No. 21-40618

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF LOUISIANA,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, ACTING COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY; UNITED STATES CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, IN HIS OFFICIAL CAPACITY; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; UR M. JADDOU, DIRECTOR OF THE U.S. CITIZENSHIP AND IMMIGRATION SERVICES; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas

BRIEF FOR APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

No. 21-40618

State of Texas and State of Louisiana v. United States of America, et al.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellants, as governmental parties, need not furnish a certificate of interested persons.

/s/ Sean Janda
SEAN JANDA
Counsel for Appellants

STATEMENT REGARDING ORAL ARGUMENT

The district court entered a preliminary injunction prohibiting the Executive from relying on a set of interim guidelines intended to guide agency officials' exercise of discretion in enforcing the immigration laws. Since the district court's ruling, the Secretary of Homeland Security has promulgated superseding guidelines, which will take effect on November 29, 2021 and which will rescind the interim guidelines at that point. Once that occurs, the government expects that this appeal will become moot and therefore oral argument will be unnecessary.

Nevertheless, as this Court recognized in largely staying the district court's injunction pending appeal, the district court's ruling rests on a fundamental misunderstanding of the nature of enforcement discretion and the relevant statutes. Given the importance of this case and those issues, if this appeal is not dismissed before it becomes ripe for resolution, the government respectfully requests that the Court hold oral argument, which should assist the Court in understanding the issues, before issuing any decision.

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INTRODUCTION

The "federal power to determine immigration policy is well settled." *Arizona v. United States*, 567 U.S. 387, 395 (2012). Consistent with the fact that immigration policy affects many complex and important areas, Congress constructed an immigration enforcement system whose "principal feature" is the "broad discretion exercised by immigration officials." *Id.* at 395-96. This reflects the reality—embodied in every Presidential administration's policies for decades—that officials must deploy limited resources according to priorities set by policymakers.

Earlier this year, the Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE), a component of DHS, issued two memoranda that, consistent with longstanding practice over many decades and with the Secretary of Homeland Security's responsibility to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), laid out an interim framework to guide agency officials' exercise of their enforcement discretion while the agencies developed revised enforcement priorities. The memoranda state that, given the agencies' limited resources, officials should prioritize enforcement actions against noncitizens who pose the greatest threats to national security, border security, and public safety. The memoranda permit immigration officials to take enforcement actions against other noncitizens beyond the presumed priority categories when warranted by the facts and circumstances.

Texas and Louisiana challenge that interim framework, contending primarily that the Immigration and Nationality Act (INA) requires the Secretary to detain every noncitizen who either falls within a group that the statute refers to as "criminal aliens," 8 U.S.C. § 1226(c), or who has recently received a final order of removal, *see id.* § 1231(a)(2), and that the memoranda contradict those supposed statutory mandates. But the States misread federal law. There is no such mandate, and there has never been an expectation that DHS would detain all noncitizens in either broad statutory category. The text, context, and history of the INA all demonstrate Congress's intent to allow the Executive to exercise its deep-rooted enforcement discretion as the agencies did here.

In any event, the States are wrong to contend that the memoranda will harm them by requiring them to expend additional resources. Those claims of harm rest on unsupported speculation and fail to establish the concrete injury required for standing, much less the harm necessary to support the extraordinary remedy of a preliminary injunction undermining core Executive prerogatives.

Moreover, as a stay panel of this Court recognized, the States' claims are not reviewable because the priorities memoranda are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2). In addition, the memoranda do not represent reviewable "final agency action," *id.* § 704, and each of the States' claims fails on the merits.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331.[1] ROA.21. As explained below, *infra* pp. 21-27, the district court lacks jurisdiction over this case because plaintiffs do not have standing to sue. The district court granted plaintiffs' motion for a preliminary injunction on August 19, 2021. ROA.1285. Defendants filed a timely notice of appeal on August 20, 2021, ROA.1446, and this Court has jurisdiction over the appeal under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the district court erred in entering a preliminary injunction prohibiting the implementation of interim priorities to guide Executive officials' exercise of immigration enforcement discretion.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

