IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF FLORIDA,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants-Appellees.

No. 21-11715

OPPOSITION TO MOTION FOR EXPEDITED APPEAL

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, the undersigned counsel certifies that, to the best of his knowledge, the following constitutes a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, excluding those individuals and entities named in the Certificate of Interested Persons contained in plaintiff-appellant's Motion for Expedited Appeal:

1. Byron III, H. Thomas, *Attorney for Defendants-Appellees*
2. Janda, Sean, *Attorney for Defendants-Appellees*
3. Shih, Michael, *Attorney for Defendants-Appellees*

/s/ Sean Janda
SEAN JANDA

This appeal arises from the State of Florida's challenge to interim priorities issued by the Department of Homeland Security (DHS) to guide its efforts to enforce the Nation's immigration laws. Florida now asks this Court to hear its appeal on an expedited schedule that would require the government to file a response brief in just 15 days. Florida's request to drastically shorten the time to prepare the government's brief is unwarranted and unsupported, and the government should instead be permitted 28 days to file its response brief, for three principal reasons. First, to the extent that Florida deems an accelerated schedule sufficiently important, Florida retains—and has not yet exercised—the ability to file its opening brief whenever it wishes. Second, the government's proposed 28-day alternative more than suffices to protect Florida's asserted interest in expedited resolution of its appeal, particularly given that Florida's allegations of irreparable injury are not compelling. Third, Florida's proposed schedule is not feasible given the many pressing appellate matters for which counsel for defendants are responsible.

In addition, this Court might well reasonably conclude that expedition of this appeal is not warranted at all. Not only are Florida's assertions of injury unpersuasive, but the district court was also clearly correct on the merits, and this appeal concerns interim priorities that might well be superseded before this appeal is finally resolved, even under an expedited schedule.

1. This appeal arises from a memorandum issued by then-Acting Secretary of Homeland Security David Pekoske on January 20, 2021 (Pekoske Memorandum) and a further implementing memorandum issued by U.S. Immigration and Customs Enforcement (ICE) on February 18, 2021 (ICE Memorandum). As relevant to this appeal, both of those memoranda were directed at establishing priorities to guide DHS's immigration enforcement decisions.

First, the Pekoske Memorandum called upon DHS components "to conduct a review of policies and practices concerning immigration enforcement" in light of the agency's inherent resource limitations and the "significant operational challenges" created by the COVID-19 pandemic. Pekoske Mem. 1 (Add.[1] 25). That Memorandum also adopted a set of interim enforcement priorities to guide the agency while its review was ongoing. Recognizing that DHS is subject to "limited resources" and "cannot respond to all immigration violations," the Pekoske Memorandum identified three broad groups of noncitizens on which to focus DHS's immigration-enforcement efforts. *Id.* at 2 (Add. 26). Those groups include individuals who endanger national security; individuals apprehended while attempting to unlawfully enter the United States on or after November 1, 2020, or who were not physically present in the United States before that date; and previously incarcerated individuals

[1] Citations to "Add." refer to the Addendum filed with this opposition.

who were convicted of an aggravated felony as defined by 8 U.S.C. § 1101(a)(43), and who pose a threat to public safety. *Id.* The Pekoske Memorandum expressly states that "nothing" in the interim priorities "prohibits the apprehension or detention of" noncitizens "who are not identified as priorities." *Id.* at 4 (Add. 27).

Second, the ICE Memorandum provides further interim guidance related to implementation of the removal priorities identified in the Pekoske Memorandum. The ICE Memorandum recognizes that "ICE operates in an environment of limited resources" and "necessarily must prioritize[] certain enforcement and removal actions over others" to "most effectively achieve [its] mission" of "national security, border security, and public safety." ICE Mem. 3-4 (Add. 32-33). Accordingly, that Memorandum advises ICE agents to focus enforcement efforts on the broad categories set forth in the Pekoske Memorandum. The ICE Memorandum also states that, at ICE's request, DHS had expanded its presumed priority categories to include "qualifying members of criminal gangs and transnational criminal organizations as presumed enforcement priorities." *Id.* at 2 (Add. 31).

Like the Pekoske Memorandum, the ICE Memorandum reiterates that the interim priorities do not "prohibit the arrest, detention, or removal of any noncitizen." ICE Mem. 4 (Add. 33). Instead, the priorities merely require supervisory preapproval of "enforcement or removal actions" against individuals who fall outside

the presumed priority categories unless "exigent circumstances and the demands of public safety" make preapproval "impracticable"—in which case approval need only be requested within 24 hours of the action in question. *Id.* at 7 (Add. 36).

2. Florida challenged the interim priorities in district court and moved for a preliminary injunction on the theory that the priorities violated the Administrative Procedure Act (APA) and the Constitution. The court denied the motion. In the process, the court rejected many of Florida's arguments with respect to the harms that the priorities allegedly cause—including Florida's assertion that the priorities would lead to higher crime rates and, in turn, more governmental expenditures. Dist. Ct. Op. at 17 (Add. 17) ("Even assuming that application of the interim policies results in decreased interior immigration enforcement, whether the challenged interim policies will thereafter result in an increase in criminal activity in Florida requires stacking assumptions and is speculative."); *accord Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015) (rejecting similar allegations of injury for identical reasons).

The district court concluded that Florida has standing to challenge the priorities because of the money it expends to supervise some number of noncitizens who are on supervised release in the State but who might otherwise (in the absence of the enforcement priorities) be taken into custody by DHS. *See* Dist. Ct. Op. 17-19 (Add. 17-19). But the court then held that Florida was unlikely to succeed on the merits of

its claims because the setting of the interim enforcement priorities is not subject to judicial review. As the court explained, the priorities are not final agency action because they "do not have the status of law": they "do not change anyone's legal status" and "do not prohibit the enforcement of any law or [the] detention of any noncitizen." *Id.* at 21 (Add. 21). And even if the priorities did constitute final agency action, the court explained that they would nevertheless remain unreviewable under the APA because they "relate[] to the prioritization of immigration enforcement cases," which is committed to agency discretion by law. *Id.* at 22-23 (Add. 22-23); *see Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (recognizing that "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing," and that "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities").

3. Florida now appeals from the district court's denial of its motion for a preliminary injunction and has sought expedited consideration of its appeal. Under the proposed expedited schedule, Florida would receive 10 days (from the date this Court sets a briefing schedule) to file its initial brief, the government would have 15 days to file its response brief, and Florida would receive 10 days to file its reply brief. Amicus briefs would be due 3 days after the brief of the party supported by the amicus. *See* Florida Motion to Expedite 7. Although the government does not object

to Florida's proposed schedule as applied to the State's own briefs, the circumstances here do not support Florida's request to provide only 15 days for the government to file its response brief. We respectfully request that the Court instead provide the government 28 days to file that brief.

First, to the extent that Florida believes that the circumstances of this case warrant such extreme expedition, Florida has the ability to file its opening brief whenever it wishes. But as of today—fourteen days after the district court denied its motion for a preliminary injunction—Florida has chosen not to do so. Moreover, even under Florida's proposed schedule, it would not file its brief until ten days after this Court sets a briefing schedule, which seems likely to result in Florida filing its opening brief nearly four weeks (or perhaps even longer) after the entry of the district court's order. Florida displayed that same relaxed approach in district court, waiting to file its motion for a preliminary injunction until March 9—48 days after the Pekoske Memorandum, and 19 days after the ICE Memorandum. Florida's litigation conduct belies any assertion that breakneck appellate review is warranted here and only serves to highlight the unfairness that would result from drastically shortening the time provided to the government to file its own principal brief.

