s
8 population and a concomitant increase in the need for the state’s resources.” *Arpaio v.*
9 *Obama*, 27 F. Supp. 3d 185, 202 (D.D.C. 2014), *aff’d*, 797 F.3d 11. Such an injury is a
10 generalized grievance; to accept it “would permit nearly all state officials to challenge a
11 host of Federal laws simply because they disagree with how many—or how few—Federal
12 resources are brought to bear on local interests.” *Id.* “[S]uch a ‘generalized grievance,’ no
13 matter how sincere, is insufficient to confer standing.” *Hollingsworth v. Perry*, 570 U.S.
14 693, 706 (2013) (quoting *Lujan*, 504 U.S. at 573-74).

15 Regardless, any costs that Arizona might incur as a result of the alleged criminal
16 acts of third parties are not fairly traceable to the challenged conduct, but rather would be
17 the consequence of the “unfettered choices made by independent actors.” *Lujan*, 504 U.S.
18 at 562. Although standing may sometimes be found where the challenged conduct has a
19 “determinative or coercive effect upon” those choices (*Levine v. Vilsack*, 587 F.3d 986,
20 992 (9th Cir. 2009)), here, the conduct Plaintiffs challenge—the issuance of NTRs and the
21 use of parole—do not encourage or cause any noncitizen to perform an illegal act. *See*
22 *Arpaio*, 797 F.3d at 15-20. Similarly, even if Arizona incurs increased medical expenses
23 caring for noncitizens, this expense would be the result of events unrelated to the
24 challenged policies, including noncitizens needing medical care, noncitizens not paying for
25 that care, healthcare providers requesting the Arizona to pay, and Arizona paying without
26 federal reimbursement. *Cf. Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 43
27 (1976). Arizona therefore lacks standing.

28

III. Claims 9 To 13 Are Not Reviewable Under the APA.

Claims 9 to 13 are barred by the APA and INA. The challenged policies are committed to agency discretion, do not constitute final agency action, are precluded by the INA, and do not fall within the INA's zone of interests.

A. Claims 9 to 13 Are Subject to Dismissal Because the Challenged Conduct Is Committed to Agency Discretion.

“[T]he APA does not apply to permit judicial review or permit a reviewing court to compel agency action where ‘agency action is committed to agency discretion by law.’” *United States v. Arizona*, CV-10-1413-PHX-SRB, 2011 WL 13137062, at *9 (D. Ariz. Oct. 21, 2011) (quoting 5 U.S.C. § 701(a)(2)). As this Court recognized in an earlier action by Arizona challenging what Arizona thought to be inadequate enforcement of immigration laws, “enforcement decisions, including the decisions to prioritize agency resources and act on agency determined priorities, are committed to the discretion of” the Executive. *Id.* at *9 n.6; see *California v. United States*, 104 F.3d 1086, 1094 (9th Cir. 1997) (“While Arizona may disagree with the established enforcement priorities, Arizona’s allegations do not give rise to a claim that the Counter-defendants have abdicated their statutory responsibilities.”); *Arizona v. United States Dep’t of Homeland Sec.*, No. CV-21-00186-PHX-SRB, 2021 U.S. Dist. LEXIS 125687, at *29, *31, FN 15 (D. Ariz. June 30, 2021) (concluding that guidance concerning enforcement priorities, based on resource constraints, is committed to agency discretion):

The Court does not read the use of a naked ‘shall’ in § 1231(a)(1)(A) as stripping the Government of its discretion to prioritize the removal of certain noncitizens over others Plaintiffs argue that the Interim Guidance ‘is not mere prioritization/allocation of scarce resources, but rather a substantive rule.... The Court does not agree.... [The Government] is prioritizing the removal of some noncitizens over others. While Plaintiffs may not agree with this prioritization scheme’, “the Court finds that it is barred from conducting judicial review of the Interim Guidance as agency action committed to agency discretion by law. *Id.* (internal citations omitted).

1 *see also Morales de Soto v. Lynch*, 824 F.3d 822, 827 (9th Cir. 2016). Both alleged
2 activities Arizona challenges in this lawsuit fall under this exception.

3 First, the decision whether to commence a removal proceeding or to release instead
4 with an NTR is committed to agency discretion. The choice to refrain from pursuing
5 particular enforcement actions is “generally committed to an agency’s absolute discretion.”
6 *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Such decisions “often involve[] a
7 complicated balancing of a number of factors which are peculiarly within [the agency’s]
8 expertise,” including “whether agency resources are best spent on this violation or another,
9 whether the agency is likely to succeed if it acts, whether the particular enforcement action
10 requested best fits the agency’s overall policies, and, indeed, whether the agency has
11 enough resources to undertake the action.” *Id.*

12 Arizona does not dispute that the presumption against reviewability applies to
13 enforcement decisions, but contends only that Congress imposed statutory duties on DHS
14 through 8 U.S.C. § 1225. TAC, *in passim*. The statute, however, imposes no unconditional
15 duty on DHS. *See infra* pp. 18-24. In brief, Congress has not displaced the power inherent
16 to the Executive to exercise prosecutorial discretion—a power the Supreme Court has held
17 is “greatly magnified” in the immigration context, *AADC*, 525 U.S. at 490, as immigration
18 policy may also “affect trade, investment, tourism, and diplomatic relations for the entire
19 Nation, as well as the perceptions and expectations of aliens in this country who seek the
20 full protection of its laws,” and the “nation’s foreign policy.” *Arizona v. United States*, 567
21 U.S. 387, 395, 397 (2012). Although section 1225 uses the word “shall,” the Supreme
22 Court has instructed that the “deep-rooted nature of law-enforcement discretion” persists
23 “even in the presence of seemingly mandatory legislative commands.” *Town of Castle Rock*
24 *v. Gonzales*, 545 U.S. 748, 761 (2005); see, e.g., *Richbourg Motor Co. v. United States*,
25 281 U.S. 528, 534 (1930) (“Undoubtedly, ‘shall’ is sometimes the equivalent of ‘may’
26 when used in a statute prospectively affecting government action.”). Thus, a state law
27 instructing that officers “shall arrest” an individual who violates a restraining order did not
28 “truly ma[k]e enforcement of [such] orders *mandatory*,” because “‘insufficient resources’”

1 and “sheer physical impossibility,” among other factors, required enforcement discretion.
2 *Castle Rock*, 545 U.S. at 760 (citation omitted). *See also Arizona*, 2021 U.S. Dist. LEXIS
3 125687, at *27 (a blanket ‘shall’ does not automatically constitute a statutory mandate,
4 especially when it concerns the enforcement of laws”).

