No. 21-11715

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.

On Appeal from the United States District Court
for the Middle District of Florida
No. 8:21-cv-541-CEH-SPF

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

ANAND BALAKRISHNAN
DAVID CHEN
MICHAEL K.T. TAN
NOOR ZAFAR
OMAR C. JADWAT
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2660
abalakrishnan@aclu.org
dchen@aclu.org
mtan@aclu.org
nzafar@aclu.org
ojadwat@aclu.org

AMIEN KACOU
DANIEL TILLEY
American Civil Liberties Union
of Florida
4343 West Flagler St., Suite 400
Miami, FL 33143
Tel: (786) 363-2700
akacou@aclufl.org
dtilley@aclufl.org

Additional Counsel on Next Page

CODY H. WOFSY
SPENCER E. AMDUR
American Civil Liberties Union
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0770
cwofsy@aclu.org
samdur@aclu.org

Counsel for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS

In addition to those persons listed in Plaintiff-Appellant's and Defendant-Appellee's Statements of Interested Persons, the following persons have an interest in the outcome of the particular case or appeal as required by Fed. R. App. P. 26.1 and 29(a)(4), and 11th Cir. R. 26.1-1, 28-1, and 29-2:

1) Anand Balakrishnan, *Attorney for amicus American Civil Liberties Union (ACLU)*
2) Cody H. Wofsy, *Attorney for amicus ACLU*
3) Daniel Tilley, *Attorney for amicus ACLU of Florida*
4) David Chen, *Attorney for amicus ACLU*
5) Michael K.T. Tan, *Attorney for amicus ACLU*
6) Noor Zafar, *Attorney for amicus ACLU*
7) Omar C. Jadwat, *Attorney for amicus ACLU*
8) Spencer E. Amdur, *Attorney for amicus ACLU*

/s/ Amien Kacou
Amien Kacou

CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF AMICI CURIAE

Amici Curiae American Civil Liberties Union Foundation and American Civil Liberties Union Foundation of Florida, Inc., are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in *amici curiae*.

No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

All parties have consented to the filing of this brief.

/s/ Amien Kacou
Amien Kacou

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF AMICI CURIAE ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE ISSUE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. 8 U.S.C. § 1226(c) Provides No Basis to Enjoin the Memos 4

A. Florida relies on an overbroad interpretation of when § 1226(c) requires detention 6

B. The Memos do not conflict with § 1226(c) because they do not prohibit *any* enforcement action 12

1. The Memos on their face do not prohibit any arrests or detentions 12

2. The Memos do not impose a de facto prohibition on enforcement of other priority categories 15

C. Even if an injunction were appropriate, it should be limited to the extent of any statutory violation 17

II. The Memos Did Not Require Notice and Comment. 18

CONCLUSION 21

CERTIFICATE OF COMPLIANCE 23

CERTIFICATE OF SERVICE 24

TABLE OF AUTHORITIES

Cases

Am. Fed'n of State, Cty. & Mun. Emps. Council 79 v. Scott,
717 F.3d 851 (11th Cir. 2013) 17

Am. Hosp. Ass'n v. Bowen,
834 F.2d 1037 (D.C. Cir. 1987) 20

Arizona v. DHS,
CV-21-00186-PHX-SRB (June 30, 2021) 15

Arizona v. United States,
567 U.S. 387 (2012) 9, 10

Ass'n of Priv. Sector Colleges & Universities v. Duncan,
681 F.3d 427 (D.C. Cir. 2012) 14