Second, the government's proposed alternative, which would provide it with 28 days to file its response brief, is reasonable. As an initial matter, given the time that

has already passed since the district court's order, that alternative would provide the government and Florida with approximately equal amounts of time to prepare their principal briefs. And taking into account that neither party will likely be able to later obtain an extension of the deadline to file their brief, such a schedule would result in completion of briefing on a substantially shorter timeframe than in the usual appeal—and, indeed, would mirror the expedited time limits established by one of this Court's sister circuits for resolving appeals of preliminary injunctions. *See* 9th Cir. R. 3-3(b) (providing that in appeals from orders granting or refusing a preliminary injunction, each party shall generally have 28 days to file its principal brief). The government's proposal is particularly reasonable in these circumstances, given that Florida's assertions of irreparable harm are thin, at best. Indeed, the only harm to Florida that the district court found sufficient even to support standing is the monetary harm associated with the increased costs to the state to supervise some unspecified number of noncitizens who are on supervised release. *See* Dist. Ct. Op. 17-19 (Add. 17-19); *cf.* Florida Motion to Expedite at 6 ("Florida now asks this Court to expedite its appeal to mitigate the monetary harm it is suffering by the day . . . ."). Even assuming that Florida has sufficiently substantiated that injury for purposes of demonstrating standing, those sorts of unspecified monetary costs hardly justify the extreme expedition contemplated by Florida's motion.

Third, Florida's proposed schedule would not allow counsel for defendants adequate time to prepare and review the government's response brief. The attorneys with principal responsibility for drafting the brief are Michael Shih and Sean Janda. Both Mr. Shih and Mr. Janda are responsible for many other appellate matters with deadlines in the near future. *See, e.g.*, *Index Newspapers LLC v. U.S. Marshals Service*, No. 20-35739 (9th Cir.) (mediation conference scheduled for June 3); *U.S. WeChat Users' Alliance v. Trump*, No. 20-16908 (9th Cir.) (status report due on June 11); *National Postal Policy Council v. Postal Regulatory Commission*, Nos. 17-1276, 20-1505, 20-15010, and 20-1521 (D.C. Cir.) (response brief due on June 14); and *Samma v. U.S. Department of Defense*, No. 20-5320 (D.C. Cir.) (response brief due following multiple extensions on July 2). The attorney with principal supervisory responsibility for the brief is H. Thomas Byron III. Mr. Byron is likewise responsible for many other matters with imminent deadlines. *See Himmelreich v. BOP*, No. 19-4146 (6th Cir.) (oral argument set for June 15); *Jayyousi v. Garland*, No. 20-5368 (D.C. Cir.) (response brief due June 16) (second extension); *Elhady v. Bradley*, No. 20-1339 (6th Cir.) (reply brief due June 18 as extended). And Mr. Byron, Mr. Shih, and Mr. Janda are all responsible for reviewing and monitoring many other matters with pressing internal deadlines.

4. Although the government has not objected to Florida's request for expedited briefing as a general matter (as long as the briefing schedule affords

sufficient time for the government to prepare its brief), we take no position on the timing of oral argument—a matter within the Court's authority and judgment to decide. And we respectfully observe that this Court might well conclude that no expedition is warranted here.

First, as explained above, the only asserted harm to Florida that the district court found to be supported by the record is some amount of unspecified marginal costs related to supervising some unspecified number of additional noncitizens. Not only does that asserted harm fail to justify the extreme expedition requested by Florida, it might well fail to justify expedition at all.

Second, the district court's decision denying Florida's motion for a preliminary injunction is clearly correct. Florida spends significant time in its motion reciting its argument that the interim priorities conflict with a supposed "mandatory duty" to arrest certain noncitizens. *See* Florida Motion to Expedite 3-5. That argument is incorrect on its own terms, as the "deep-rooted nature of law-enforcement discretion" persists "even in the presence of seemingly mandatory commands." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005). But even setting aside the merits of that argument, Florida never engages with the district court's threshold conclusion, relying on this Court's longstanding case law, that the interim priorities are not subject to judicial review because they do not represent final agency action, *see* Dist. Ct. Op. 20-

22 (Add. 20-22) (citing, among other cases, *Tennessee Valley Auth. v. Whitman*, 336 F.3d 1236, 1248 (11th Cir. 2003)). Nor has Florida presented any compelling argument against the district court's conclusion, well-grounded in established Supreme Court case law, that the interim priorities represent discretionary enforcement priority decisions that are unreviewable as committed to agency discretion by law. *See id.* at 22-23 (Add. 22-23) (citing *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985)).

Finally, as the ICE Memorandum makes clear, the enforcement priorities that Florida has challenged in this litigation are "interim guidance" that will only "remain in effect until Secretary Mayorkas issues new enforcement guidelines." ICE Mem. 2 (Add. 31). Over the past three months, DHS has been working diligently to develop those final enforcement priorities. Even if this appeal were to proceed on Florida's extremely expedited schedule, the interim priorities at issue could well be superseded—thus mooting the appeal—before this Court had the opportunity to issue a decision. Because even an appeal conducted at breakneck speed may well result in nothing more than unnecessary consumption of the parties' and this Court's resources, it may well be that no expedition at all is warranted.

CONCLUSION

For these reasons, the requests that the Court deny the motion for expedition at least in part and provide the government with 28 days from service of Florida's opening brief to file its response brief.

Respectfully submitted,

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JUNE 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this motion complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,352 words, according to the count of Microsoft Word.

/s/ Sean Janda
SEAN JANDA

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2021, I filed and served the foregoing document with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. The parties to the case are registered CM/ECF users and will be served via the CM/ECF system.

/s/ Sean Janda
SEAN JANDA

ADDENDUM

INDEX TO ADDENDUM

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STATE OF FLORIDA,

Plaintiff,

v. Case No: 8:21-cv-541-CEH-SPF

UNITED STATES OF AMERICA, *et al.*,

Defendants.
_____/

ORDER

This matter comes before the Court on Florida's Motion for a Preliminary Injunction (Doc. 4), filed on March 9, 2021. Plaintiff, the State of Florida, requests the Court enter a preliminary injunction precluding the federal government from implementing and enforcing interim immigration policies set forth in the Department of Homeland Security's January 20, 2021 Memo and the U.S. Immigration and Customs Enforcement's February 18, 2021 Memo. Defendants filed a response in opposition. Doc. 23. The State of Florida filed supplemental exhibits to which the Defendants responded with a declaration. Docs. 29, 30. The Court held a hearing on the motion on April 13, 2021. Also pending is Florida's unopposed motion to supplement its motion for preliminary injunction (Doc. 34), to which Defendants responded (Doc. 36). Florida seeks to supplement its motion for preliminary injunction with additional information and an exhibit, which the Court will grant. The Court, having considered the motion, the response, the parties' supplemental filings, heard

argument of counsel, and being fully advised in the premises will deny Florida's Motion for a Preliminary Injunction.

I. BACKGROUND

The State of Florida ("Florida") sues Defendants, the United States of America (the "Government"), Alejandro Mayorkas in his official capacity as Secretary of the United States Department of Homeland Security ("Mayorkas"), United States Department of Homeland Security ("DHS"), Troy Miller in his official capacity as Acting Commissioner of U.S. Customs and Border Protection ("Miller"), U.S. Customs and Border Protection ("CBP"), Tae Johnson in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement ("Johnson"), U.S. Immigration and Customs Enforcement ("ICE"), Tracy Renaud in her official capacity as Acting Director of U.S. Citizenship and Immigration Services ("Renaud"), and U.S. Citizenship and Immigration Services ("USCIS") (collectively "Defendants"), in a seven-count Complaint for declaratory and injunctive relief. Doc. 1. In its Complaint, Florida seeks to enjoin the federal government from implementing interim immigration enforcement policies as set forth in a DHS memorandum dated January 20, 2021 (the "January 20 memo") and an ICE memorandum issued February 18, 2021 (the "February 18 memo"). *Id.* According to Florida, these memos effectively abandon the federal government's duty to enforce immigration laws by failing to detain and remove criminal aliens and by imposing a 100-day pause on the removal of noncitizens, regardless of their criminal status.