5 The justification for dismissal is further bolstered by examination of section 1225.
6 Enforcement discretion encompasses not just choices about whether to enforce, but also
7 choices about *how* to enforce. *Arizona*, 567 U.S. at 396 (DHS has “broad discretion” to
8 decide “whether it makes sense to pursue removal at all.”). DHS must consider a host of
9 issues, such as the “dynamic nature of relations with other countries” and the need for
10 enforcement policies to be “consistent with this Nation’s foreign policy with respect to
11 these and other realities.” *Id.* at 397. Accordingly, DHS may “decline to institute
12 proceedings” in the first instance. *AADC*, 525 U.S. at 484; *see also Crane*, 783 F.3d at 249
13 (“[Section 1225] does not limit the authority of DHS to determine whether to pursue the
14 removal of the immigrant.”). Congress has not required that DHS initiate removal
15 proceedings and detain every inadmissible noncitizen it encounters at or near the border,
16 and therefore CBP’s policy prioritizing when and how to issue NTAs at crowded border
17 patrol stations, particularly during the pandemic, is committed to agency discretion by law.
18 *See, e.g., Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 967 (9th Cir. 2017) (“the federal
19 statutory and regulatory scheme, as well as federal case law, vest the Executive with very
20 broad discretion to determine enforcement priorities.”);⁶ *Morales de Soto*, 824 F.3d at 827
21 (enforcement priorities are committed to agency discretion by law); *Arizona*, 2021 WL
22 2787930, at *9-11 (same). In fact, “the Department of Homeland Security only has funding
23 annually to remove a few hundred thousand of the 11.3 million undocumented aliens living
24 in the United States. Constrained by these limited resources, the Department of Homeland

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26 ⁶ “[T]he Department of Homeland Security only has funding annually to remove a
27 few hundred thousand of the 11.3 million undocumented aliens living in the United States.
28 Constrained by these limited resources, [DHS] must make difficult decisions about whom
to prioritize for removal.” *Dream Act Coal.*, 855 F.3d at 976.

1 Security must make difficult decisions about whom to prioritize for removal.” *Ariz. Dream*
2 *Act Coal*, 855 F.3d at 976.

3 Second, “[s]ection 1182(d)(5)(A) gives the government broad parole discretion,
4 without mentioning any threshold standard that the government must meet or the timing of
5 when a decision as to admissibility must be made.” *Romero v. Garland*, 999 F.3d 656, 664
6 (9th Cir. 2021); *see also Garcia-Mir v. Smith*, 766 F.2d 1478, 1484 (11th Cir. 1985)
7 (“Congress has delegated remarkably broad discretion to executive officials under the
8 [INA]” and its grants of authority “are nowhere more sweeping than in the context of
9 parole.”). Accordingly, the parole statute provides that the Secretary “*may. . . in his*
10 *discretion* parole into the United States temporarily under such conditions as he may
11 prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public
12 benefit any alien applying for admission,” 8 U.S.C. § 1182(d)(5)(A) (emphasis added).
13 Courts lack jurisdiction to review the discretionary decision whether to parole an individual
14 under 8 U.S.C. § 1252(a)(2)(B)(ii). *See e.g. Padilla v. ICE*, 953 F.3d 1134, 1145 (9th Cir.
15 2020), *vacated on other grounds*, 141 S. Ct. 1041 (2021) (“parole decisions are solely in
16 the discretion of the Secretary of DHS and are not judicially reviewable”); *Torres v. Barr*,
17 976 F.3d 918, 931 (9th Cir. 2020) (similar); *Lopez v. DHS*, No. 20-cv-1063, 2021 WL
18 2079840, at *3 (D. Ariz. Jan. 28, 2021) (similar); *see also Hassan v. Chertoff*, 593 F. 3d
19 785 (9th Cir. 2010) (affirming district court decision that court lacked jurisdiction to
20 consider the revocation of advance parole because the revocation, like the grant of
21 advance parole, is discretionary).

22 More generally, the decision to release an individual on parole involves the same
23 “complicated balancing of a number of factors which are peculiarly within [the agency’s]
24 expertise.” *Heckler*, 470 U.S. at 831. Indeed, parole determinations encompass, among
25 other things, “the possibility that [a noncitizen] may abscond to avoid being returned to his
26 or her home country,” “priorities for the use of limited detention space,” whether detention
27 is in the public interest, and of course, the statutorily undefined requirements that parole
28 be for “urgent humanitarian reasons or significant public benefit.” *Jeanty v. Bulger*, 204 F.

1 Supp. 2d 1366, 1377, 1382 (S.D. Fla. 2002), *aff'd*, 321 F.3d 1336 (11th Cir. 2003); 8 U.S.C.
2 § 1182(d)(5); *accord Padilla*, 953 F.3d at 1145 (describing ICE policy allowing parole “in
3 light of available detention resources”). Because the parole decision involves a complicated
4 balancing of factors that are not well suited to judicial supervision, that decision has long
5 been committed to agency discretion and not subject to judicial review.

6 Finally, Arizona essentially maintains that section 1225 requires CPB to pursue a
7 policy of “absolute” enforcement. But Congress has said otherwise, authorizing DHS and
8 its components to establish “immigration enforcement policies and priorities,” 6 U.S.C. §
9 202(5), and to “issue such instructions” and “perform such other acts as he deems necessary
10 for carrying out [DHS’s] authority” under the INA, 8 U.S.C. § 1103(a)(3). Indeed, DHS
11 has unreviewable “discretion regarding when and whether to initiate deportation
12 proceedings.” *Cortez-Felipe v. INS*, 245 F.3d 1054, 1057 (9th Cir. 2001).

13 A. Because There Is No Final Agency Action, Claims 9-13 Must Be Dismissed.

14 Plaintiffs’ challenge to Defendants’ alleged parole and NTR policies do not
15 challenge “final agency action” subject to judicial review. 5 U.S.C. § 704. Agency action
16 is final if it determines legal “rights or obligations.” *Bennett v. Spear*, 520 U.S. 154, 178
17 (1997). The actions that Arizona challenges are not in fact “policies,” but are a set of
18 individual enforcement decisions taken by CBP officers, but even if they did constitute
19 general policies, they are not final agency action, because they do not finally determine
20 legal rights or obligations. A nonfinal agency order is one that “does not of itself adversely
21 affect complainant but only affects his rights adversely on the contingency of future
22 administrative action”. *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939).

23 Neither the NTR nor the alleged parole “policies” satisfy this rule. As to the NTR
24 guidance and its replacement, “Parole Plus,” neither creates legal rights nor imposes legal
25 obligations. *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014). Indeed,
26 the agency retains the discretion to alter or revoke the guidance at will, so the guidance is
27 nonfinal notwithstanding any expectation that rank-and-file officers will comply with the
28 guidance while it is in effect. *Cf. Wilderness Soc’y v. Norton*, 434 F.3d 584, 596 (D.C. Cir.