The INA, 8 U.S.C. § 1101 *et seq.*, sets forth procedures for removal of noncitizens. As relevant here, the process generally begins when DHS initiates a removal proceeding, *id.* § 1229(a), a discretionary decision that requires DHS to consider the enforcement priorities that Congress has charged the Secretary with establishing, *see* 6 U.S.C. § 202(5). An immigration judge determines whether the

[1] Plaintiffs also cited the Tucker Act, 28 U.S.C. § 1346; the Administrative Procedure Act's cause-of-action and venue provisions, 5 U.S.C. §§ 702-703; and 28 U.S.C. § 1361 as bases for jurisdiction in their complaint. ROA.21. These statutes do not supply a basis for jurisdiction over the claims at issue.

noncitizen is removable and, if so, whether to enter a removal order. 8 U.S.C. § 1229a(c)(1)(A); *see* 8 C.F.R. § 1240.12. In most cases, the noncitizen can obtain administrative and judicial review of such an order.

The INA also sets forth the framework for arresting and detaining a noncitizen present in the United States "pending a decision on whether [he] is to be removed." 8 U.S.C. § 1226(a). That provision "distinguishes between two different categories of aliens." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). Section 1226(a) applies generally to all removable noncitizens and allows the government "to issue warrants for their arrest and detention pending removal proceedings." *Id.* at 846. Section 1226(c) provides that DHS "shall take into custody any alien," 8 U.S.C. § 1226(c)(1), who "falls into one of several enumerated categories involving criminal offenses and terrorist activities," *Jennings*, 138 S. Ct. at 837, and "may release [such] an alien . . . only if" a specified condition not relevant here is satisfied, 8 U.S.C. § 1226(c)(2).

Once a removal order is administratively final and other conditions are satisfied, DHS may remove the noncitizen. Section 1231 sets a "removal period" of 90 days and provides that the noncitizen generally is subject to detention and removal during that period. 8 U.S.C. § 1231(a).

Both § 1226 and § 1231 contain provisions insulating the Secretary's enforcement of those sections from judicial review. Section 1226 states that the Secretary's "discretionary judgment regarding the application of this section shall not be subject to review" and that "[n]o court may set aside any action or decision" taken

under that section "regarding the detention or release of any alien." 8 U.S.C. § 1226(e). And § 1231 provides that "[n]othing" in that section "shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." *Id.* § 1231(h).

"A principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona v. United States*, 567 U.S. 387, 396 (2012). "[A]s an initial matter," the Executive "must decide whether it makes sense to pursue removal at all." *Id.* And "the Executive has discretion to abandon the endeavor" at "each stage" of the removal process. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (*AADC*). Such discretion is not merely a function of the Framers' constitutional design. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005) (setting forth the "deep-rooted nature of law-enforcement discretion"). It also reflects the reality of limited resources. For example, as of August 2021, ICE is "manag[ing] a non-detained docket of more than 3.2 million cases," including noncitizens in removal proceedings or with a final order of removal. ROA.1460-61. Yet Congress has appropriated money to fund just "34,000 detention beds." ROA.1463.

B. Factual Background

This appeal concerns two memoranda that establish interim priorities to guide DHS's and ICE's enforcement decisions. The memoranda implement Executive

Order 13993, which establishes the nation's policy "to protect national and border security, address the humanitarian challenges at the southern border, and ensure public health and safety." Exec. Order No. 13,993, 86 Fed. Reg. 7051, 7051 (Jan. 20, 2021).

1. The DHS Memorandum

The first memorandum was issued by then-Acting Secretary of Homeland Security David Pekoske on January 20, 2021. *See* ROA.48 (DHS Memorandum). The memorandum explained that the United States was "fac[ing] significant operational challenges at the southwest border as it [was] confronting the most serious global public health crisis in a century." ROA.48. Those challenges required DHS to "surge resources to the border . . . to ensure safe, legal and orderly processing, to rebuild fair and effective asylum procedures . . . , to adopt appropriate public health guidelines and protocols, and to prioritize responding to threats to national security, public safety, and border security." ROA.48.