A. Immigration Law Framework

The Immigration and Nationality Act ("INA") provides a comprehensive framework for enforcement of the immigration laws. The Secretary of DHS is "charged with the administration and enforcement" of the immigration laws. 8 U.S.C. § 1103 (a)(1). Congress specifies which noncitizens may be removed from the United States and the procedures for doing so. *Arizona v. United States*, 567 U.S. 387, 396 (2012). Specifically, immigration laws provide that noncitizens are subject to removal if they were "inadmissible at the time of entry," or they commit certain offenses or meet other criteria for removal. *Id.* "A principal feature of the removal system is the broad discretion exercised by immigration officials." *Id.*

At issue here, Florida cites to 8 U.S.C. § 1226(c),[1] which commands federal immigration authorities to arrest all criminal noncitizens, and 8 U.S.C. § 1231 (a)(1)(A), which requires federal officials to remove a noncitizen from the United States within 90 days after issuance of a final order of removal. In support of its request for injunctive relief, Florida points to two recent memoranda wherein the Biden Administration purportedly "seeks to post hoc veto much of the immigration scheme":

[1] Under 8 U.S.C. § 1226(c), ICE shall take into custody any noncitizen who is inadmissible for having committed any offense under 8 U.S.C. § 1182(a)(2) (specified criminal and related grounds); deportable for having committed any offense covered under 8 U.S.C. § 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) (specified criminal offenses, including aggravated felonies as defined under 8 U.S.C. § 1101(a)(43)); deportable under 8 U.S.C. § 1227(a)(2)(A)(i) (crime involving moral turpitude) for an offense in which the alien has been sentenced to a term of imprisonment for at least one year; or, is inadmissible under 8 U.S.C. § 1182(a)(3)(B) or deportable under section 8 U.S.C. § 1227(a)(4)(B) (national security related grounds).

the "January 20 Memo" issued by DHS and the "February 18 Memo" issued by ICE. Doc. 1, ¶ 4.

B. January 20, 2021 Memo

On January 20, 2021, President Biden issued Executive Order 13993, Revisions of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051.[2] In section 1 of the Executive Order, President Biden sets forth the following priorities regarding immigration enforcement: "to protect national and border security, address the humanitarian challenges at the southern border, and ensure public health and safety." 86 FR 7051, § 1. In so doing, President Biden directed "[t]he Secretary of State, the Attorney General, the Secretary of Homeland Security, the Director of the Office of Management and Budget, the Director of the Office of Personnel Management, and

[2] The effect of this Executive Order was to, among other things, repeal former President Trump's Executive Order No. 13768, which set forth the following immigration enforcement priorities in January 2017:

> DHS shall prioritize for removal those aliens described by the Congress in sections 212(a)(2), (a)(3), and (a)(6)(C), 235, and 237(a)(2) and (4) of the INA (8 U.S.C. 1182(a)(2), (a)(3), and (a)(6)(C), 1225, and 1227(a)(2) and (4)), as well as removable aliens who:
>
> (a) Have been convicted of any criminal offense;
> (b) Have been charged with any criminal offense, where such charge has not been resolved;
> (c) Have committed acts that constitute a chargeable criminal offense;
> (d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
> (e) Have abused any program related to receipt of public benefits;
> (f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or
> (g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

Enhancing Public Safety in the Interior of the United States, 82 FR 8799 (Jan. 25, 2017).

the heads of any other relevant executive departments and agencies [to] . . . take action, including issuing revised guidance, as appropriate and consistent with applicable law, that advances the policy set forth in section 1 of [the] order." 86 FR 7051, § 2.

In response to the Executive Order, David Pekoske ("Pekoske"), as acting secretary of DHS, issued a memorandum on January 20, 2021 to Miller (senior official performing the duties of commissioner of CBP), Johnson (acting director of ICE), and Renaud (senior official performing the duties of the director of USCIS). Doc. 1-3 (the "January 20 Memo"). The January 20 Memo issued three directives: (1) conduct a comprehensive review of enforcement policies and priorities; (2) provide interim civil enforcement guidelines; and (3) institute an immediate 100-day pause on removals. *Id.* at 3–5.

The comprehensive review of policies required the Chief of Staff to coordinate a department-wide review of policies and practices concerning immigration enforcement and thereafter develop recommendations to address various aspects of immigration enforcement. The Chief of Staff was tasked with making recommendations for the issuance of revised policies within 100 days from the date of the January 20 Memo. Pending the issuance of revised policies, the Director of DHS identified the following priorities of DHS:

> 1. **National security**. Individuals who have engaged in or are suspected of terrorism or espionage, or whose apprehension, arrest and/or custody is otherwise necessary to protect the national security of the United States.
> 2. **Border security**. Individuals apprehended at the border or ports of entry while attempting to unlawfully enter the United States on or after November 20, 2020, or who

> were not physically present in the United States before November 20, 2020.
>
> 3. **Public safety**. Individuals incarcerated within federal, state, and local prisons and jails released on or after the issuance of this memorandum who have been convicted of an aggravated felony as that term is defined in section 101(a)(43) of the Immigration and Nationality Act at the time of conviction, and are determined to pose a threat to public safety.

Doc. 1-3 at 3. Notwithstanding the listing of priorities, the memo states that "nothing in [the] memorandum prohibits the apprehension or detention of individuals unlawfully in the United States who are not identified as priorities." *Id.* at 4. The final dictate was an immediate 100-day pause[3] on removal of any noncitizens with a final order of removal, subject to certain exceptions,[4] with the pause to go into effect no later than January 22, 2021.

C. February 18, 2021 Memo

On February 18, 2021, Johnson issued a memorandum to all ICE employees regarding interim guidance pertaining to civil immigration enforcement and removal priorities. Doc. 1-4 (the "February 18 Memo"). The interim policies were to take effect immediately and remain in effect until Mayorkas issues new enforcement guidelines

[3] Of note, on January 26, 2021, a Southern District of Texas court entered a nationwide temporary restraining order against the 100-day stay of removal, and on February 23, 2021, the court converted its order to a preliminary injunction. *See Texas v. United States*, No. 6:21-cv-3, 2021 WL 723856 (S.D. Tex. Feb. 23, 2021).

[4] Excluded from the pause are individuals who (1) engaged in or are suspected of terrorism or espionage or otherwise pose a danger to national security; (2) were not physically in the United States before November 1, 2020; (3) voluntarily agreed to waive any rights to remain in the United States; or (4) the Acting Director of ICE determines removal is required by law. Doc. 1-3 at 4–5. The Texas court's injunction of the 100-day pause was acknowledged in the February 18 Memo. Doc. 1-4 at 3 and n.3.

after consultation with leadership from ICE, USCIS, and DHS, which was anticipated by mid-May 2021. *Id.* at 2. Johnson requested enhancements to the priorities set forth in the January 20 Memo, which he outlined and included in the guidance provided in the February 18 Memo. The revisions included authorization to apprehend presumed priority noncitizens in at-large enforcement actions without advance approval; inclusion of current qualifying members of criminal gangs and transnational criminal organizations as presumed enforcement priorities; authorization to apprehend other presumed priority noncitizens without prior approval; guidance to evaluate whether a noncitizen who is not a presumed priority poses a public safety threat and should be apprehended; the further delegation of approval authority; and the importance of providing advance notice of at-large enforcement actions to state and local law enforcement. *Id.* at 2–3.

The guidance from the February 18 Memo was to be applied to all civil immigration and removal decisions including whether to issue a detainer or assume custody of a noncitizen subject to a previously issued detainer; to issue, reissue, serve, file or cancel a Notice to Appear; to focus resources only on administrative violations or conduct; to stop, question, or arrest a noncitizen for an administrative violation; to detain or release from custody subject to conditions; to grant deferred action or parole; or when and under what circumstances to execute final orders of removal. *Id.* at 4. The February 18 Memo sets forth the criteria for defining cases that are presumed to be priorities. *Id.* at 5–6. The Memo clarifies, however, that "the interim policies do not require or prohibit the arrest, detention, or removal of any noncitizen." *Id.* at 4.

Consistent with the January 20 Memo, the priority categories identified in the February 18 Memo were: (1) national security; (2) border security; and (3) public safety. As it pertains to public safety, "[a] noncitizen is *presumed* to be a public safety enforcement and removal priority if he or she poses a threat to public safety and:

> 1) he or she has been convicted of an aggravated felony as defined in section 1101(a)(43)[5] of the INA; or
> 2) he or she has been convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or is not younger than 16 years of age and intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization.