1 2006). Nor does the NTR and Parole Plus guidance require CBP officers to take any
2 specific action in any specific circumstance. Under the policy, CBP officers retained
3 discretion on a “case-by-case basis” to release an individual on an NTR, now on Parole
4 Plus, or to take any other enforcement action authorized by statute. Ex. A at 1-2. And the
5 INA “makes clear that whether and for how long temporary parole is granted are matters
6 entirely within the discretion” of DHS, *Kwai Fun Wong v. United States INS*, 373 F.3d
7 952, 968 (9th Cir. 2004), such that the NTR and Parole Plus guidance do not constitute
8 final agency action. Prioritization guidelines “are not statutes and do not have the status of
9 law as they constitute a prioritization and not a prohibition of enforcement”. *Florida v.*
10 *United States*, No. 8:21-cv-541-CEH-SPF, 2021 U.S. Dist. LEXIS 94083, at *28-29 (M.D.
11 Fla. May 18, 2021). Prioritization schemes which “do not change anyone’s legal status nor
12 [] prohibit the enforcement of any law or detention of any noncitizen” do “not constitute
13 final agency action reviewable under the APA.” *Id.*

14 Second, Arizona has not identified any parole “policy” that exists generally. Instead,
15 Arizona challenges an amalgam of parole decisions made by DHS at the Southwest border.
16 But as explained, parole is an individual discretionary decision made on a “case-by-case
17 basis.” 8 U.S.C. § 1182(d)(5)(A). Accordingly, Plaintiffs cannot establish a unified
18 “policy” to challenge. *Cf. Lightfoot v. D.C.*, 273 F.R.D. 314, 326 (D.D.C. 2011) (“The
19 question is not whether a constellation of disparate but equally suspect practices may be
20 distilled from the varying experiences” but rather, Plaintiffs must first identify the ‘policy
21 or custom’ they contend violates the” law).

22 A particular noncitizen’s parole decision may be a final agency action with respect
23 to that individual, as that decision has direct consequences for his/her personal legal status
24 regarding detention versus release. *See Nat’l Min. Ass’n*, 758 F.3d at 253. But an individual
25 noncitizen’s decision is not final with respect to Arizona, because it does not create “direct
26 and appreciable legal” consequences to satisfy the APA’s finality inquiry requires. *Bennett*,
27 520 U.S. at 178. Regardless, even if Defendants’ had a general “parole” policy, it would
28 not constitute final agency action for the same reasons. Parole by its nature requires a case-

1 by-case assessment, and Plaintiffs have identified nothing that *requires* DHS officers to
2 take a specific action with respect to parole in any specific case. *See* 8 U.S.C. § 1182(d)(5);
3 8 C.F.R. § 212.5. No identified policy prevents DHS officials from granting or denying
4 parole in any specific case.

5 Arizona asserts that it will shoulder the burden of increased social service costs
6 caused by the possible increase in migration to Arizona. It further argues that this influx of
7 immigrants to Arizona is due to Defendants’ parole practices. Accordingly, Arizona
8 argues, Defendants’ parole practices have determined rights and obligations, rendering
9 them “final agency action”. Arizona’s argument fails. Defendants’ alleged guidance to
10 enforcement officers on how to use their discretion regarding release of noncitizens does
11 not “require” any State or noncitizen “to do anything,” nor does it “prohibit” any State or
12 noncitizen “from doing anything.” *Nat’l Mining Ass’n*, 758 F.3d at 252. *If* more noncitizens
13 settle in Arizona because of Defendants’ actions, there may be downstream *practical*
14 consequences to Plaintiffs, such as increased expenditures on social services. *See e.g.*,
15 *Louisiana v. U.S. Army Corps of Engineers*, 834 F.3d 574, 583 (5th Cir. 2016)
16 (distinguishing practical consequences from legal consequences). These consequences,
17 however, do not constitute the “direct and appreciable legal” consequences that the APA’s
18 finality inquiry requires. *Bennett*, 520 U.S. at 178.

19 B. Statutes Preclude Judicial Review Of Claims 9 to 13.

20 Several provisions of the INA also bar Arizona’s claims. *See* 5 U.S.C. § 701(a)(1)
21 (no APA review when “statutes preclude judicial review”).

22 Section 1252(g). Arizona’s claim that DHS must issue NTAs to each inadmissible
23 noncitizen who is apprehended at or near the border and inspected under section 1225 is
24 barred by section 1252(g). Section 1252(g) bars jurisdiction over any claim “arising from
25 the decision or action by the [Secretary] to commence proceedings, adjudicate cases, or
26 execute removal orders against any alien under this chapter.” Section 1252(g) reflects
27 Congress’s desire to “protect[] the Executive’s discretion from the courts” in general and
28

1 from “attempts to impose judicial constraints upon prosecutorial discretion” in particular.
2 *AADC*, 525 U.S. at 485-86, 485 n.9.

3 Arizona challenges the NTR policy on the grounds that “the government is also
4 required to initiate removal proceedings against these aliens.” TAC at ¶ 125. But DHS does
5 issue notices to appear, just not on the timeline Arizona would prefer as a policy matter.
6 *See supra* 3. Plaintiffs thus challenge Defendants’ decision whether and when to
7 “commence proceedings,” a claim which falls squarely under the jurisdictional bar of
8 section 1252(g). *See AADC*, 525 U.S. at 487.

9 Section 1252(a)(2)(b)(ii). Arizona’s challenges to Defendants’ individual decisions
10 to release noncitizens on parole are barred by section 1252(a)(2)(B)(ii)—which bars review
11 of “decision or action[s] ... the authority for which is specified under this subchapter to be
12 in the discretion of ... the Secretary of Homeland Security”—as the parole decision is
13 expressly specified by the INA to be within the Secretary’s discretion. 8 U.S.C. §
14 1182(d)(5)(A); *supra* pp. 10-12.⁷ The court would similarly lack jurisdiction over any
15 challenge to a parole policy or procedure. *See Loa-Herrera v. Trominski*, 231 F.3d 984,
16 991 (5th Cir. 2000) (“discretionary judgment regarding the application of parole--including
17 the *manner* in which that discretionary judgment is exercised, and whether the procedural
18 apparatus supplied satisfies regulatory, statutory, and constitutional constraints--is not . . .
19 subject to review.”) (internal citations omitted).

20 C. Arizona Does Not Fall Within the Zone of Interests of the Statutes They Invoke.

21 Arizona’s claims also do not fall within the zone of interests of sections 1182(d)(5)
22 or 1225(b). This inquiry asks whether Congress intended for a particular plaintiff to invoke
23 a particular statute to challenge agency action. *See Clarke v. Security Indus. Ass’n*, 479
24 U.S. 388, 399 (1987). If a plaintiff is not the object of a challenged regulatory action—
25 which Arizona is not—the plaintiff has no right of review as its “interests are so marginally
26

27 ⁷ To the extent Arizona challenges the decision not to serve NTAs on noncitizens
28 subject to section 1225(b)(1), i.e., processed for expedited removal but establishing a
credible fear of persecution or torture, review of these decisions is separately barred by the
INA. *See* 8 U.S.C. § 1252(a)(2)(A)(i), (iv).

1 related to or inconsistent with the purposes implicit in the statute that it cannot reasonably
2 be assumed that Congress intended to permit the suit.” *Id.* at 399.