Bates v. United States,
522 U.S. 23 (1997) 8

Califano v. Yamasaki,
442 U.S. 682 (1979) 17

Crane v. Johnson,
783 F.3d 244 (5th Cir. 2015) 9

Ctr. for Auto Safety, Inc. v. NHTSA,
342 F. Supp. 2d 1 (D.D.C. 2004) 19

Ctr. for Auto Safety, Inc. v. NHTSA,
452 F.3d 798 (D.C. Cir. 2006) 19

Demore v. Kim,
538 U.S. 510 (2003) 1, 7, 10

Dept. of Labor v. Kast Metals Corp.,
744 F.2d 1145 (5th Cir. 1984) 20, 21

DHS v. Regents of the Univ. of California,
140 S. Ct. 1891 (2020) 9

FCC v. Schreiber,
381 U.S. 279 (1965) 14

In re Joseph,
22 I&N Dec. 660 (BIA 1999) 8

In re Wild,
994 F.3d 1244 (11th Cir. 2021) 9

Jama v. ICE,
543 U.S. 335 (2005) 8

Jean v. Nelson,
711 F.2d 1455 (11th Cir. 1983) 20

Jennings v. Rodriguez,
138 S. Ct. 830 (2018) 1, 6, 7

John Doe #1 v. Veneman,
380 F.3d 807 (5th Cir. 2004) 18

Johnson v. Guzman Chavez,
No. 19-897, 2021 WL 2653264 (U.S. June 29, 2021) 7

LaMarca v. Turner,
995 F.2d 1526 (11th Cir. 1993) 17

Mada-Luna v. Fitzpatrick,
813 F.2d 1006 (9th Cir. 1987) 19

Matter of M-S-,
27 I&N Dec. 509 (A.G. 2019) 8

Matter of Vizcarra-Delgadillo,
13 I&N Dec. 51 (BIA 1968) 9

Morales v. Chadbourne,
793 F.3d 208 (1st Cir. 2015) 11

Morales v. Trans World Airlines,
504 U.S. 374 (1992) 13

Nielsen v. Preap,
139 S. Ct. 954 (2019) 1, 6, 7

Regions Bank v. Legal Outsource PA,
936 F.3d 1184 (11th Cir. 2019) 11

Reno v. Am.-Arab Anti-Discrimination Comm.,
525 U.S. 471 (1999) 9

Rodriguez v. United States,
480 U.S. 522 (1987) 10

Ryder Truck Lines, Inc. v. United States,
716 F.2d 1369 (11th Cir. 1983) 19, 20

Sherley v. Sebelius,
644 F.3d 388 (D.C. Cir. 2011).....15

Town of Castle Rock v. Gonzales,
545 U.S. 748 (2005) 10

United States v. Cespedes,
151 F.3d 1329 (11th Cir. 1998).....9

United States v. Ream,
491 F.2d 1243 (5th Cir. 1974).....9

United States v. Salerno,
481 U.S. 739 (1987) 15

Wayte v. United States,
470 U.S. 598 (1985) 9

Zadvydas v. Davis,
533 U.S. 678 (2001) 7

Statutes

5 U.S.C. § 553(b)(A)..... 19, 20

6 U.S.C. § 202(5) 13

8 U.S.C. § 1103(a)(2).....13

8 U.S.C. § 1103(a)(4).....13

8 U.S.C. § 1226.....6, 8

8 U.S.C. § 1226(a) 6, 7

8 U.S.C. § 1226(c) ..... passim

8 U.S.C. § 1226(c)(1)..... passim

Regulations

8 C.F.R. § 236.1(b)(1).....8

8 C.F.R. § 236.1(c)(1)(i) 13

8 C.F.R. § 236.1(c)(8) 13
8 C.F.R. § 239.2(e) 8
8 C.F.R. § 287.3(b) 12
8 C.F.R. § 287.3(d) 12
8 C.F.R. § 1236.1(c) 13

Other Authorities

Dep't of Interior, Order No. 3385 (Sept. 14, 2020) 18
FCC, Enforcement Overview, (Apr. 2020) 18
Forman Memo., Issuance of Notices to Appear (June 21, 2004) 15
ICE Directive No. 11072.1 (Jan. 10, 2018) 16
ICE, Detention & Deportation Officer's Field Manual, § 20.11(g) 13
ICE, Detention & Deportation Officer's Field Manual, § 20.11(i) 13
ICE, Detention & Deportation Officer's Field Manual, § 20.9(a) 13
ICE, Detention & Deportation Officer's Field Manual, § 20.10(b) 13
Johnson Memo., Interim Guidance: Civil Immigration Enforcement and Removal Priorities (Feb. 18, 2021) ..... passim
Kelly Memo., Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017) 2
Meissner Memo., Exercising Prosecutorial Discretion, (Nov. 17, 2000) 2, 8
Morton Memo., Civil Immigration Enforcement (Mar. 2, 2011) 2, 16
Morton Memo., Enforcement at Sensitive Locations (Oct. 24, 2011) 16
Myers Memo., Prosecutorial and Custody Discretion (Nov. 7, 2007) 2
Pekoske Memo., Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities (Jan. 20, 2021) ..... passim
U.S. Fish & Wildlife Serv., 444 FW 1, FWM #464 (Aug. 25, 2005) 18

INTEREST OF AMICI CURIAE

The ACLU is a nationwide, nonpartisan, public interest organization of nearly two million members dedicated to protecting the fundamental rights and liberties that U.S. law guarantees to all persons. The ACLU of Florida is the ACLU's state affiliate, and is committed to protecting those same rights and liberties for all persons in Florida. *Amici* have extensive experience with the immigration removal system, and have litigated dozens of cases involving immigration detention, including *Demore v. Kim*, 538 U.S. 510 (2003), *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), *Nielsen v. Preap*, 139 S. Ct. 954 (2019), and countless other cases in the federal district courts and courts of appeals. The policies and legal issues in this case are of significant interest to *amici* and their members, because Florida's claims threaten the liberty interests of persons subject to immigration enforcement in Florida and across the country. *Amici* file this brief pursuant to Fed. R. App. P. 29(a)(2).