Doc. 1-4 at 5–6 (emphasis in original). Officers may consider factors such as seriousness and recency of criminal activity when determining whether an individual poses a threat to public safety. Officers may also take into consideration mitigating factors such as family circumstances, health and medical factors, evidence of rehabilitation, ties to the community, and whether the individual has potential immigration relief available. *Id.* at 6. For those individuals not meeting the criteria of a presumed priority, officers should obtain preapproval before civil enforcement or removal action. *Id.*

D. Litigation

Following Defendants' issuance of the January 20 and February 18 Memoranda, Florida sued Defendants arguing it is being irreparably harmed because

[5] The term "aggravated felony" is defined in 8 U.S.C. § 1101(a)(43). The memo incorrectly references section 101(a)(43). The correct section has been used in this order.

of ICE's refusal, in violation of law, to take custody of criminal noncitizens in the State of Florida, resulting in their release into Florida. Florida sues Defendants under the Administrative Procedures Act ("APA") for agency action alleged to be in excess of authority (Count 1), arbitrary and capricious agency action under the APA (Count 2), failure to provide notice and comment as required by the APA (Count 3), violation of 8 U.S.C. § 1226(c) (Count 4), violation of 8 U.S.C. § 1231(a)(1)(A) (Count 5), violation of the take care clause (Count 6), and violation of the separation of powers (Count 7). Doc. 1. Florida seeks an order from this Court setting aside the January 20 and February 18 Memos as unlawful, issuance of preliminary and permanent injunctive relief enjoining Defendants from enforcing the January 20 and February 18 Memos, issuance of declaratory relief declaring the January 20 and February 18 Memos are *ultra vires* and unconstitutional, postponing the effective date of the January 20 and February 18 Memos, and awarding Florida attorney's fees and costs. *Id.* at 27.

E. Florida's Motion and the Government's Response

In its motion for preliminary injunction, Florida argues it will be irreparably harmed by the enforcement of the policies in the January 20 and February 18 Memos, ICE's refusal to take custody of criminal noncitizens in the State of Florida, and the resulting release of criminal noncitizens into Florida communities. Doc. 4. Florida argues it has standing to seek the requested relief and that the increasing number of criminal noncitizens released into Florida will cause a variety of harms. Florida contends that this Court may review the agency actions in the memos and further argues the memos exceed DHS's and ICE's statutory authority and are contrary to

law. Florida submits that it is likely to succeed on the merits of its claims and that the balance of equities and public interest favor preliminary injunctive relief.

In support of its motion, Florida cites to numerous examples of ICE detainers being withdrawn or lifted for criminal noncitizens whom, Florida argues, should be taken into custody upon their release and removed. Docs. 4-1; 4-2; 29-1. Instead, ICE's refusal to act because of the interim policies' new guidance has resulted in criminal noncitizens being released into Florida, which Florida submits directly contradicts the dictate of 8 U.S.C. § 1231(a)(1)(A), which requires "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days."

Defendants oppose Florida's motion for preliminary injunction. Doc. 23. Defendants submit that Florida's motion seeks to have this Court dictate where DHS should focus its limited resources. Defendants argue that Florida lacks standing because it is unable to show it is under a threat of actual and imminent injury. *Id.* at 14–17. Further, Defendants argue the agency actions are not subject to judicial review and that Florida is unlikely to prevail on the merits of its claims. According to Defendants, the balance of equities and public interest disfavor a preliminary injunction because the requested relief interferes with the federal government's discretionary judgment as to where it should dedicate its resources. *Id.* at 32.

Generally, Defendants respond that every administration has to implement some priority scheme. Admittedly, DHS is unable to arrest, detain, and remove all noncitizens unlawfully in the United States. Hence, the need for priorities, but the

establishment of priorities does not prohibit the arrest or detention of any noncitizen. And, indeed, the January 20 and February 18 Memos state such.

Defendants urge that the Memoranda at issue are agency actions which are discretionary and therefore not subject to judicial review under the APA. Although Florida claims the statutory provisions' use of "shall" removes the Government's discretion when it comes to removal of criminal aliens, Defendants respond that the word "shall" in section 1226(c)(1) does not mean covered individuals will be arrested *immediately* following their release. Doc. 23 (citing *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019)).

Regarding the specific noncitizens whose detainers have been lifted and whom ICE purportedly refuses to take into custody, Defendants submit that at least five of the individuals are either not removable or are not subject to section 1226(c) at this time. Defendants explain that at least some of the noncitizens were not convicted of any crimes in Florida that are classified as "aggravated felonies," as defined by 8 U.S.C. § 1101(a)(43). Defendants further state they have issued detainers for two of the individuals and, admittedly, lifted a third detainer on another noncitizen in error. *See* Doc. 23-4.

II. LEGAL STANDARD

A party seeking entry of a preliminary injunction must establish: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the opposing party;

and (4) if issued, the injunction would not be adverse to the public interest. *Forsyth Cty. v. U.S. Army Corps of Eng'rs*, 633 F.3d 1032, 1039 (11th Cir. 2011) (quotations omitted). "A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four requisites." *Am. C.L. Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009) (citation omitted). The entry of a preliminary injunction is "the exception rather than the rule, and plaintiff must clearly carry the burden of persuasion." *Siegel v. LePore*, 234 F.3d 1163, 1179 (11th Cir. 2000) (quoting *Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175, 179 (5th Cir. 1975)).

III. DISCUSSION

A. 100-day Pause

At the hearing, the parties agreed the 100-day pause was no longer a focal issue in the instant litigation because of the Texas court's entry of a nationwide injunction, which the United States did not appeal. Doc. 32 at 4–5. As a practical matter, the 100-day pause would have expired of its own accord by the end of April 2021 before an appeal of the injunction could have been heard. Thus, the issue of the 100-day pause is moot as to the instant motion and the motion is due to be denied on this basis.

B. Standing

"The constitutionally minimum requirements for standing are three-fold." *Am. C.L. Union of Fla.*, 557 F.3d at 1190 (quoting *Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1159 (11th Cir. 2008)).

> First, the plaintiff must have suffered, or must face an imminent and not merely hypothetical prospect of suffering, an invasion of a legally protected interest resulting in a "concrete and particularized" injury. Second, the injury must have been caused by the defendant's complained-of actions. Third, the plaintiff's injury or threat of injury must likely be redressible by a favorable court decision.

Id. (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). In discussing the injury requirement, the Supreme Court elaborates that it must be "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks and citation omitted). Regarding the causal connection, the Court explains "the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.'" *Id.* The third constitutional minimum for standing requires the injury to be likely to be redressable by a favorable decision, as opposed to merely speculative. *Id.* at 561 (internal quotation marks and citation omitted).

Florida contends that three theories support its standing here to challenge the prioritization scheme in the January 20 and February 18 Memos. Citing *Massachusetts v. EPA*, 549 US 497 (2007), Florida first contends that its standing to challenge the Government's immigration policies, is grounded in its entitlement to "special solicitude." Thus, Florida argues that "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests,'—here, the right to challenge agency action unlawfully withheld, § 7607(b)(1)—'can assert that right without meeting all the normal standards for redressability and immediacy.'" *Id.* at 517–18. Florida submits its standing is predicated on its entitlement to protect its quasi-sovereign interests

where it is otherwise unable to do so because "the removal process is entrusted to the [sole] discretion of the Federal Government," *Arizona v United States*, 567 U.S. 387, 409 (2012); *see also Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress[.]").

Defendants respond that although the *Massachusetts v. EPA* opinion recognized a special solicitude for states, there nevertheless must still be some concrete actual injury. The Supreme Court recognized the "special position and interest of Massachusetts," and noted that "States are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts*, 549 US at 518. The Court went on to discuss the injury requirement stating, "[t]he harms associated with climate change are serious and well recognized" and that the "EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent.'" *Id.* at 521 (citations omitted). Thus, despite Florida's "special position" here, the analysis still requires demonstration of an actual and imminent harm.

Florida argues the release, instead of removal, of criminal noncitizens irreparably harms Florida. In support, Florida provides the Court with national statistics on recidivism among released prisoners. Doc. 4-11. Thus, Florida argues a second basis to support its standing is the resulting increase in criminal noncitizens released in Florida that will cause irreparable harm to Florida. Specifically, Florida argues the increase in criminal noncitizens will cause an increase in crimes in Florida

which, in turn, will require Florida to expend considerable resources. Florida cites to higher expenses associated with increased state law enforcement, mental health and substance-abuse programs, and crime victims' assistance programs.