3 Nothing in the text, structure, or purpose of the INA generally, or sections
4 1182(d)(5) or 1225(b) specifically, suggests that Congress intended to permit a State to
5 invoke attenuated financial impacts of immigration enforcement policies to contest those
6 policies. *See Fed’n for Am. Immigration Reform (FAIR), Inc. v. Reno*, 93 F.3d 897, 902
7 (D.C. Cir. 1996) (“*FAIR*”) (“The immigration context suggests the comparative
8 improbability of any congressional intent to embrace as suitable challengers in court all
9 who successfully identify themselves as likely to suffer from the generic negative features
10 of immigration.”). The D.C. Circuit in *FAIR* rejected a similar challenge that the federal
11 government’s “scheme for parole” of arriving noncitizens violated statutory limits on
12 parole authority, holding that the plaintiffs were not within the zone of interests because
13 there was nothing in the “language of the statutes on which [plaintiffs] rely” nor the
14 “legislative history that even hints at a concern about regional impact” of immigration. *Id.*
15 at 900-01. So too here.

16 Indeed, a litigant does not have a “judicially cognizable interest” in another’s
17 prosecution, *Linda R.S.*, 410 U.S. at 619, or “in procuring enforcement of the immigration
18 laws” against third parties in particular ways. *Sure-Tan, Inc. v. NLRB*, 457 U.S. 883, 897
19 (1984). Congress has enacted several provisions aimed at protecting the Executive’s
20 discretion from the courts, *AADC*, 525 U.S. at 486–87, making clear that only noncitizens
21 may challenge enforcement decisions, and only certain types of decisions, and only through
22 their removal proceedings. *See, e.g.*, 8 U.S.C. §§ 1226(e); 1252(a)(2)(B)(ii), 1252(a)(5),
23 (b)(9), (g); *see also id.* §§ 1226a(b)(1), 1229c(f), 1231(h), 1252(a)(2)(A), (a)(2)(C),
24 (b)(4)(D), (b)(9), (d), (f), (g); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029-31 (9th Cir. 2016)
25 (district courts lack jurisdiction over “any issue—whether legal or factual—arising from
26 any removal-related activity.”). A detailed review scheme that allows some parties, but not
27 others, to challenge specific executive action is “strong evidence that Congress intended to
28 preclude [other parties] from obtaining judicial review.” *United States v. Fausto*, 484 U.S.

1 439, 448 (1988); *see Ayuda, Inc. v. Reno*, 7 F.3d 246, 250 (D.C. Cir. 1993) (holding that
 2 organizational plaintiff could not challenge INS policies “that bear on an alien’s right to
 3 legalization”); *Las Americas Immigrant Advoc. Ctr. v. Biden*, No. 3:19-CV-02051-IM,
 4 2021 WL 5530948, at *5 (D. Or. Nov. 24, 2021) (INA provides only noncitizens with cause
 5 of action for enforcement, so other entities lack a cause of action).

6 **IV. Plaintiffs Fail to State a Claim for Relief.**

7 The complaint should also be dismissed under Rule 12(b)(6) as each of the five
 8 counts fails to state a plausible, cognizable claim for relief.⁸

9
 10 ⁸ In support of this motion, the government relies upon:

11 **Exhibit A**, (Parole Plus Alternatives to Detention (Nov. 2, 2021), available at 3:21-
 12 cv-01066, ECF No. 62),

13 **Exhibit B** (Memorandum from Gene McNary, INS Comm’r, *Parole Project for*
 14 *Asylum Seekers at Ports of Entry and INS Detention* (Apr. 20, 1992), 9 Immigration Law
 15 Service 2d PSD Selected DHS Document 4110),

16 **Exhibit C** (Memorandum from John Kelly, Sec’y of Homeland Security,
 17 *Implementing the President’s Border Security and Immigration Enforcement Improvement*
 18 *Policies* (Feb. 20, 2017), available at
 19 [https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-
 20 Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf)),

21 **Exhibit D** (Memorandum from Matthew T. Albence, Exec. Assoc. Dir., U.S.
 22 Immigration and Customs Enf’t, *Implementing the President’s Border Security and*
 23 *Interior Immigration Enforcement Policies* (Feb. 21, 2017), available at
 24 [https://www.ice.gov/doclib/foia/eoRecords/eoRecordsEnforcement_01-20-2017_03-14-
 25 2017.pdf](https://www.ice.gov/doclib/foia/eoRecords/eoRecordsEnforcement_01-20-2017_03-14-2017.pdf)),

26 **Exhibit E** (ICE Policy No. 11002.1, *Parole of Arriving Aliens Found to Have a*
 27 *Credible Fear of Persecution or Torture* (Dec. 8, 2009), available at
 28 [https://www.ice.gov/doclib/dro/pdf/11002.1-hd-
 parole-of-arriving-aliens-found-credible-fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole-of-arriving-aliens-found-credible-fear.pdf)), and

29 **Exhibit F** (Memorandum from Victor X. Cerda, Acting Dir., Det. and Removal
 30 Operations, U.S. Immigration and Customs Enf’t, *ICE Transportation, Detention and*
 31 *Processing Requirements* (Jan. 11, 2005), available at
 32 [https://www.ice.gov/doclib/foia/dro_policy_memos/icetransportationdetentionandprocess
 33 ingrequirements.pdf](https://www.ice.gov/doclib/foia/dro_policy_memos/icetransportationdetentionandprocessingrequirements.pdf)).

34 Each of these documents is a publically available government document. Exhibit A
 35 is also incorporated in to the complaint by reference. Therefore the Court can consider
 36 these exhibits without converting this motion into one for summary judgment. *United*
 37 *States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003) (in evaluating Rule 12(b)(6)
 38 motion, court may consider documents external to the complaint by judicial notice or by
 39 incorporation by reference in the complaint); *U.S. ex rel Robinson Rancheria Citizens*
 40 *Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir.1992)(“Federal courts may take notice
 41 of proceedings in other courts, both within and without the federal judicial system, if those
 42 proceedings have a direct relation to the matters at issue.”); *Collins v. Wells Fargo Bank*,
 43 No. CV-12-2284-PHX-LOA, 2013 U.S. Dist. LEXIS 102791, at *20 (D. Ariz. July 22,
 44 2013).

1 A. Counts 9 and 12 (Substantive APA Claims)

2 Counts 9 and 12 assert essentially the same claim: Defendants’ practices are “not in
3 accordance with law” or “in excess of statutory . . . authority,” 5 U.S.C. § 706(2)(A), (C)
4 (Count 9), and are “unlawfully withheld or unreasonably delayed,” 5 U.S.C. § 706(1)
5 (Count 12), because they allegedly violate detention mandates of section 1225(b)(1) and
6 (2) and the parole provision, 8 U.S.C. 1182(d)(5)(A). TAC at ¶¶ 216-221, 231-232. These
7 claims fail as a matter of law because the cited statutes do not support Plaintiffs’ theory.
8 Sections 1225(b)(1) and (2) do not require that Defendants initiate removal proceedings or
9 detain every noncitizen encountered at or near the border. First, nothing in sections
10 1225(b)(1) and (b)(2) overcomes the “deep-rooted nature of law-enforcement discretion.”
11 *Town of Castle Rock*, 545 U.S. at 760-61. The fact that § 1225(b) uses the terms “shall ...
12 detain[.]” and “shall order” does not constrain the government’s longstanding discretion to
13 determine whether commencement of removal proceedings is appropriate. DHS is
14 “invested with the sole discretion to commence [such] removal proceedings,” *Matter of*
15 *Avetisyan*, 25 I. & N. Dec. 688, 690-91 (BIA 2012), and nothing in the statute evinces a
16 “stronger indication” of intent to impose a true mandate on the Executive to mandate
17 removal in every instance. *See Town of Castle Rock*, 545 U.S. at 761; *Arizona*, 2021 U.S.
18 Dist. LEXIS 125687, at *27 (a blanket ‘shall’ does not automatically constitute a statutory
19 mandate, especially when it concerns the enforcement of laws”).