Given those challenges and other factors, the memorandum instructed DHS components to conduct a "Department-wide review of policies and practices concerning immigration enforcement." ROA.49. In particular, the memorandum solicited recommendations addressing "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." ROA.49.

The memorandum set forth interim civil-enforcement guidelines "pending completion of that review." ROA.49. It recognized that, "[d]ue 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." ROA.49. The memorandum therefore instructed DHS components to prioritize "national security, border security, and public safety" while the agency developed "detailed revised enforcement priorities." ROA.49. Specifically, the memorandum urged components to focus enforcement efforts on individuals suspected of terrorism or espionage or whose apprehension is "otherwise necessary to protect the national security of the United States"; 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 "[i]ndividuals incarcerated within federal, state, and local prisons and jails . . . who have been convicted of an 'aggravated felony'" as defined by 8 U.S.C. § 1101(a)(43) and who pose a threat to public safety. ROA.49.

The memorandum expressly noted that "nothing" in the priorities "prohibits the apprehension or detention of" noncitizens "who are not identified as priorities." ROA.50. The memorandum further noted that the priorities "are not intended to, do not, and may not be relied upon to create any" enforceable "right or benefit." ROA.51.

The interim priorities went into effect on February 1, 2021. DHS intended them to "remain in effect until superseded by revised priorities developed in connection with the review" discussed above. ROA.50.

2. The ICE Memorandum

The second memorandum, which implemented the DHS Memorandum, was issued by ICE on February 18, 2021. ROA.54 (ICE Memorandum). The memorandum recognized that "ICE operates in an environment of limited resources," and that, as a result, "ICE has always prioritized, and necessarily must prioritize, certain enforcement and removal actions over others." ROA.55. The memorandum further explained that ICE's mission has been rendered "particularly complex" due to "several other factors," including

> 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.

ROA.55. "[T]o most effectively achieve" its mission to protect "national security, border security, and public safety" in light of those factors, ICE determined that it was necessary to "exercise its well-established prosecutorial discretion." ROA.56. Accordingly, the ICE memorandum instructed officers to focus enforcement on the categories of noncitizens specified in the DHS memorandum. ROA.57-58. The memorandum also stated that, at ICE's request, DHS had expanded the public safety

category to include "qualifying members of criminal gangs and transnational criminal organizations." ROA.54.

Like the DHS Memorandum, the ICE Memorandum reiterated that the interim priorities do not "prohibit the arrest, detention, or removal of any noncitizen." ROA.56. The memorandum requires supervisory preapproval of "enforcement or removal actions" against individuals who fall outside the presumed priorities unless "exigent circumstances and the demands of public safety" make preapproval "impracticable"—in which case approval may be requested within 24 hours after the action. ROA.59. That preapproval process simply requires an officer to "raise a written justification through the chain of command . . . explaining why the action otherwise constitutes a justified allocation of limited resources" and "identify[ing] the date, time, and location" of the proposed enforcement action. ROA.59. Preapproval has "regularly" been granted, including for "non-aggravated felon sexual predators, individuals with warrants from foreign governments . . . , and individuals with violent criminal convictions such as aggravated assault." ROA.679.

3. The Superseding Priorities

Over the last eight months, as directed by the DHS Memorandum, the Department of Homeland Security has been reviewing current policies, acquiring input from relevant stakeholders, and evaluating the interim priorities' effectiveness. Following that process, on September 30, 2021, the Secretary of Homeland Security issued a memorandum establishing revised immigration enforcement priorities. *See*

DHS, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), https://go.usa.gov/xe2CP. That new guidance is set to become effective on November 29, 2021, at which point the "guidance will serve to rescind" the DHS and ICE Memoranda at issue in this appeal. *Id.* at 6. The likely effect of that rescission will be to moot this appeal.

C. Prior Proceedings

1. Plaintiffs, the States of Texas and Louisiana, challenged the DHS Memorandum and the ICE Memorandum in district court. They moved for a preliminary injunction, primarily on the theory that the priorities violated the Administrative Procedure Act (APA) and the INA. On August 19, 2021, the district court granted plaintiffs' motion and entered a nationwide preliminary injunction prohibiting the agencies from implementing the priorities.