Defendants respond that Florida's claimed injuries are speculative. Because DHS prioritizes those noncitizens who pose the greatest risk (*e.g.*, those who are terrorist threats, those who have committed aggravated felonies, and those involved in gang-related activities), Defendants argue this does not necessarily translate into a decrease in overall enforcement actions nor an increase in criminal activity. Florida, on the other hand, argues that it does result in a decrease in enforcement activity, citing to an ICE email produced in another case discussing the expected impact of the interim enforcement priorities resulting in a fifty percent decrease in "book ins" compared to historical numbers. Doc. 34-2. Florida argues this is borne out by recent data showing current ICE interior enforcement—which is at issue in this litigation—has plummeted. Doc. 34 at 3. Florida contends this defeats Defendants' argument that the memos merely represent a reallocation of resources instead of reflecting the reality that the interim policies have resulted in a drastic reduction in interior immigration enforcement. *Id.* at 4. As pointed out by the Government, however, the evidence proffered by Florida speaks to a reduction in enforcement against noncitizens *generally*, regardless of whether they are covered by section 1226(c) or whether or not they reside in Florida, making the data unpersuasive on the instant motion. *See* Doc. 36.

Moreover, the Government urges that the mere threat of possible future criminal conduct and the costs incurred by Florida as a result are too tenuous to

constitute a concrete, cognizable injury.[6] The Court agrees and finds the opinion in *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015) to be informative on this point. In *Arpaio*, the County Sheriff challenged the constitutionality and validity of the Deferred Action for Childhood Arrivals (DACA) and the Deferred Action for Parents of Americans (DAPA) programs. The effect of the programs was to deprioritize removals of non-dangerous individuals to allow federal agencies to focus their limited resources on removing dangerous criminals. *Id.* at 14. The Sheriff sued the President and other federal officials "seeking a declaration and preliminary injunction that DACA and DAPA violated the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, namely the President's constitutional duty to 'take Care that the Laws be faithfully executed,' U.S. Const. art. II, § 3, and the non-delegation doctrine." *Arpaio*, 797 F.3d at 18.

The district court dismissed the Sheriff's complaint finding he failed to allege a cognizable injury in fact for purposes of Article III standing. *Arpaio v. Obama*, 27 F. Supp. 3d 185, 192, 207 (D.D.C. 2014). In affirming the lower court's finding that the Sheriff lacked standing, the appellate court held that although "the Sheriff's Office's expenditures of resources on criminal investigation, apprehension, and incarceration of criminals are indeed concrete, . . . Sheriff Arpaio lacks standing to challenge DACA and DAPA because any effects of the challenged policies on the county's crime rate

[6] Defendants also argue that to the extent the State of Florida points to the injuries suffered by its citizens who fall victim to a criminal noncitizen as a basis to demonstrate the State's standing is unavailing. An increase in crime does not equate to an injury to *the State*. States generally may not bring suit on behalf of their citizens against the federal government. *See Chiles v. Thornburgh*, 865 F.2d 1197, 1209 (11th Cir. 1989).

are unduly speculative." *Arpaio*, 797 F.3d at 19. There, the court held that Sheriff Arpaio presented a non-justiciable "generalized grievance," as opposed to a particularized injury. *Id.* at 18. Thus, it concluded the Sheriff's allegations that DACA and DAPA will cause unlawful immigration to increase were "conjectural and conclusory." *Id.* at 21.

The *Arpaio* court further held that even if it were to "ignore the disconnect between the challenged policies and the increased law enforcement expenditures that Sheriff Arpaio predicts, his reliance on the anticipated action of unrelated third parties makes it considerably harder to show the causation required to support standing." *Id.* at 20. Although it is not impossible to find standing in a case that turns on third-party conduct, "it is ordinarily substantially more difficult to establish." *Id*. at 20 (quoting *Lujan*, 504 U.S. at 562) (internal quotation marks omitted). Florida's analysis here similarly relies on predictions of future criminal conduct by released noncitizens and the potential for increased expenditures that follow the anticipated increase in crime. Even assuming that application of the interim policies results in decreased interior immigration enforcement, whether the challenged interim policies will thereafter result in an increase in criminal activity in Florida requires stacking assumptions and is speculative. Further, the possibility that future economic injury will result is the type of speculative injury the D.C. Circuit rejected in *Arpaio* as a basis for establishing standing.

At the hearing on the instant motion, however, Florida clarified that it not only claims standing exists based on the fact that potential future criminal conduct will

result in increased forthcoming expenses to the State. Rather, Florida offers a third basis for standing, evidenced by the expenses incurred by Florida due to criminal noncitizens re-entering society on supervised release. Florida contends it is incurring actual costs for released noncitizens being under community supervision that Florida would not normally incur if the federal government would fulfill its duty and take custody of the criminal noncitizens and institute their removal as required by law. The probation costs to the State for overseeing these noncitizens on supervised release are concrete and particularized injuries that are fairly traceable to the federal government's withdrawal of retainers on noncitizens that they would have otherwise taken into custody. The Court finds that such concrete injury satisfies both the requirements of an actual and imminent injury and a causal connection to Defendants' conduct.

Whether such injury is redressable by a favorable ruling, however, is not as clear. Defendants argue that every administration must, by necessity, institute some prioritization scheme. Therefore, even if the interim priorities were enjoined, Defendants submit a different scheme would have to be implemented and may not satisfy Florida nor redress its alleged injury. But that is not the test for determining redressability. The opinion in *Massachusetts v. EPA* is instructive on the matter, recognizing a State's special solicitude in the standing analysis. 549 U.S. at 520. As the Supreme Court explained, in a procedural rights challenge such as this, the litigant vested with that procedural right "has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 518 (citations omitted). Under this standard, the

Court concludes that redressability is likely met because there is some possibility that Florida's challenges will cause the United States to reconsider its immigration enforcement policies.

The Court is aware the policies at issue are interim policies that, by their nature, are going to be reconsidered and evaluated by Defendants, notwithstanding this litigation. Nevertheless, the redressability element of standing, albeit not eliminated in this context, is considered relaxed, *see id.* at 517–18 (not requiring the "normal" standards be met for redressability), and thus, Florida is able to satisfy the redressability element. As Florida has satisfied the elements of injury, traceability, and redressability, Florida establishes its standing on the instant motion.

C. Review of Agency Action

Florida argues the January 20 and February 18 Memos are agency actions reviewable by this Court under the Administrative Procedures Act ("APA") because the APA creates a "basic presumption of judicial review." Doc. 4 (quoting *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2567 (2019)); *see also* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). Florida requests, pursuant to 5 U.S.C § 705, that the court "postpone the effective date of action" taken by the Defendant agencies "pending judicial review."

Under 5 U.S.C. § 704, the APA allows challenges only to "final agency action." Section 704 states:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704.

Defendants argue that the interim policies here are not final agency action, and therefore not subject to judicial review. The Court agrees with Florida that the "interim" label alone does not necessarily make the actions nonfinal. *See U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1814 (2016) (the ability to revise an agency action based on new information "is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal"); *Sackett v. E.P.A.*, 566 U.S. 120, 127 (2012) ("The mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal."). But, by their terms, the prioritization scheme here is short-term guidance with the anticipation of new guidelines within 90 days of February 18, 2021. *See* Doc. 1-4 at 2. Moreover, what makes an agency action "final" has been described as an action that "determines rights or obligations" from which "legal consequences flow." *Sackett*, 566 U.S. at 126 (internal punctuation and citations omitted). The immigration prioritization scheme outlined in the January 20

and February 18 Memos do not determine anyone's legal rights. The Memos do not change any person's legal status; they do not prohibit enforcement of any law; they do not determine any legal benefits; and they do not change prior agency action. The interim memoranda provide guidance and specifically confirm they do not create any right or benefit. *See* Docs. 23-1 at 5; 23-2 at 8.