20 Second, sections 1225(b)(1) and (b)(2) by their terms do not require initiating
21 removal and detention in all cases. Section 1225(b)(1)—which authorizes the expedited
22 removal of certain noncitizens—does not mandate expedited removal. Immigration
23 officers must first make a discretionary determination whether a noncitizen should be
24 processed under § 1225(b)(1) at all. *See Matter of E-R-M-*, 25 I. & N. Dec. at 523 (“DHS
25 has discretion to put aliens in [§ 1229a] removal proceedings even though they may also
26 be subject to expedited removal”). The Board of Immigration Appeals (BIA) has concluded
27 that nothing in the statute compels “DHS to exercise its prosecutorial discretion to initiate
28 expedited removal proceedings.” *Matter of J-A-B- & I-J-V-A-*, 27 I. & N. Dec. 168, 172

1 (BIA 2017). The BIA’s longstanding position that DHS has discretion not to apply section
2 1225(b)(1) in individual cases is entitled to judicial deference under *Chevron, U.S.A., Inc.*
3 *v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *INS v. Aguirre-*
4 *Aguirre*, 526 U.S. 415, 424-425 (1999).

5 Next, nothing in section 1225(b)(2)(A) mandates the commencement of removal
6 proceedings under section 1229a against all applicants for admission at the border or
7 physically present in the country. See, e.g., *E-R-M-*, 25 I. & N. Dec. at 523 (noting “broad
8 discretion given to ... charging decisions by the Executive Branch, that is, the DHS, in the
9 immigration context”). Rather, section 1225(b)(2)(A) “authorizes the government to detain
10 certain aliens” seeking admission to the United States *if* it decides to remove them through
11 section 1229a removal proceedings. *Jennings v. Rodriguez*, 138 S. Ct. 830, 838 (2018).
12 The antecedent decision whether to pursue removal at all is a separate, discretionary
13 decision of the Secretary that is not subject to judicial review—just as prosecutors’
14 decisions whether to bring criminal charges against suspected offenders are not subject to
15 judicial review. See *Arizona*, 567 U.S. at 396; *AADC*, 525 U.S. at 483, 485-86, 485 n.9.
16 Accordingly, even if Section 1225(b)(2)(A) “directs [immigration officers] to detain an
17 alien for the purpose of placing that alien in removal proceedings”—a proposition the
18 government disputes—the provision “does not limit the authority of DHS to determine
19 whether to pursue the removal of the immigrant” in the first place. *Crane*, 783 F.3d at 249;
20 *Cortez-Felipe*, 245 F.3d at 1057 (DHS has unreviewable “discretion regarding when
21 and whether to initiate deportation proceedings”).

22 As to Plaintiffs’ argument that detention is mandatory once proceedings are
23 initiated, TAC at ¶ 122, nothing in the statute requires DHS to take into custody and detain
24 all eligible noncitizens. Instead, as explained, the INA authorizes DHS to release detained
25 noncitizens in particular circumstances, subject to statutory and regulatory limitations,
26 including through parole, 8 U.S.C. § 1182(d)(5)(A), or “bond” and “conditional parole,” 8
27 U.S.C. § 1226(a)(2)(A)-(B). And, the decision whether to release is a complex decision
28

1 that considers many factors, and is not subject to judicial review. *See* 8 U.S.C. §
2 1252(a)(2)(B)(ii); 1226(e); *Loa-Herrera*; 231 F.3d at 991.⁹

3 Finally, the federal government has exercised discretionary release authority for as
4 long as it has been regulating immigration. *See, e.g., Nishimura Ekiu v. U.S.*, 142 U.S. 651,
5 651, 661 (1892) (discussing release of noncitizen to care of private organization); *Kaplan*
6 *v. Tod*, 267 U.S. 228, 230 (1925) (same). Indeed, Congress enacted 8 U.S.C. § 1182(d)(5)
7 as a “codification of the [prior] administrative practice.” *Leng May Ma v. Barber*, 357 U.S.
8 185, 188 (1958). DHS has long interpreted section 1182(d)(5) to authorize parole of
9 noncitizens who “present neither a security risk or a risk of absconding” and “whose
10 continued detention is not in the public interest.” 8 C.F.R. § 212.5(b)(5). It is the agency,
11 not the court, that determines what undefined statutory terms like “significant public
12 benefit” warranting parole may include, *see* 8 U.S.C. §§ 1103(a)(1), 1182(d)(5), and that
13 determination has always encompassed resource constraints. *See e.g., Padilla*, 953 F.3d at
14 1145, *vacated on other grounds*, 141 S. Ct. 1041 (2021) (describing ICE policy allowing
15 parole “in light of available detention resources”); *Jeanty*, 204 F. Supp. 2d at 1377 (parole
16 decision may take into consideration “priorities for the use of limited detention space”).

17 Multiple presidential administrations have construed section 1182(d)(5) this way.
18 For example, in 1992, the former Immigration and Naturalization Service (INS), expanding
19 upon a pilot project conducted in May 1990 to October 1991, issued guidelines on
20 releasing, through parole, asylum seekers from INS detention. In the memorandum, INS
21 explained that it “has limited detention space” and that by adopting the parole project it
22 would “be able to detain those persons most likely to abscond or to pose a threat to public
23 safety rather than to base the detention decision solely or primarily on the availability of
24 detention space.” Ex. B, Memorandum from Gene McNary, INS Comm’r, *Parole Project*
25 *for Asylum Seekers at Ports of Entry and INS Detention* (Apr. 20, 1992), 9 Immigration

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27
28 ⁹ Section 1252(f)(1) bars this Court from issuing an injunction placing requirements
and limitations on Defendants’ authority to charge and detain or release noncitizens under
section 1225, *see AADC*, 525 U.S. at 481-82; *Hamama v. Adducci*, 912 F.3d 869, 880 (6th
Cir. 2018), and so Arizona’s claims for such injunctive relief must be dismissed.