STATEMENT OF THE ISSUE

Whether the district court correctly denied Florida's request for a preliminary injunction to enjoin implementation of memoranda establishing federal immigration enforcement priorities to guide DHS's enforcement discretion.

SUMMARY OF ARGUMENT

Florida seeks to deny ICE a basic and essential tool that the agency has used for decades. In every administration, ICE and its predecessors have set enforcement priorities using memoranda like the ones Florida challenges here. *See, e.g.*, Pekoske Memo., Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities (Jan. 20, 2021), App. 105–08; Johnson Memo., Interim Guidance: Civil Immigration Enforcement and Removal Priorities (Feb. 18, 2021), App. 112–18 ("Memos");[1] Kelly Memo., Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), https://bit.ly/3tNxBzk; Morton Memo., Civil Immigration Enforcement (Mar. 2, 2011), https://bit.ly/31hkwC9; Myers Memo., Prosecutorial and Custody Discretion (Nov. 7, 2007), https://bit.ly/3rfw8jZ; Meissner Memo., Exercising Prosecutorial Discretion, (Nov. 17, 2000), https://bit.ly/3bp1nUC. These policies are a basic component of the immigration system and ubiquitous across all types of enforcement agencies. As the United States explains, these kinds of priority policies have typically not been subject to judicial review. ARB 27–42.

If, however, the Court concludes that the Memos are reviewable, Florida's claims nevertheless fail on the merits. *Amici* write to highlight a key flaw in

[1] "App. __" refers to pages in Appendix of Appellant; "AOB __" refers to pages in Appellant's Opening Brief; and "ARB __" refers to pages in Appellee's Response Brief.

Florida's statutory claim: The statute on which Florida relies, 8 U.S.C. § 1226(c), at most requires arrest and detention *if* ICE chooses to initiate removal proceedings, and does not require ICE to initiate proceedings in the first place. Without removal proceedings, the statute imposes no obligations of any kind. Florida has not identified a single person *in removal proceedings* whom ICE has declined to arrest. In other words, Florida is unable to identify a single real-world violation of the statute, and has entirely failed to demonstrate entitlement to any injunction.

Florida also misreads the Memos to prohibit enforcement of other priorities that the Memos do not single out for presumptive enforcement. The Memos only set general enforcement guidelines and identify which officials will make which case-by-case enforcement decisions. By their terms, they do not prohibit *any* enforcement action, including any detention mandated by § 1226(c). And unrebutted record evidence confirms that ICE is regularly approving enforcement actions against other priorities beyond the Memos' initial priorities.

Even if the Memos violated § 1226(c), any relief would have to be limited to the narrow category of detentions mandated under that section. Florida offers no reason why the Memos should be enjoined as applied to categories of people *not* listed in § 1226(c)(1).

Finally, the Memos are exempt from notice and comment rulemaking both as general statements of policy and as rules of agency procedure. Every modern presidential administration has issued enforcement priorities like the Memos without notice and comment, and courts have uniformly upheld such policies against notice-and-comment challenges.

Neither the Immigration and Nationality Act, nor the Administrative Procedure Act, permit the State of Florida to sweep aside the federal government's authority to set enforcement priorities and dictate the national immigration policy the State would prefer. The district court correctly denied Florida's motion for a preliminary injunction and its decision should be affirmed.

ARGUMENT

I. 8 U.S.C. § 1226(c) Provides No Basis to Enjoin the Memos.

Even if the Court finds the Memos to be reviewable, *but see* ARB 27–42, Florida's challenge fails on the merits. Its primary claim that the Memos violate § 1226(c) rests on a misreading of both the statute and the Memos.

First, Florida's argument rests on an overbroad reading of what § 1226(c) requires. The statute at most mandates the arrest and detention of people who are removable based on a qualifying offense *pending their removal proceedings*. If ICE exercises its discretion not to pursue removal against someone, § 1226(c) imposes no duty to arrest or detain that person. And nothing in the statute requires

ICE to pursue removal in the first place. While Florida alleges violations of § 1226(c) in individual cases, it has not identified a single individual *in removal proceedings* whom ICE has declined to arrest. The State is thus unable to show that the Memos are causing any violations of the statute.