At the outset, the district court concluded that plaintiffs have standing to sue. ROA.1304-30. The court first stated that the interim priorities would result in the release from custody of an unspecified number of noncitizens whom the court believed would otherwise be detained or removed, and that some subset of those noncitizens might then commit crimes. Relying on that predicate, the court concluded that the States would spend money to detain released noncitizens who later reoffend. ROA.1311-12 (stating that Texas spends an average of approximately $60 daily per inmate). The court also found that such crimes would harm plaintiffs' "quasi-

sovereign" "*parens patriae*" interest in protecting their citizens. ROA.1317-18 (quotation omitted).

The district court also determined that the States' APA claims are reviewable as a statutory matter. The court first concluded that the interim priorities constitute "final agency action," 5 U.S.C. § 704, subject to judicial review. ROA.1337-45. That is so, in the court's view, because the priorities alter legal obligations by directing officers to make enforcement decisions that the court believed were incompatible with §§ 1226(c) and 1231(a)(2) and by sparing some noncitizens from enforcement action who might then become eligible for other legal benefits. *See* ROA.1337-45. Next, the district court concluded that the interim priorities are not unreviewable as "committed to agency discretion by law," 5 U.S.C. § 701(a)(2). ROA.1345-84. Although the district court recognized that decisions regarding the prioritization of limited enforcement resources are "presumptively unreviewable" under that provision, ROA.1346 (quotation omitted), the court believed that §§ 1226(c) and 1231(a)(2) provide mandatory, enforceable limits on the Executive's enforcement discretion primarily because both provisions use the word "shall," ROA.1354-65. Finally, the court decided that plaintiffs fall within the zone of interests of §§ 1226(c) and 1231(a)(2), concluding that the INA was "enacted to protect and benefit the states." ROA.1384-87.

On the merits, the court concluded that plaintiffs were likely to succeed on their APA claims and that the equities supported preliminary injunctive relief. First,

incorporating by reference its earlier conclusion that §§ 1226(c) and 1231(a)(2) represent mandatory directives to detain particular noncitizens, the court concluded that plaintiffs were likely to succeed on their claims that the interim priorities violate those statutes by "conferring discretion to the Government" to prioritize detention of some noncitizens over others. ROA.1389. Second, the court determined that plaintiffs were likely to succeed on their claim that the priorities are arbitrary and capricious, concluding that the interim priorities lack a rational connection between the facts found and the decision made and that the agency improperly failed to consider various factors. ROA.1389-411. Third, the court held that plaintiffs were likely to succeed on their claim that the interim priorities were improperly promulgated without notice-and-comment rulemaking, primarily for the same reasons that the court concluded the priorities constituted final agency action. ROA.1411-28. Finally, the court determined that plaintiffs' asserted irreparable injuries of "incur[ring] financial costs" sufficed to justify a preliminary injunction prohibiting the Executive from implementing its chosen prioritization scheme. ROA.1428-35. And the court decided that it was "bound by applicable Fifth Circuit precedent" to enter an injunction of nationwide scope. ROA.1435-39. Thus, the court entered a preliminary injunction prohibiting the government "from enforcing and implementing" the policies described in the relevant portions of the DHS and ICE Memoranda "on a nationwide basis." ROA.1441-42.

2. Following the district court's entry of a preliminary injunction, the government filed a notice of appeal and moved for a stay of the injunction pending appeal, first in the district court and then in this Court. After briefing and argument, a motions panel of this Court largely stayed the preliminary injunction. *See Texas v. United States*, 14 F.4th 332 (5th Cir. 2021).