1 Law Service 2d PSD Selected DHS Document 4110, at 1. Likewise, in February 2017,
2 then-Secretary John Kelly issued a policy memorandum stating that “[a]s the Department
3 works to expand detention capabilities, detention of all [individuals described in section
4 1225] may not be immediately possible, and detention resources should be prioritized
5 based upon potential danger and risk of flight if an individual [noncitizen] is not detained,
6 and parole determinations will be made in accordance with current regulations and
7 guidance. *See* 8 C.F.R. §§ 212.5, 235.3.” Ex. C, Memorandum from John Kelly, Sec’y of
8 Homeland Security, *Implementing the President’s Border Security and Immigration*
9 *Enforcement Improvement Policies* (Feb. 20, 2017), available
10 at [https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf)
11 [Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf), at 3.
12 ICE similarly issued policy guidance stating that “[p]arole or other release, with all
13 available safeguards, may also be warranted where detention capacity limits the agency’s
14 ability to detain the [noncitizen] consistent with legal requirements, including court orders
15 and settlement agreements.” Ex. D, Memorandum from Matthew T. Albence, Exec. Assoc.
16 Dir., U.S. Immigration and Customs Enf’t, *Implementing the President’s Border Security*
17 *and Interior Immigration Enforcement Policies* (Feb. 21, 2017), available at
18 [https://www.ice.gov/doclib/foia/eoRecords/eoRecordsEnforcement_01-20-2017_03-14-](https://www.ice.gov/doclib/foia/eoRecords/eoRecordsEnforcement_01-20-2017_03-14-2017.pdf)
19 [2017.pdf](https://www.ice.gov/doclib/foia/eoRecords/eoRecordsEnforcement_01-20-2017_03-14-2017.pdf), at 3.¹⁰

20 And, in July 2019, following legal decisions addressing whether certain noncitizens
21 were entitled to bond hearings before an immigration judge, (*see Padilla v. ICE*, 387 F.
22 Supp. 3d 1219 (W.D. Wash. 2019); *Matter of M-S-*, 27 I. & N. Dec. 509 (A.G. 2019)), ICE
23 issued interim guidance to its workforce specifically noting that it lacked the detention
24 capacity to detain all noncitizens to whom the immigration law detention provisions apply,
25 that the agency accordingly needed to appropriately prioritize the use of this limited

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27 ¹⁰ *See also* Ex. E, ICE Policy No. 11002.1, *Parole of Arriving Aliens Found to Have*
28 *a Credible Fear of Persecution or Torture* (Dec. 8, 2009), available at
[https://www.ice.gov/doclib/dro/pdf/11002.1-hd-](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf)
[parole_of_arriving_alien_found_credible_fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf).

1 detention capacity, and that the public interest favored maintaining custody of noncitizens
2 posing the greater potential danger to public safety or risk of flight. *See Interim Guidance*
3 *for Implementation of Matter of M-S-*, 27 I. & N. Dec. 509 (A.G. 2019): Parole of Aliens
4 Who Entered Without Inspection, Were Subject to Expedited Removal, and Were Found
5 to Have a Credible Fear of Persecution or Torture.¹¹

6 Courts have long acknowledged and upheld this practice. *See e.g Padilla*, 953 F.3d
7 at 1145 (describing ICE policy allowing parole “in light of available detention resources”);
8 *Jeanty*, 204 F. Supp. 2d at 1377 (parole decision may take into consideration “priorities for
9 the use of limited detention space”); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 324 (D.D.C.
10 2018) (describing DHS’s “Parole Directive,” effective since 2009); *see also New Mexico*
11 *v. McAleenan*, 450 F. Supp. 3d 1130, 1214 (D.N.M. 2020) (“[8 U.S.C. § 1182(d)(5)(A)]
12 grants the Attorney General the discretion to parole asylum seekers for ‘significant public
13 benefit.’ [] This vague standard conceivably encompasses a wide range of public benefits,
14 such as conserving resources otherwise spent on housing asylum seekers or allowing an
15 individual to carry on their employment in the United States.”).

16 Yet, the Fifth Circuit recently concluded that that DHS may not parole noncitizens
17 “*en masse*” under Section 1182(d)(5) based on insufficient detention capacity, because
18 doing so would be an abdication of the case-by-case adjudication required by Section
19 1182(d)(5). *Texas v. Biden*, No. 21-10806, 2021 U.S. App. LEXIS 36689, *142 (5th Cir.
20 Dec. 13, 2021) (emphasis in original). That decision is incorrect and should not be

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22 ¹¹ Guidance from both ICE and the former INS has long recognized the need to
23 release individuals in light of limited detention capacity. For example, in 2005, ICE issued
24 guidance indicating that noncitizens subject to mandatory detention or a high priority for
25 detention should be released at the time of processing only “when national bed space
26 population is at capacity.” Ex. F, Memorandum from Victor X. Cerda, Acting Dir., Det.
27 and Removal Operations, U.S. Immigration and Customs Enf’t, *ICE Transportation,*
28 *Detention and Processing Requirements* (Jan. 11, 2005), available at
https://www.ice.gov/doclib/foia/dro_policy_memos/icetransportationdetentionandprocessingrequirements.pdf, at 2. *See also Matter of Garvin-Noble*, 21 I. & N. Dec. 672, 674–75 (BIA 1997) (noting that insufficient INS detention capacity motivated the enactment of the Transition Period Custody Rules); U.S. Gov’t Accountability Off., GAO-92-85, *Immigration Control: Immigration Policies Affect INS Detention Efforts* 27–28, 54–55 (1992) (discussing the 18-month parole pilot program ending in October 1991 through which asylum seekers were released based on detention capacity).

1 followed. Moreover, it is inapplicable to this case, which does not involve any practice of
2 paroling “en masse.”¹²

3 First, Congress charged *the Secretary* with determining, “in his discretion,” whether
4 the parole of specific persons—such as those whom DHS cannot detain due to insufficient
5 appropriations and who do not pose a danger or a flight risk—would be a “significant
6 public benefit.” 8 U.S.C. 1182(d)(5)(A).

7 Second, *Texas* fails to acknowledge the longstanding practice across multiple
8 administrations—which is entitled to deference—of relying in part on detention capacity
9 as a factor in case-by-case parole determinations. Indeed, without addressing the many
10 policies discussed here, the Fifth Circuit simply assumed that the government *must* be
11 releasing individuals without addressing their individual factors case-by-case. But the fact
12 that a particular factor such as lack of detention capacity might be implicated in many cases
13 does not mean that DHS has abdicated case-by-case review or is paroling “en masse.” *Id.*
14 at * 91. To the contrary, as the guidance discussed earlier implementing section 1182(d)(5)
15 demonstrates, DHS’s parole regulations require “case-by-case” decisions, including a
16 threshold determination that a noncitizen “presents neither a security risk nor a risk of
17 absconding” and a further determination that parole is appropriate, including because
18 “continued detention is not in the public interest.” 8 C.F.R. 212.5(b). In making those
19 determinations, DHS must of course account for its actual detention capacity. But that does
20 not make its decisions any less case-by-case.