Second, Florida's arguments that the Memos on their face prohibit arrests and detentions that § 1226(c) mandates fare no better. AOB 32–35. The Memos by their terms do not prohibit *any* enforcement action. They simply set general enforcement priorities and identify which officials will make which enforcement decisions on a case-by-case basis. Because the Memos do not prevent officials from complying with any statutory duty, they are valid on their face. Nor is ICE treating the Memos as a prohibition on enforcement actions of other priority categories in practice. Unrebutted record evidence makes clear that ICE supervisors are regularly approving enforcement action against other priorities. Such supervisory review is a common feature of ICE's enforcement policies.

Finally, even if an injunction were appropriate, it must be limited to remedying the extent of the statutory violation established. In this case, any injunction cannot go beyond suspending the Memos with respect to the categories of people described in § 1226(c)(1).

A. Florida relies on an overbroad interpretation of when § 1226(c) requires detention.

Florida's statutory argument fails because it misinterprets the scope of § 1226(c). Section 1226(c) does not unconditionally mandate the arrest and detention of everyone who has committed one of its predicate offenses. At most, it requires ICE to arrest and detain people who are removable based on a predicate offense *only if* ICE chooses, in its discretion, to initiate removal proceedings against them. And nothing in § 1226(c) requires ICE to initiate proceedings in the first place. Florida has not identified anyone in removal proceedings and has thus not shown any violation of the statute.

The text of § 1226 makes clear that any duties in subsection (c) only arise when removal proceedings are pending. Section 1226(a) "sets out the general rule regarding [an alien's] arrest and detention pending a decision on removal." *Nielsen v. Preap*, 139 S. Ct. 954, 959 (2019). It authorizes—but does not require—arrest and detention "[o]n a warrant issued by the Attorney General" and "pending a decision on whether the alien is to be removed"—i.e. "pending removal proceedings." *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018). If ICE does not initiate removal proceedings, § 1226 provides no authority to arrest or detain.

Section 1226(c), in turn, "limit[s]" the discretionary detention "authority conferred by subsection (a)" by making detention mandatory for people who are removable based on certain predicate offenses. *Preap*, 139 S. Ct. at 966.

Critically, it does not provide a separate source of detention authority; those subject to mandatory detention under § 1226(c) are nonetheless "arrested by authority that springs from subsection (a)." *Preap*, 139 S. Ct. at 966. So, because § 1226(a) permits detention only pending removal proceedings, § 1226(c) can only require detention pending removal proceedings—without removal proceedings it requires nothing. *See Jennings*, 138 S. Ct. at 846 ("[T]ogether with § 1226(a), § 1226(c) makes clear that detention of aliens within its scope must continue 'pending a decision on whether the alien is to be removed from the United States.'"); *Johnson v. Guzman Chavez*, No. 19-897, 2021 WL 2653264, at *11 (U.S. June 29, 2021) (similar). The Supreme Court confirmed this reading in *Preap* when it acknowledged that a parallel limitation on § 1226(a)—the warrant requirement—also applies to 1226(c). 139 S. Ct. at 966 (approving DHS "practice of applying to the arrests of all criminal aliens certain procedural requirements, such as the need for a warrant, that appear only in subsection (a)").

Consistent with this straightforward reading, the Supreme Court has repeatedly stated that § 1226(c) only "mandates detention *during removal proceedings* for a limited class of deportable aliens." *Demore v. Kim*, 538 U.S. at 517–18 (emphasis added); *Id.* at 517 ("[T]he statutory provision at issue governs detention of deportable criminal aliens pending their removal proceedings."); *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001) (noting § 1226(c) requires "detention

of criminal aliens during removal proceedings"). Likewise, the Executive Branch, under all administrations, has understood that § 1226's detention powers and duties only arise if ICE pursues removal proceedings. *See, e.g.*, *Matter of M-S-*, 27 I&N Dec. 509, 512 (A.G. 2019); *In re Joseph*, 22 I&N Dec. 660, 662, 668 (BIA 1999); 8 C.F.R. § 236.1(b)(1); 8 C.F.R. § 239.2(e).

Florida's legal theory fundamentally misses this limitation built into § 1226(c). In its view, if an individual has been convicted of a predicate offense, ICE *must* prioritize enforcement against that person and arrest them. But, as explained above, § 1226(c) only applies pending removal proceedings. Without such proceedings, § 1226 does not impose any duty to arrest.