At the outset, this Court held that the government had shown a likelihood of success on appeal "at least to the extent the injunction prevents immigration officials from relying on the memos' enforcement priorities before an immigration proceeding is commenced" because such decisions "are the type of enforcement decisions that are 'committed to agency discretion by law' and not reviewable (for substance or procedure) under the APA." *Texas*, 14 F.4th at 336 (quoting 5 U.S.C. § 701(a)(2)). As the Court explained, the decision whether or not to institute enforcement proceedings in any context is generally committed to an agency's absolute discretion, and the "concerns that underlie the unreviewability of enforcement decisions are 'greatly magnified in the deportation context.'" *Id.* at 336-37 (quoting *AADC*, 525 U.S. at 490).

The Court rejected plaintiffs' argument that §§ 1226(c) and 1231(a)(2) "eliminate immigration officials' 'broad discretion' to decide who should face enforcement action in the first place." *Texas*, 14 F.4th at 337. The Court relied on a combination of "the strong background principle that the 'who to charge' decision is committed to law enforcement discretion, including in the immigration arena," *id.* at

338; the fact that "no court at any level previously has held that" those provisions "eliminate immigration officials' discretion to decide who to arrest or remove," *id.*; the long history of "executive branch memos listing immigration enforcement priorities," *id.* at 339; and "longstanding precedent holding that the use of 'shall' in arrest laws does not limit prosecutorial discretion," *id.* (citing, among other cases, *Castle Rock*, 545 U.S. at 759-61). Given all of those considerations, the Court determined that there was no "strong justification for concluding that the [INA's] detention statutes override the deep-rooted tradition of enforcement discretion when it comes to decisions that occur before detention, such as who should be subject to arrest, detainers, and removal proceedings." *Id.* at 340.

Finally, the Court held that equitable considerations supported a stay of the injunction pending appeal. The Court explained that "[j]udicial interference with a government agency's policies often constitutes irreparable injury" and that "prosecutorial discretion is a core power of the Executive Branch, so its impairment undermines the separation of powers." *Texas*, 14 F.4th at 340. And the Court observed that, as a result of that reality, "in recent years the Supreme Court has repeatedly stayed nationwide injunctions that prevented the Executive Branch from pursuing its immigration policies." *Id.* at 341. In addition, the Court held that the balance of the equities favored a stay, in part because "eliminating DHS's ability to prioritize removals poses a number of practical problems given its limited resources." *Id.*

Therefore, the Court granted a stay of the preliminary injunction "to the extent the injunction prevents immigration officials from relying on the memos' enforcement priorities before an immigration proceeding is commenced." *Texas*, 14 F.4th at 336. The Court also stated, however, that §§ 1226(c) and 1231(a)(2) address "the custodial status of individuals who are facing removal proceedings or who have been [ordered] removed" and so declined to stay the preliminary injunction "[t]o the extent the injunction prevents" the government "from relying on the memos to release those who are facing enforcement actions and fall within" those statutes' scope. *Id.* at 337. That understanding of the relevant statutes is generally consistent with DHS's longstanding interpretation and its detention practices concerning detained noncitizens whom DHS determines are subject to any mandatory portion of those statutes.

SUMMARY OF ARGUMENT

The district court improperly enjoined the Secretary's exercise of his statutory authority to do what Administrations have done for decades: identify and articulate a set of priorities to guide the agencies' allocation of limited enforcement resources. DHS and ICE have "limited resources" and "cannot respond to all immigration violations or remove all persons unlawfully in the United States." ROA.49. Given the agencies' mission to "protect[] national security, border security, and public safety," the memoranda identify enforcement priorities that focus resources on those noncitizens who represent the greatest threats to those values; they also allow for

case-by-case approvals of additional enforcement actions that are justified in particular circumstances. ROA.49; ROA.59. In nevertheless enjoining the Executive's exercise of discretion and prioritization of limited resources, the district court's analysis failed at every turn: the plaintiff States have not demonstrated standing to sue or the irreparable harm necessary to support an injunction, the memoranda are unreviewable under the APA, each of the States' claims fails on the merits, and the court's nationwide injunction is overbroad in multiple respects.