21 Third, the Fifth Circuit ignored the government’s argument that detention capacity
22 must be a factor in parole decisions because Congress has not appropriated enough funds

23
24 ¹² *Texas* involved a challenge to DHS’s termination of the Migrant Protection
25 Protocols, which implemented DHS’s statutory authority permitting the return of certain
26 noncitizens to Mexico pending the disposition of their removal proceedings. *See* 8 U.S.C.
27 1225(b)(2)(C) (authorizing Secretary to return certain noncitizens arriving by land to
28 contiguous territory). The Fifth Circuit concluded that the government is required by 8
U.S.C. §1225 to detain all such noncitizen applicants for admission who are not returned
to contiguous territories—except for those paroled into the United States based on case-
by-case humanitarian considerations—and that parole of such individuals is not permitted
based on capacity limitations. *Id.* at *7-8, *141-142. The government filed a Petition for a
Writ of Certiorari on December 29, 2021. *See Texas v. Biden*, No. 21-954.

1 to detain everyone potentially subject to detention under Section 1225. Instead, the Court
2 perfunctorily noted that “Section 1225(b)(2)(C) authorizes contiguous-territory return
3 as an alternative” to parole. *Id.* at 140-141. But contiguous-territory return was employed
4 principally on a limited, ad hoc basis for over two decades after Section 1225(b)(2)(C) was
5 enacted, and yet Congress never amended the statute to require greater use of contiguous
6 territory return. Nor did Congress amend Section 1182(d)(5) at any time since 1996 to limit
7 consideration of detention capacity or appropriate sufficient additional funds to increase
8 capacity when amending the INA, despite the agency’s longstanding practice. *See Lorillard*
9 *v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative
10 ... interpretation of a statute and to adopt that interpretation when it re-enacts a statute
11 without change.”). Moreover, contiguous-territory return is not an alternative option for
12 many individuals potentially subject to detention under Section 1225, as it is limited to
13 noncitizens who *arrive by land* via Mexico or Canada. It cannot be used for noncitizens
14 who arrive by boat or by plane. But under the Fifth Circuit’s reasoning, all such individuals
15 must be detained, and cannot be paroled even if DHS lacks any means of detaining them.
16 *Texas*, 2021 U.S. App. LEXIS 36689 at *94, 138. That contravenes settled law that
17 Congress does not intend for statutory provisions like Sections 1225 and 1182 to mean
18 different things for different people in different circumstances. *Clark v. Martinez*, 543 U.S.
19 371, 378 (2005) (“To give these same words a different meaning for each category [of
20 person it applied to] would be to invent a statute rather than interpret one.”). In sum,
21 Defendants’ parole practices are fully consistent with the discretionary authority vested in
22 DHS by the statute under longstanding interpretation by the agency and courts.

23 **B. Count 10 (APA Arbitrary and Capricious Claim)**

24 Count 10 alleges that “Defendants’ policy is arbitrary and capricious for several
25 reasons,” including its alleged failure to consider costs to States and their reliance interests,
26 alternatives to parole, and the agency’s purported departure from prior practice. Plaintiffs
27 also allege that the agency’s reliance on resource constraints is pre-textual. TAC at ¶¶ 222-
28 223. Plaintiffs’ argument fails at the threshold because it presumes Defendants’ release

1 practices are spelled out in a policy document. But the only “policy” addressed in such a
2 document at issue here are NTRs, and the policy document has *ended* that practice, Ex. A,
3 mooting Plaintiffs’ challenge to it.

4 As to Arizona’s general “parole” and “release” allegations, no such “policy” exists
5 and the Third Amended Complaint does not identify any specific policy, but reveals that
6 the parole “policy” at issue is Plaintiffs’ undeveloped speculation that the release of a
7 certain threshold number of noncitizens means the government must not be adhering to the
8 criteria permitting parole under the statute and regulation. *See* TAC at ¶ 132 (“*If they are,*
9 *instead, paroling each of these individuals, they are not limiting the use of parole to “case-*
10 *by-case bas[e]s” nor to situations presenting “urgent humanitarian reasons or significant*
11 *public benefit.”*) (emphasis added). Plaintiffs’ mere conjecture fails to plausibly allege the
12 existence of any cohesive policy addressing the conduct at issue. *See Bell Atl. Corp. v.*
13 *Twombly*, 550 U.S. 544, 570 (2007); *Lightfoot*, 273 F.R.D. at 326 (cannot allege a “policy”
14 by looking at disparate individual actions). Indeed, Arizona appears to be challenging as a
15 “policy” merely an amalgam of individual release decisions issued under the parole statute
16 and regulation that it disagrees with. *See* 8 U.S.C. § 1182(d)(5); 8 C.F.R. § 212.5. However,
17 the APA may not be invoked to demand “day-to-day agency management” of agency
18 decisions *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 67 (2004). And as
19 explained, the Court lacks jurisdiction to review these expressly discretionary individual
20 determinations. *See* 8 U.S.C. § 1252(a)(2)(B)(ii); *supra* pp. 15-17.

21 Further, the APA’s limitation of review to “agency action” does not permit this
22 “kind of broad programmatic attack” seeking “*wholesale* improvement of [a] program by
23 court decree.” *Norton*, 542 U.S. at 64. “Under the terms of the APA, [Plaintiffs] must
24 direct its attack against some particular ‘agency action’ that causes it harm.” *Lujan*, 497
25 U.S. at 891. The APA does not provide a cause of action for Plaintiffs to promote their
26 view of how parole determinations generally must be decided. *See id.*; *Ctr. for Biological*
27 *Diversity v. Zinke*, 260 F. Supp. 3d 11, 20 (D.D.C. 2017) (“The discreteness limitation
28 precludes using broad statutory mandates to attack agency policy[.]”). Plaintiffs thus fail

1 to allege a cognizable “agency action” that could even be scrutinized under the APA for
2 arbitrary and capricious reasoning.

3 C. Count 11 (APA Notice and Comment)

4 Count 11 alleges that Defendants violated 5 U.S.C. § 553, arguing “[e]ven assuming
5 Defendants have discretion to depart from the clear requirements of the INA with respect
6 to arriving aliens, a sea change of this magnitude required notice and comment.” TAC at
7 ¶ 230. First, this claim suffers the same deficiency as Count 10. The APA requires notice
8 and comment only for “rule making.” 5 U.S.C. § 533; *see id.* § 551(4)–(5) (defining “rule”
9 and “rule making”). Plaintiffs have not identified any “rule” that they challenge regarding
10 parole, but merely what they view as unlawful decisions in aggregate of individual
11 discretionary determinations. These individual determinations based on the facts of
12 specific cases are best described as “adjudications,” not “rules,” and are not bound by
13 notice-and-comment rulemaking. *See* 5 U.S.C. § 551(6)–(7); *United States v. Florida E.*
14 *Coast Ry.*, 410 U.S. 224, 244–45 (1973).