Nor does § 1226(c) withdraw the government's long-standing prosecutorial discretion over whether to initiate proceedings in the first place. Section 1226(c) says nothing about a duty to initiate proceedings and no court or agency has ever recognized such a duty. *See* Meissner Memo., *supra*, at 6 (explaining that the INS could decline to initiate proceedings against a person who "would be subject to mandatory detention" "*if* served with an NTA") (emphasis added). To adopt the contrary view—that the statute silently requires the initiation of proceedings—would represent an impermissible judicial creation of statutory "requirements" that "Congress has omitted from its adopted text." *Jama v. ICE*, 543 U.S. 335, 341 (2005); *see Bates v. United States*, 522 U.S. 23, 29 (1997) (same).

This is especially true for charging decisions, because "the decision whether or not to charge an individual" lies at "the core of prosecutorial discretion." *In re Wild*, 994 F.3d 1244, 1260 (11th Cir. 2021); *see Wayte v. United States*, 470 U.S. 598, 607 (1985); *United States v. Cespedes*, 151 F.3d 1329, 1332 (11th Cir. 1998); *United States v. Ream*, 491 F.2d 1243, 1246 & n.2 (5th Cir. 1974). That discretion has long been recognized in the immigration context, where "[a] principal feature of the removal system is the broad discretion exercised by immigration officials," who "must decide whether to pursue removal at all." *Arizona v. United States*, 567 U.S. 387, 396 (2012). The "Executive has discretion to abandon the endeavor" of commencing proceedings and has long "enagag[ed] in a regular practice of exercising that discretion for humanitarian reasons or simply for its own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999); *see DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1912 (2020) (forbearing removal of a certain class of immigrants was "squarely within the discretion" of DHS); *Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015) (need for "prosecutorial discretion" is "greatly magnified in the deportation context") (quotation marks omitted); *Matter of Vizcarra-Delgadillo*, 13 I&N Dec. 51, 53 (BIA 1968) ("[D]iscretion not to proceed in a given case must be accorded to those responsible for immigration law enforcement.").

Thus, where an agency's prosecutorial discretion is concerned, there can be no mandatory duties without an unmistakably clear legislative statement. In *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760–61 (2005), the Supreme Court held that even a statutory directive that an agency "shall" take a specific enforcement action is not enough; there must be "some stronger indication" that the action is mandatory. If an explicit "shall" is not enough, it is inconceivable that Congress could eliminate the core of ICE's prosecutorial discretion by mere implication.

Instead of taking the unprecedented step of mandating particular prosecutions, Congress focused on "detention of criminal aliens during their removal proceedings" as the "way to ensure their successful removal" after proceedings. *Demore*, 538 U.S. at 521 (emphasis added). The Supreme Court identified that the lack of detention during such proceedings was "one of the major causes" of the issues Congress faced when it enacted § 1226(c). *Id*. at 519; *see id*. at 521 ("Congress enacted 8 U.S.C. § 1226" "following . . . [r]eports" recommending detention during proceedings "because of the high rate of no-shows for those criminal aliens released on bond"). It made sense for Congress to address that particular issue while otherwise respecting the Executive's deeply rooted discretion over "whether it makes sense to pursue removal at all." *Arizona*, 567 U.S. at 396. After all, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (cleaned up) (rejecting purpose-

driven interpretation, because the statute's text shows "what competing values will or will not be sacrificed to the achievement of a particular objective"); *see Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 1196 (11th Cir. 2019) (same).

Thus, § 1226(c) at most requires arrest and detention once ICE has decided to commence removal proceedings. And the Memos are entirely consistent with that proper understanding of the statute. Indeed, Florida has not identified a single violation of this duty. It points to thirteen individuals for whom ICE has either declined to issue a detainer or lifted a previously issued detainer. AOB 11–12; App. 75-102, 207-230, 313-335. But Florida makes no showing that any of these individuals were in removal proceedings. And without removal proceedings, § 1226(c) imposes no duty to arrest or detain any of them. The issuance of a detainer does not mean removal proceedings have commenced and Florida does not allege that removal proceedings have commenced against any of the individuals it has identified.[2] *See Morales v. Chadbourne*, 793 F.3d 208, 214–15 (1st Cir. 2015) (a detainer "request[s] the continued detention of an alien so that ICE officials may assume custody of that alien and investigate *whether to initiate*

[2] Of the thirteen individuals Florida identified, five are not even subject to mandatory detention because they have not committed any crimes described in § 1226(c)(1). App. 307–08. For another five, ICE has decided in its lawful discretion not to take further enforcement action. App. 309–10, 337–38. For two others, ICE subsequently *did* issue a detainer. App. 308-09. ICE lifted one other detainer in error and now considers the individual a Public Safety priority. App. 309.

removal proceedings against her." (Emphasis added.)); *cf.* 8 C.F.R. § 287.3(b), (d) (describing charging decision made *after* arrest).[3]

B. The Memos do not conflict with § 1226(c) because they do not prohibit *any* enforcement action.

In addition to misinterpreting § 1226(c), Florida's statutory argument fails because it misreads the Memos to prohibit enforcement actions against other priorities beyond the Memos' initial priority categories.