The Supreme Court has outlined several factors for courts to consider in determining whether an agency action is final: "(1) whether the agency action constitutes the agency's definitive position; (2) whether the action has the status of law or affects the legal rights and obligations of the parties; (3) whether the action will have an immediate impact on the daily operations of the regulated party; (4) whether pure questions of law are involved; and (5) whether pre-enforcement review will be efficient." *Tennessee Valley Auth. v. Whitman*, 336 F.3d 1236, 1248 (11th Cir. 2003). (citing *FTC v. Standard Oil of Calif.*, 449 U.S. 232, 239–43 (1980)). Applying these factors to the interim immigration enforcement policies at issue here, the Court cannot conclude that the Memos constitute the agency's definitive position. Clearly, the interim policies are a work in progress as evidenced by the additions to the policies from the January 20 Memo to the February 18 Memo. Moreover, the February 18 Memo indicates that the Secretary is continuing to get input from the leadership of ICE, CBP, and DHS. The guidelines are just that; they are not statutes and do not have the status of law as they constitute a prioritization and not a prohibition of enforcement. The policies do not change anyone's legal status nor do they prohibit the enforcement of any law or detention of any noncitizen. The prioritization scheme does

not necessarily have a direct day-to-day impact on Florida, although certainly an indirect impact can be claimed. Regarding the challenge to these interim policies, the challenge is more likely to create piecemeal litigation and therefore be less efficient. As noted previously, the interim policies were only intended for an approximate 90-day period. Thus, the Court concludes that the prioritization scheme that is at issue[7] does not constitute final agency action reviewable under the APA.

Even if the Court were to conclude the agency action is final reviewable action, the Court agrees with Defendants that the memoranda reflect discretionary agency decisions related to the prioritization of immigration enforcement cases, which are presumptively not subject to judicial review. Although Florida relies on what it claims is the mandatory statutory language of sections 1226 and 1231 that state DHS "shall" engage in certain enforcement actions, the fact is the memoranda in no way prohibit any enforcement action. Instead, the January 20 and February 18 Memos focus and prioritize the cases of immigration enforcement given the resources available in light of what DHS deems most pressing. The prioritization scheme does not prohibit any enforcement action.

The issues before this Court differ from those recently before the Texas District Court on related matters. The 100-day pause addressed by that court dealt with inaction—referred to as a pause—on the part of Defendants. While Florida claims that the prioritization scheme constitutes a similar wholesale abdication of the federal

[7] Per the parties' representations at the hearing, the 100-day pause is no longer at issue on the instant motion.

government's duties, such is not the case. The ordering of priorities is not a refusal to act, but rather is a specific choice to act as it relates to certain matters over others. Here, Florida simply disagrees with the choices made by the Biden Administration as to the priorities. It is undisputed, however, that "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing." *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985). Thus, there must necessarily be a prioritization. And the Supreme Court has recognized, "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.*

Having concluded that the agency action at issue here is not subject to judicial review, the Court need not address the merits of Florida's APA claims. Accordingly, it is hereby

ORDERED:

1. Florida's Unopposed Motion for Leave to Amend its Motion for Preliminary Injunction (Doc. 34) is **GRANTED**.

2. Florida's Motion for a Preliminary Injunction (Doc. 4) is **DENIED**.

DONE AND ORDERED in Tampa, Florida on May 18, 2021.

Charlene Edwards Honeywell
Charlene Edwards Honeywell
United States District Judge

Copies to:
Counsel of Record and Unrepresented Parties, if any

EXHIBIT 3

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

January 20, 2021

MEMORANDUM FOR: Troy Miller
Senior Official Performing the Duties of the Commissioner
U.S. Customs and Border Protection

Tae Johnson
Acting Director
U.S. Immigration and Customs Enforcement

Tracey Renaud
Senior Official Performing the Duties of the Director
U.S. Citizenship and Immigration Services

CC: Karen Olick
Chief of Staff

FROM: David Pekoske
Acting Secretary

SUBJECT: **Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities**

This memorandum directs Department of Homeland Security components to conduct a review of policies and practices concerning immigration enforcement. It also sets interim policies during the course of that review, including a 100-day pause on certain removals to enable focusing the Department's resources where they are most needed. The United States faces significant operational challenges at the southwest border as it is confronting the most serious global public health crisis in a century. In light of those unique circumstances, the Department must surge resources to the border in order to ensure safe, legal and orderly processing, to rebuild fair and effective asylum procedures that respect human rights and due process, to adopt appropriate public health guidelines and protocols, and to prioritize responding to threats to national security, public safety, and border security.

This memorandum should be considered Department-wide guidance, applicable to the activities of U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS).

A. Comprehensive Review of Enforcement Policies and Priorities

The Chief of Staff shall coordinate a Department-wide review of policies and practices concerning immigration enforcement. Pursuant to the review, each component shall develop recommendations to address aspects of immigration enforcement, including policies for prioritizing the use of enforcement personnel, detention space, and removal assets; policies governing the exercise of prosecutorial discretion; policies governing detention; and policies regarding interaction with state and local law enforcement. These recommendations shall ensure that the Department carries out our duties to enforce the law and serve the Department's mission in line with our values. The Chief of Staff shall provide recommendations for the issuance of revised policies at any point during this review and no later than 100 days from the date of this memo.

The memoranda in the attached appendix are hereby rescinded and superseded.

B. Interim Civil Enforcement Guidelines

Due to limited resources, DHS cannot respond to all immigration violations or remove all persons unlawfully in the United States. Rather, DHS must implement civil immigration enforcement based on sensible priorities and changing circumstances. DHS's civil immigration enforcement priorities are protecting national security, border security, and public safety. The review directed in section A will enable the development, issuance, and implementation of detailed revised enforcement priorities. In the interim and pending completion of that review, the Department's priorities shall be:

1. **National security.** Individuals who have engaged in or are suspected of terrorism or espionage, or whose apprehension, arrest and/or custody is otherwise necessary to protect the national security of the United States.
2. **Border security.** Individuals apprehended at the border or ports of entry while attempting to unlawfully enter the United States on or after November 1, 2020, or who were not physically present in the United States before November 1, 2020.
3. **Public safety.** Individuals incarcerated within federal, state, and local prisons and jails released on or after the issuance of this memorandum who have been convicted of an "aggravated felony," as that term is defined in section 101(a) (43) of the Immigration and Nationality Act at the time of conviction, and are determined to pose a threat to public safety.

These priorities shall apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action or parole. In

addition, all enforcement and detention decisions shall be guided by DHS's ability to conduct operations and maintain custody consistent with applicable COVID-19 protocols.

While resources should be allocated to the priorities enumerated above, nothing in this memorandum prohibits the apprehension or detention of individuals unlawfully in the United States who are not identified as priorities herein. In order to ensure appropriate allocation of resources and exercise of prosecutorial discretion, the Acting Director of ICE shall issue operational guidance on the implementation of these priorities. This guidance shall contain a protocol for the Acting Secretary to conduct a periodic review of enforcement actions to ensure consistency with the priorities set forth in this memorandum. This guidance shall also include a process for the Director of ICE to review and approve of any civil immigration enforcement actions against individuals outside of federal, state or local prisons or jails.

These interim enforcement priorities shall go into effect on February 1, 2021 and remain in effect until superseded by revised priorities developed in connection with the review directed in section A.

C. Immediate 100-Day Pause on Removals

In light of the unique circumstances described above, DHS's limited resources must be prioritized to: (1) provide sufficient staff and resources to enhance border security and conduct immigration and asylum processing at the southwest border fairly and efficiently; and (2) comply with COVID-19 protocols to protect the health and safety of DHS personnel and those members of the public with whom DHS personnel interact. In addition, we must ensure that our removal resources are directed to the Department's highest enforcement priorities. Accordingly, and pending the completion of the review set forth in section A, I am directing an immediate pause on removals of any noncitizen[1] with a final order of removal (except as noted below) for 100 days to go into effect as soon as practical and no later than January 22, 2021.

The pause on removals applies to any noncitizen present in the United States when this directive takes effect with a final order of removal except one who:

1. According to a written finding by the Director of ICE, has engaged in or is suspected of terrorism or espionage, or otherwise poses a danger to the national security of the United States; or
2. Was not physically present in the United States before November 1, 2020; or
3. Has voluntarily agreed to waive any rights to remain in the United States, provided that he or she has been made fully aware of the consequences of waiver

[1] "Noncitizen" as used in this memorandum does not include noncitizen nationals of the United States.

and has been given a meaningful opportunity to access counsel prior to signing the waiver;[2] or

4. For whom the Acting Director of ICE, following consultation with the General Counsel, makes an individualized determination that removal is required by law.