15 Second, regarding the NTR guidance and Defendants’ alleged general parole
16 policy—assuming one exists—both are “general statements of policy,” 5 U.S.C.
17 § 553(b)(3)(A), that “advise the public prospectively of the manner in which the agency
18 proposes to exercise a discretionary power,” *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993),
19 and not subject to notice-and-comment rulemaking. “The critical factor to determine
20 whether a directive announcing a new policy constitutes a rule or a general statement of
21 policy is the extent to which the challenged directive leaves the agency, or its implementing
22 official, free to exercise discretion to follow, or not to follow, the announced policy in an
23 individual case.” *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987) (cleaned
24 up). The policy document ending the NTR practice and providing for Parole Plus instead
25 offered guidelines, but no requirements, for when agency officers “may consider” such
26 release mechanisms, and provided that these discretionary decisions must still be assessed
27 “on a case-by-case basis.” Ex. A at 1-2. The policy thus “leaves the agency, or its
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1 implementing official, free to exercise discretion to follow, or not to follow, the announced
2 policy in an individual case.” *Mada-Luna*, 813 F.2d at 1013.

3 Similarly, while Plaintiffs do not allege that Defendants have made any relevant
4 policy statement regarding parole, past policy statements regarding parole have historically
5 left discretion in the hands of the line officer adjudicators. *See* ICE, “Exercising
6 Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of
7 the Agency for the Apprehension, Detention, and Removal of Aliens,” June 17, 2011,
8 *available at* [https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-](https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf)
9 [memo.pdf](https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf); ICE Policy Directive No. 11002.1, “Parole of Arriving Aliens Found to Have a
10 Credible Fear of Persecution or Torture,” Dec. 8, 2009, *available at*
11 [https://www.ice.gov/doclib/dro/pdf/11002.1-hd-](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf)
12 [parole_of_arriving_alien_found_credible_fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf), § 4.4 (“Parole remains an inherently
13 discretionary determination entrusted to the agency; this directive serves to guide the
14 exercise of that discretion.”). The alleged “policies,” to the extent they even exist, “do[]
15 not negate the discretionary nature of” the determination regarding release and “each case
16 receives individual consideration” indicating that such policies “do[] not establish a
17 ‘binding norm’” and “need not be promulgated as a rule under the APA.” *Bulger*, 204 F.
18 Supp. 2d at 1383. Count eleven should be dismissed.

19 D. Count 13 (INA and Constitution Claim)

20 Count 13 alleges that “the federal government cannot ignore federal statutes, and
21 the Constitution—including the separation of powers doctrine and the Take Care Clause—
22 provides a separate cause of action to challenge the conduct described in Count VII.” TAC
23 at ¶ 234. This Count fails to state a cognizable claim for relief.

24 First, Arizona offers no factual allegations to support this claim, and its one-
25 sentence, conclusory, legal assertion is insufficient to plead a claim for relief. *Ashcroft v.*
26 *Iqbal*, 556 U.S. 662, 678 (2009). Second, even if Arizona had offered factual allegations,
27 sections 1225(b) and 1182(d), as explained above, do not override the government’s
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1 discretion to decide whether to initiate proceedings or to release noncitizens on parole or
2 otherwise. *Supra* pp. 8-12.

3 Third, separation of powers principles, to the extent they are implicated at all, defeat
4 Plaintiffs' legal theory. Both the Constitution, and Congress in the INA, vest the Executive
5 with authority over decisions regarding detention and removal of noncitizens. *See, e.g.,*
6 *Knauff*, 338 U.S. at 543; *United States v. Velasquez*, 524 F.3d 1248, 1253 (11th Cir. 2008)
7 (holding that Executive, not judiciary, has the authority to decide to detain noncitizens).¹³

8 Finally, Plaintiffs' Take Care Clause argument fails as it is merely a conclusory
9 legal assertion, *see id.*, and lacks a cause of action. No court has ever found that the Take
10 Care Clause provides a private right of action. *Las Americas Immigrant Advocacy Center*
11 *v. Biden*, No. 3:19-cv-02051-IM, 2021 U.S. Dist. LEXIS 226730, at *8 (D. Or. Nov. 24,
12 2021) (collecting cases); *see, e.g., City of Columbus v. Trump*, 453 F. Supp. 3d 770, 800
13 (D. Md. 2020) ("No court in this circuit, or any other circuit, has definitively found that the
14 "Take Care Clause" provides a private cause of action which a Plaintiff may bring against
15 the President of the United States or his administration."); *Robbins v. Reagan*, 616 F. Supp.
16 1259, 1269 (D.D.C.), *aff'd*, 780 F.2d 37 (D.C. Cir. 1985) (similar)). The Supreme Court
17 has cautioned courts against "creat[ing] new causes of action" under the Constitution. *See*
18 *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020). Plaintiffs' conclusory invocation of this
19 Clause offers no basis for this Court to be the first to break with the caution that has deterred
20 all other courts from recognizing a private right of action.

21 Even were the Court to recognize such a cause of action, Plaintiffs' claim still fails.
22 The Supreme Court has distinguished between duties that are ministerial and that are
23 "executive and political," explaining that court lacked authority to order the Executive to

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25 ¹³ *See also United States v. Litton Indus., Inc.*, 462 F.2d 14, 18 (9th Cir. 1972);
26 *Dalton v. Specter*, 511 U.S. 462, 474 (1994) (holding that claims that executive branch
27 actions are inconsistent with carrying out their "statutory authority are not 'constitutional'
28 claims" but rather statutory claims, and that the "distinction between claims that an official
exceeded his statutory authority, on one hand, and claims that he acted in violation of the
Constitution, on the other, is too well established to permit this sort of evisceration").

1 take certain action in the latter case but possibly could for ministerial duties, because
2 “nothing was left to discretion. There was no room for the exercise of judgment.” *State of*
3 *Mississippi v. Johnson*, 71 U.S. 475, 498, 18 L. Ed. 437 (1866); *see Nat’l Treasury Emps.*
4 *Union v. Nixon*, 492 F.2d 587, 608 (D.C. Cir. 1974). Ordering the Executive to take action
5 involving discretion and political judgment would violate separation of powers “and the
6 general principles which forbid judicial interference with the exercise of Executive
7 discretion.” *Johnson*, 71 U.S. at 499.

8 Here, Plaintiffs request an injunction requiring Defendants to take action under
9 sections 1225(b) and 1182(d) that is not purely ministerial, but political, in that it involves
10 inherently discretionary duties—requiring that the government charge and detain
11 noncitizens for removal and deny parole. Plaintiffs’ claim falls squarely under the
12 longstanding bar on judicial interference with the exercise of Executive discretion, *see id.*,
13 and must be dismissed.

14 CONCLUSION

15 For the foregoing reasons, the Court must dismiss Counts 9 through 13 of the Third
16 Amended Complaint.
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1 Date: January 3, 2022

Respectfully submitted,

2 BRIAN M. BOYNTON

3 Acting Assistant Attorney General
4 WILLIAM C. PEACHEY

5 Director
6 EREZ REUVENI
7 Assistant Director
8 /s/ Elissa Fudim

9 ELISSA FUDIM

Trial Attorney

10 U.S. Department of Justice, Civil Division
11 Office of Immigration Litigation,
12 District Court Section

13 P.O. Box 868, Ben Franklin Station
14 Washington, D.C. 20044

Tel: (202) 598-6073

15 Email: elissa.p.fudim@usdoj.gov

16 *Counsel for Defendants*

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