1. The Memos on their face do not prohibit any arrests or detentions.

Nothing in the Memos purports to bar ICE from detaining *anyone*—in fact just the opposite. The Memos are crystal clear that they do not "prohibit the arrest, detention, or removal of *any* noncitizen." App. 114 (emphasis added); *see* App. 107, 114 (explaining that enforcement actions against other priorities "may also be justified," and providing factors to consider).

The Memos do not determine whether enforcement action will be taken in any given case. Rather, they establish a decision-making process. If a person falls within one of several priority categories—recent arrivals, those convicted of a long list of crimes, and those deemed to threaten national security—then line agents can decide whether to take discretionary enforcement action. App. 115–16. If a

[3] Of course, even if Florida could identify individual cases in which § 1226(c) was violated, that would only show that those specific applications of the Memos were unlawful, not that the Memos as a whole are unlawful.

person falls outside those categories, enforcement is still permissible, but a supervisor must decide whether to take the enforcement action. App. 114. Line agents can take action outside those categories without supervisory review when "exigent circumstances" render such review "impracticable." App. 117.[4] The Memos thus do exactly what Congress has instructed ICE to do: They set "priorities" for enforcement, 6 U.S.C. § 202(5), and they determine which officers perform which functions, 8 U.S.C. § 1103(a)(2), (4).

Nor do the Memos claim to supersede ICE's existing § 1226(c) protocols, which continue to govern mandatory detention. *See, e.g.*, 8 C.F.R. §§ 236.1(c)(1)(i), (c)(8), 1236.1(c); ICE, Detention & Deportation Officer's Field Manual, §§ 20.9(a), 20.10(b), 20.11(g), (i). It is common for general policies like the Memos to coexist with more specific rules, like those in § 1226(c). Absent a direct and unavoidable conflict, general and specific rules are typically harmonized with the understanding that the specific rule controls where applicable, and otherwise the general policy governs. *See, e.g.*, *Morales v. Trans World Airlines*, 504 U.S. 374, 384–85 (1992). In fact, the Memos explicitly provide for this situation by acknowledging that "other relevant factors" might require enforcement

[4] Florida incorrectly states that the exigent-circumstances exception applies "only in situations posing 'an imminent threat to life' or 'imminent and substantial risk to property.'" AOB 35, 10. Although exigent circumstances may "generally" involve those situations, they are not limited to those situations. App. 117.

in specific cases, App. 114, 117, and this would naturally include any statutory mandates.

It is therefore clear that nothing in the Memos bars any detention required by § 1226(c), and, to the contrary, the Memos are full of indications that mandatory detention is unaffected. This is borne out by the fact that, in the months the Memos have been in effect, Florida has been unable to identify any actual violations of the statute. *See supra* at 11.

Florida strains to identify any prohibitions against enforcement on the face of the Memos. It points out that the three priority categories do not include some people covered under § 1226(c); that to be deemed a priority, some people must be deemed a public safety risk; and that supervisor review for other priorities means that some enforcement requests will be denied. AOB 32–34. But in all of these cases, nothing on the face of the Memos prevents supervisors from approving enforcement action against people who fall outside the three categories. There is no reason to assume that such approval would be denied for the limited set of people who are subject to mandatory detention. *See FCC v. Schreiber*, 381 U.S. 279, 296 (1965) (rejecting "assumption" that official would implement policy illegally). Florida's "speculation" that ICE will implement the Memos illegally "cannot be the basis for declaring the regulations facially invalid." *Ass'n of Priv. Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 454 (D.C. Cir. 2012); *see*

United States v. Salerno, 481 U.S. 739, 745 (1987) ("The fact that [a policy] might operate [unlawfully] under some conceivable set of circumstances is insufficient to render it wholly invalid."); *Sherley v. Sebelius*, 644 F.3d 388, 397 (D.C. Cir. 2011) ("[I]t is not enough for the plaintiffs to show the [policies] could be applied unlawfully." (Emphasis added.)).