No later than February 1, 2021, the Acting Director of ICE shall issue written instructions with additional operational guidance on the further implementation of this removal pause. The guidance shall include a process for individualized review and consideration of the appropriate disposition for individuals who have been ordered removed for 90 days or more, to the extent necessary to implement this pause. The process shall provide for assessments of alternatives to removal including, but not limited to, staying or reopening cases, alternative forms of detention, custodial detention, whether to grant temporary deferred action, or other appropriate action.

D. No Private Right Statement

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

[2] A voluntary waiver encompasses noncitizens who stipulate to removal as part of a criminal disposition.

APPENDIX

Department of Homeland Security, *Enforcement of the Immigration Laws to Serve the National Interest,* Memorandum of February 20, 2017.

U.S. Immigration and Customs Enforcement, *Implementing the President's Border Security and Interior Immigration Enforcement Policies*, Memorandum of February 20, 2017.

U.S. Immigration and Customs Enforcement, *Guidance to OPLA Attorneys Regarding the Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement*, Memorandum of August 15, 2017.

US Citizenship and Immigration Services, *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens,* Policy Memorandum of June 28, 2018. (US Citizenship and Immigration Services should revert to the preexisting guidance in Policy Memorandum 602-0050, US Citizenship and Immigration Services, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens*, Policy Memorandum of Nov. 7, 2011.)

US Citizenship and Immigration Services, *Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) When Processing a Case Involving Information Submitted by a Deferred Action for Childhood Arrivals (DACA) Requestor in Connection with a DACA Request or a DACA-Related Benefit Request (Past or Pending) or Pursuing Termination of DACA,* Policy Memorandum of June 28, 2018.

U.S. Customs and Border Protection, *Executive Orders 13767 and 13768 and the Secretary's Implementation Directions of February 17, 2017*, Memorandum of February 21, 2017.

EXHIBIT 4

Policy Number: 11090.1
FEA Number: 306-112-002b

Office of the Director

U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

February 18, 2021

MEMORANDUM FOR: All ICE Employees

FROM: Tae D. Johnson
Acting Director

SUBJECT: Interim Guidance: Civil Immigration Enforcement and Removal Priorities

Purpose

This memorandum establishes interim guidance in support of the interim civil immigration enforcement and removal priorities that Acting Secretary Pekoske issued on January 20, 2021. Acting Secretary Pekoske issued the interim priorities in his memorandum titled, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Interim Memo).

This interim guidance is effective immediately. It applies to all U.S. Immigration and Customs Enforcement (ICE) Directorates and Program Offices, and it covers enforcement actions, custody decisions, the execution of final orders of removal, financial expenditures, and strategic planning.

This interim guidance will remain in effect until Secretary Mayorkas issues new enforcement guidelines. The Secretary has informed me that he will issue new guidelines only after consultation with the leadership and workforce of ICE, U.S. Customs and Border Protection, and other Department of Homeland Security (Department) agencies and offices. He anticipates issuing these guidelines in less than 90 days.

I have requested approval of certain revisions to the Interim Memo until the Secretary issues new enforcement guidelines. My requested revisions have been approved, and they are incorporated into this guidance. To the extent this guidance conflicts with the Interim Memo, this guidance controls. As you will read below, the revisions include, but are not limited to: (1) authorization to apprehend presumed priority noncitizens[1] in at-large enforcement actions without advance approval; (2) the inclusion of current qualifying members of criminal gangs and transnational criminal organizations as presumed enforcement priorities; (3) authorization to apprehend

[1] For purposes of this memorandum, "noncitizen" means any person as defined in section 101(a)(3) of the Immigration and Nationality Act (INA).

without prior approval other presumed priority noncitizens who are encountered during enforcement operations; (4) how to evaluate whether a noncitizen who is not a presumed priority nevertheless poses a public safety threat and should be apprehended; (5) the further delegation of approval authority; and (6) the importance of providing advance notice of at-large enforcement actions to state and local law enforcement.

Section C of the Interim Memo has been enjoined. This memorandum does not implement, nor take into account, Section C. This memorandum implements Section B (Interim Civil Enforcement Guidelines).

Background

On January 20, 2021, President Biden issued Executive Order (EO) 13993, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 25, 2021), which articulated the Administration's baseline values and priorities for the enforcement of the civil immigration laws.

On the same day, Acting Secretary Pekoske issued the Interim Memo. The Interim Memo did four things. First, it directed a comprehensive Department-wide review of civil immigration enforcement policies. Second, it established interim civil immigration enforcement priorities for the Department. Third, it instituted a 100-day pause on certain removals pending the review. Fourth, it rescinded several existing policy memoranda, including two ICE-related memoranda, as inconsistent with EO 13993.[2] The Interim Memo further directed that ICE issue interim guidance implementing the revised enforcement priorities and the removal pause.

On January 26, 2021, the U.S. District Court for the Southern District of Texas issued a temporary restraining order (TRO) enjoining the Department from enforcing and implementing the 100-day removal pause in Section C.

Like other national security and public safety agencies, ICE operates in an environment of limited resources. Due to these limited resources, ICE has always prioritized, and necessarily must prioritize, certain enforcement and removal actions over others.

In addition to resource constraints, several other factors render ICE's mission particularly complex. These factors include ongoing litigation in various fora; the health and safety of the ICE workforce and those in its custody, particularly during the current COVID-19 pandemic; the responsibility to ensure that eligible noncitizens are able to pursue relief from removal under the immigration laws; and the requirements of, and, relationships with, sovereign nations, whose laws and expectations can place additional constraints on ICE's ability to execute final orders of removal.

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[2] Memorandum from Matthew T. Albence, Exec. Assoc. Dir., ICE, to All ERO Employees, *Implementing the President's Border Security and Interior Immigration Enforcement Policies* (Feb. 21, 2017); Memorandum from Tracy Short, Principal Legal Advisor, ICE, to All OPLA Attorneys, *Guidance to OPLA Attorneys Regarding Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement* (Aug. 15, 2017).

Accordingly, in executing its critical national security, border security, and public safety mission, the Department must exercise its well-established prosecutorial discretion and prioritize its limited resources to most effectively achieve that mission.

Civil Immigration Enforcement and Removal Priorities

In support of the interim priorities, the guidance established in this memorandum shall be applied to all civil immigration enforcement and removal decisions made after the issuance of this memorandum. The civil immigration enforcement and removal decisions include, but are not limited to, the following:[3]

- Deciding whether to issue a detainer, or whether to assume custody of a noncitizen subject to a previously issued detainer;
- Deciding whether to issue, reissue, serve, file, or cancel a Notice to Appear;
- Deciding whether to focus resources only on administrative violations or conduct;
- Deciding whether to stop, question, or arrest a noncitizen for an administrative violation of the civil immigration laws;
- Deciding whether to detain or release from custody subject to conditions;
- Deciding whether to grant deferred action or parole; and
- Deciding when and under what circumstances to execute final orders of removal.

For ease of reference, the interim priorities identified in the Interim Memo, and as revised by this guidance, are set forth below along with further explanation.

As a preliminary matter, it is vitally important to note that the interim priorities do not require or prohibit the arrest, detention, or removal of any noncitizen. Rather, officers and agents are expected to exercise their discretion thoughtfully, consistent with ICE's important national security, border security, and public safety mission. Enforcement and removal actions that meet the criteria described below are presumed to be a justified allocation of ICE's limited resources. Actions not reflected in the criteria described below may also be justified, but they are subject to advance review as outlined further below.

In determining whether to pursue an action that falls outside the criteria described below, all relevant facts and circumstances regarding the noncitizen should be considered. For instance, officers and agents should consider: whether there are criminal convictions; the seriousness and recency of such convictions, and the sentences imposed; the law enforcement resources that have been spent; whether a threat can be addressed through other means, such as through recourse to criminal law enforcement authorities at the federal, state, or local level, or to public health and other civil authorities at the state or local level; and, other relevant factors (including, for example, the mitigating factors identified on page 5).

[3] As discussed above, the Department is enjoined from enforcing the Immediate 100-Day Pause on Removals in the Interim Memo. This following interim guidance should not be read to permit implementation of Section C of the Interim Memo.