2. The Memos do not impose a de facto prohibition on enforcement of other priority categories.

Unable to identify a facial violation, Florida claims that the Memos violate § 1226(c) in practice because, by requiring supervisor approval, the Memos effectively prohibit all enforcement of other priority categories. AOB 34–35.

But ICE officials responsible for implementing the Memos have submitted unrebutted testimony that "ICE has continued the arrest and removal of individuals . . . who constitute 'other priorities,'" and that supervisors are "regularly" approving enforcement actions of other priorities. App. 298; *see* Order at 19 fn.14, *Arizona v. DHS*, cv-21-00186-PHX-SRB (June 30, 2021) (noting that Acting ICE Phoenix Field Office Director received "at bare minimum . . . on average, give or take, three [preapproval requests] a day"). ICE is clearly not treating the Memos as a bar on enforcement.

Florida claims that supervisory approval is onerous, but similar requirements are commonplace within ICE. *See* Forman Memo. at 1, Issuance of Notices to Appear (June 21, 2004), http://bit.ly/3f6hQQb (requiring approval from Special

Agent in Charge to issue NTAs and certain removal orders to noncitizens with U.S. military service); ICE Directive No. 11072.1 at 1 (Jan. 10, 2018), https://bit.ly/399Ixzt (requiring approval from Special Agent in Charge or Field Office Director for enforcement actions inside courthouses); Morton Memo. at 2, Enforcement at Sensitive Locations (Oct. 24, 2011), https://bit.ly/319y3f0 (requiring ICE "headquarters" approval for enforcement actions at "sensitive locations"); Morton Memo. at 3, Civil Immigration Enforcement (Mar. 2, 2011), https://bit.ly/31hkwC9 (requiring approval to detain certain vulnerable noncitizens). Like the Memos, these policies establish general enforcement priorities and allow additional enforcement with supervisor approval. Such approval requirements clearly do not constitute the de facto bar on enforcement that Florida claims.

Florida's argument to the contrary is remarkably thin. It relies on a single declaration from a former ICE official who has no experience with the Memos' implementation. App. 251. He offers vague and inapposite speculation that enforcement of other priorities will not be approved because ICE supervisors supervise a large number of line officers and because arrest decisions are sometimes made quickly without time for prior approval. AOB 34–35. But he does not contradict ICE's own testimony that such actions are "regularly" being approved, he does not address ICE's many other policies requiring supervisor

review, and he does not address the Memos' permission to bypass supervisor review when it is "impracticable." App. 117. Florida has thus failed to show that the Memos bar anything, including any actions that are required by § 1226(c).

C. Even if an injunction were appropriate, it should be limited to the extent of any statutory violation

As explained above, no injunction is proper here because the interim priorities do not prevent DHS from continuing to comply with § 1226(c). But even if they did, any injunction must be limited to remedying the extent of the statutory violation and no more. Section 1226(c) applies only to people who are removable on the criminal grounds listed in § 1226(c)(1). So the most Florida could obtain is an injunction of the Memos' application to that group of people. The Memos' other applications—to people who are not removable on account of a listed conviction—cannot be enjoined, because those applications are legal even if Florida's claims are correct.

"[T]he scope of injunctive relief is dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Overbroad injunctions thus represent an "inappropriate use of the court's equity powers." *LaMarca v. Turner*, 995 F.2d 1526, 1543 (11th Cir. 1993) (vacating overbroad injunction); *Am. Fed'n of State, Cty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 873 (11th Cir. 2013) (vacating overbroad injunction and directing district court to "recraft its relief to cover only those groups as to which the [challenged

policy's] application is unconstitutional"). Florida's requested injunction, which would block ICE from implementing the *entire* Johnson Memo and the priorities portion of the Pekoske Memo—even as to people not listed in § 1226(c)(1)—is hopelessly overbroad. *See John Doe #1 v. Veneman*, 380 F.3d 807, 818–19 (5th Cir. 2004) ("an injunction is necessarily overbroad [if] it exceeds the extent of the violation established").

Thus, even if Florida were correct about the Memos' effect on mandatory detention, the broadest injunction it could possibly support would only suspend the priorities with respect to custody during removal proceedings for the people described in § 1226(c)(1). Any injunction must otherwise leave the Memos intact.

II. The Memos Did Not Require Notice and Comment.

Priority policies like the one in this case are widely used across virtually every enforcement agency in the government, and DHS has used them continuously for decades.[5] Like the Memos here, these policies typically establish substantive priorities and create an internal procedure for exercising discretion beyond the priorities. Critically, these priority policies almost *never* go through notice and comment, especially an interim policy like the one at issue here.

[5] *See, e.g.*, *supra* at 2 (DHS policies); U.S. Fish & Wildlife Serv., 444 FW 1, FWM #464 (Aug. 25, 2005), https://www.fws.gov/policy/444fw1.pdf; Dep't of Interior, Order No. 3385 (Sept. 14, 2020), https://on.doi.gov/3935ww0; FCC, Enforcement Overview, (Apr. 2020), https://bit.ly/3cbhA0w.

Florida's theory would cause a sea change in administrative practice, as enforcement agencies could no longer channel their own discretion, even temporarily, without going through months of notice and comment.

It is well established that guidelines like those in the Memos do not require notice and comment. Under the APA, while legislative rules require notice and comment, "general statements of policy" do not. 5 U.S.C. § 553(b)(A). And "courts have uniformly construed enforcement guidelines as policy statements." *Ctr. for Auto Safety, Inc. v. NHTSA*, 342 F. Supp. 2d 1, 20 (D.D.C. 2004), *aff'd*, 452 F.3d 798 (D.C. Cir. 2006) (collecting cases upholding policies that established presumed priorities but allowed high-level agency officials to deviate in individual cases). The Eleventh Circuit is no exception. In *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377–78 (11th Cir. 1983), the Court rejected a notice-and-comment challenge to a policy setting "criteria which establish[ed] a presumption" against enforcement, because the policy also "explicitly stated" that individual decisions could be "decided by examining the totality of the facts." *See also Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1017 (9th Cir. 1987) (finding immigration enforcement directive did not require notice and comment because it left the agency "free to consider the individual facts in each case" (quotation marks omitted)).

The Memos here do the exact same thing by establishing "presumed priority cases" that officials can go beyond in individual cases. App. 114, 116–117 (emphasizing that individual cases can be decided based on "all relevant facts and circumstances"). As *Ryder* explained, "[a]s long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm" subject to notice and comment. 716 F.2d at 1377. Nor do the Memos operate in practice as binding norms because, as ICE officials have explained, supervisors regularly approve enforcement actions of other priorities. *See supra* at 15. By contrast, in *Jean v. Nelson*, on which Florida relies, notice and comment was required because the policy *did* establish a "binding norm" that precluded discretion. 711 F.2d 1455, 1483 (11th Cir. 1983). But the Court was clear that notice and comment would not have been required if, like here, the policy left an "implementing official[] free to exercise discretion . . . in an individual case." *Id*. at 1481.

The Memos are independently exempt from notice and comment as "rules of agency . . . procedure." 5 U.S.C. § 553(b)(A). Rules that do not alter anyone's substantive rights, but rather help agencies "direct their enforcement activity" and "concentrate agency [enforcement] resources in areas" of highest priority, are procedural. *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1051 (D.C. Cir. 1987) (rejecting notice and comment claim). For instance, in *Dept. of Labor v. Kast*

Metals Corp., 744 F.2d 1145, 1152 (5th Cir. 1984), the Fifth Circuit upheld a rule that established priority criteria to help "concentrate [the agency's enforcement] resources in industries with the highest potential for safety and health violations." Even though the rule changed the likelihood that specific employers would face enforcement action, it did not change their underlying rights or obligations, so it was procedural. *Id*. at 1155. The exact same is true here. The Memos do not give anyone lawful status or any other benefit, and they do not prohibit any enforcement action. They simply "allocate agency [enforcement] resources more efficiently" by directing them to high-priority areas. *Id*. at 1145.

CONCLUSION

The Court should affirm the district court's denial of Florida's request for a preliminary injunction.

Dated: July 15, 2021

Respectfully Submitted,

/s/ Amien Kacou

AMIEN KACOU
DANIEL TILLEY
American Civil Liberties Union
of Florida
4343 West Flagler St., Suite 400
Miami, FL 33134
Tel: (786) 363-2700
akacou@aclufl.org
dtilley@aclufl.org

ANAND BALAKRISHNAN
DAVID CHEN
MICHAEL K.T. TAN
NOOR ZAFAR
OMAR C. JADWAT
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2660
abalakrishnan@aclu.org
dchen@aclu.org
mtan@aclu.org
nzafar@aclu.org
ojadwat@aclu.org

CODY H. WOFSY
SPENCER E. AMDUR
American Civil Liberties Union
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0770
cwofsy@aclu.org
samdur@aclu.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the word limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,764 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Times New Roman.

/s/ Amien Kacou
Amien Kacou

CERTIFICATE OF SERVICE

I certify that on July 15, 2021, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

/s/ Amien Kacou
Amien Kacou