Criteria Defining Cases That Are Presumed to be Priorities

Priority Category 1: National Security. A noncitizen is *presumed* to be a national security enforcement and removal priority if:

1) he or she has engaged in or is suspected of engaging in terrorism or terrorism-related activities;
2) he or she has engaged in or is suspected of engaging in espionage or espionage-related activities;[4] or
3) his or her apprehension, arrest, or custody is otherwise necessary to protect the national security of the United States.

In evaluating whether a noncitizen's "apprehension, arrest, or custody is otherwise necessary to protect" national security, officers and agents should determine whether a noncitizen poses a threat to United States sovereignty, territorial integrity, national interests, or institutions. General criminal activity does not amount to a national security threat (as distinguished from a public safety threat) and is discussed below.

Priority Category 2: Border Security. A noncitizen is *presumed* to be a border security enforcement and removal priority if:

1) he or she was apprehended at the border or a port of entry while attempting to unlawfully enter the United States on or after November 1, 2020[5]; or
2) he or she was not physically present in the United States before November 1, 2020.

To be clear, the border security priority includes any noncitizen who unlawfully entered the United States on or after November 1, 2020.

Priority Category 3: Public Safety. A noncitizen is *presumed* to be a public safety enforcement and removal priority if he or she poses a threat to public safety and:

1) he or she has been convicted of an aggravated felony as defined in section 101(a)(43) of the INA[6]; or

[4] For purposes of the national security enforcement priority, the terms "terrorism or terrorism-related activities" and "espionage or espionage-related activities" should be applied consistent with (1) the definitions of "terrorist activity" and "engage in terrorist activity" in section 212(a)(3)(B)(iii)-(iv) of the INA, and (2) the manner in which the term "espionage" is generally applied in the immigration laws.
[5] The statutory mandates in Section 235 of the INA (regarding asylum seekers) continue to apply to noncitizens.
[6] This criterion tracks Congress's prioritization of aggravated felonies for immigration enforcement actions. Whether an individual has been convicted of an aggravated felony is a complex question that may involve securing and analyzing a host of conviction documents, many of which may not be immediately available to officers and agents. Even when all conviction documents are available, whether a conviction is for an aggravated felony may be a novel question under applicable law. Accordingly, in deciding whether a noncitizen has been convicted of an

2) he or she has been convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or is not younger than 16 years of age and intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization.

In evaluating whether a noncitizen currently "pose[s] a threat to public safety," officers and agents are to consider the extensiveness, seriousness, and recency of the criminal activity. Officers and agents are to also consider mitigating factors, including, but not limited to, personal and family circumstances, health and medical factors, ties to the community, evidence of rehabilitation, and whether the individual has potential immigration relief available.

Officers are to base their conclusions about intentional participation in an organized criminal gang or transnational criminal organization on reliable evidence and consult with the Field Office Director (FOD) or Special Agent in Charge (SAC) in reaching this conclusion.

Particular attention is to be exercised in cases involving noncitizens who are elderly or are known to be suffering from serious physical or mental illness. Similarly, particular attention is to be exercised with respect to noncitizens who have pending petitions for review on direct appeal from an order of removal; have filed only one motion to reopen removal proceedings, and such a motion either remains pending or is on direct appeal via a petition for review; or have pending applications for immigration relief and are prima facie eligible for such relief. In such cases, execution of removal orders should have a compelling reason and are to have approval from the FOD.

A civil enforcement or removal action that does not meet the above criteria for presumed priority cases will require preapproval as described below.

Enforcement and Removal Actions: Approval, Coordination, and Data Collection

To ensure compliance with this guidance and consistency across geographic areas of responsibility, and to facilitate a dialogue between headquarters and field leadership about the effectiveness of the interim guidance, ICE will require that field offices collect data on the nature and type of enforcement and removal actions they perform. In addition, ICE will require field offices to coordinate their operations and obtain preapproval for enforcement and removal actions that do not meet the above criteria for presumed priority cases. The data and coordination will inform the development of the Secretary's new enforcement guidance.

No Preapproval Required for Presumed Priority Cases

Officers and agents need not obtain preapproval for enforcement or removal actions that meet the above criteria for presumed priority cases, beyond what existing policy requires and what a supervisor instructs.

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aggravated felony for purposes of this memorandum, officers and agents must have a good-faith belief based on either a final administrative determination, available conviction records, or the advice of agency legal counsel.

Preapproval for Other Priority Cases

Any civil immigration enforcement or removal actions that do not meet the above criteria for presumed priority cases will require preapproval from the FOD or SAC. In deciding to undertake an enforcement action or removal, the agent or officer must consider, in consultation with his or her leadership, the nature and recency of the noncitizen's convictions, the type and length of sentences imposed, whether the enforcement action is otherwise an appropriate use of ICE's limited resources, and other relevant factors. In requesting this preapproval, the officer or agent must raise a written justification through the chain of command, explaining why the action otherwise constitutes a justified allocation of limited resources, and identify the date, time, and location the enforcement action or removal is expected to take place.

The approval to carry out an enforcement action against a particular noncitizen will not authorize enforcement actions against other noncitizens encountered during an operation if those noncitizens fall outside the presumption criteria identified above. An approval to take an enforcement action against any other noncitizen encountered who is not a presumed priority must be separately secured as described above.

In some cases, exigent circumstances and the demands of public safety will make it impracticable to obtain preapproval for an at-large enforcement action. While it is impossible to preconceive all such circumstances, they generally will be limited to situations where a noncitizen poses an imminent threat to life or an imminent substantial threat to property. If preapproval is impracticable, an officer or agent should conduct the enforcement action and then request approval as described above within 24 hours following the action.[7]

As always, it is important that ICE endeavor to remove noncitizens with final removal orders who have remained in post-order detention for more than 90 days. ICE will continue to review such noncitizens' cases on a regular basis, consistent with existing law and policy. ICE will endeavor to remove such noncitizens consistent with legal requirements and national, border security, and public safety priorities.

Periodically, ICE receives requests to exercise some form of individualized discretion in the interests of law and justice. ICE will create and maintain a system by which personnel can evaluate these individualized requests.

Notice of At-Large Enforcement Actions

The execution of an at-large enforcement action should be preceded by notification to the relevant state and local law enforcement agency or agencies. This notification will advance

[7] Where approval is sought following the enforcement action due to exigent circumstances, the request shall explain the exigency, where and when the enforcement activity took place, and whether the noncitizen is currently detained. Additionally, when the location of a proposed or completed enforcement action is a courthouse, as defined in ICE Directive 11072.1: Civil Immigration Enforcement Actions Inside Courthouses (Jan. 10, 2018, or as superseded), or a sensitive location, as defined in ICE Directive No. 10029.2, Enforcement Actions at or Focused on Sensitive Locations (Oct. 24, 2011, or as superseded), that should be explicitly highlighted in the request.

public safety and help ensure that planned immigration enforcement actions do not improperly interfere with state and local law enforcement investigations and actions.

Weekly Reporting of All Enforcement and Removal Actions

The Director will review all enforcement actions to ensure compliance with this guidance and consistency across geographic areas of responsibility and to facilitate a dialogue between headquarters and field leadership about the effectiveness of the interim priorities.

Each Friday, the Executive Associate Directors for Enforcement and Removal Operations and Homeland Security Investigations will compile and provide to the Office of the Director, the Office of the Deputy Director, and the Office of Policy and Planning (OPP), a written report: (1) identifying each enforcement action taken in the prior week, including the applicable priority criterion, if any; (2) providing a narrative justification of the action; and (3) identifying the date, time, and location of the action.

In addition, each Friday the Executive Associate Director for Enforcement and Removal Operations will provide to the Office of the Director, the Office of the Deputy Director, and OPP, a written report: (1) identifying each removal in the prior week, including the applicable priority criterion, if any; (2) providing a narrative justification of the removal; and (3) identifying the date, time, and location of the removal.

These reporting requirements will be assessed periodically during this interim period to ensure that they are both productive and manageable.

The weekly reports will be made available to the Office of the Secretary.

Questions

Questions regarding this interim guidance or the Interim Memo should be directed to OPP through the chain of command and Directorate or Program Office leadership. Answers to frequently asked policy questions will be published on OPP's inSight page on an ongoing basis. Please note, however, that case-specific questions should generally be addressed by Directorate or Program Office leadership.

No Private Right Statement

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.