I.A. The States' main theory of standing—that implementation of the priorities will decrease immigration enforcement against noncitizens covered by §§ 1226(c) and 1231(a)(2) in the States, which will increase crime, and then require the States to expend additional funds in response to that crime—layers speculation on speculation. Even assuming that a result of the memoranda would be a reduction in immigration enforcement against the specific population of noncitizens the States identify, the States have failed to establish that the priorities—which are designed to direct enforcement resources toward the noncitizens who pose the greatest risk to public safety, border security, and national security—will result in an increase in crime within their borders. The inadequacy of their theory is further reinforced by the Supreme Court's repeated admonitions about the difficulty of relying on the actions of third parties to establish the requisite injury, and by the D.C. Circuit's previous rejection of a nearly identical theory of standing.

B. Even assuming that plaintiffs had demonstrated some concrete and impending financial injury sufficient to support standing, that injury could not support preliminary injunctive relief. In contrast to the modest financial harm claimed by the States, a preliminary injunction would severely harm the government and the public interest by intruding on the Executive's constitutional prerogatives, undermining the agencies' expert determinations about how to address public safety and foreign relations concerns, sowing confusion among enforcement officials, and preventing the agencies from implementing policies that have already demonstrated positive results.

II.A. The States have also failed to show any likelihood of success on the merits. First, the APA does not permit review of agency action that is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). And the choice to refrain from pursuing particular enforcement actions "is a decision generally committed to an agency's absolute discretion" because it requires the "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). That principle applies with particular force in the immigration enforcement context, where enforcement decisions implicate a number of complex factors that are within the Executive's prerogative. *See Arizona v. United States*, 567 U.S. 387, 396 (2012).

The district court nevertheless concluded, primarily relying on the use of the word "shall," that 8 U.S.C. §§ 1226(c) and 1231(a)(2) override the Executive's longstanding enforcement discretion by imposing a mandatory command to detain

certain noncitizens. But the Supreme Court has recognized that the bare statutory term "shall" cannot overcome the "deep-rooted nature of law-enforcement discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-61 (2005). The district court's contrary conclusion ignores the purpose and structure of the INA, which confirm that the exercise of enforcement discretion in this context is unreviewable. For similar reasons, the States fail to satisfy the zone-of-interests test, which asks whether Congress intended for a particular plaintiff to be able to challenge agency action. Nothing in the text, structure, or purpose of either § 1226(c) or § 1231(a)(2) suggests that Congress intended to permit States to proceed with a suit like this one.

B. In addition, the States' claims fail because the memoranda are not "final agency action" subject to judicial review. 5 U.S.C. § 704. Agency action is final if it determines legal "rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quotation omitted). But the challenged memoranda merely articulate a set of enforcement priorities and related internal procedures intended to guide agency officials' exercise of discretion. They do not themselves require or forbid any action by any third party, and they do not confer any legal benefits. Thus, they do not have the "direct and appreciable legal" consequences that the finality inquiry requires. *Id.*

III.A. The States' APA claims also fail on the merits. The memoranda do not exceed the agencies' statutory authority, both because §§ 1226(c) and 1231(a)(2) cannot be read to impose a mandatory command on the Secretary (much less a

command enforceable by the States) and because the memoranda comport with the statutory provisions' requirements.

B. The memoranda are not arbitrary and capricious. DHS and ICE have properly provided an explanation for their policies—that the agencies have limited resources and have determined that the priorities scheme best allocates those resources to achieve their overarching mission—that more than satisfies the required "minimal standards of rationality." *Luminant Generation Co. LLC v. U.S. EPA*, 714 F.3d 841, 850 (5th Cir. 2013) (quotation omitted). Although the district court believed that the agencies had improperly failed to explicitly consider other factors, the court nowhere explained why any particular unaddressed factor or possible policy alternative was sufficiently important to warrant special discussion by agency decisionmakers.

C. Finally, the memoranda are not subject to notice-and-comment requirements because they constitute "general statements of policy," 5 U.S.C. § 553(b)(A), not binding legislative rules. That is so because the memoranda do not "impose any rights and obligations" and instead leave "the agency and its decisionmakers free to exercise discretion" in individual cases. *Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) (quotation omitted).

IV. Even if plaintiffs were to succeed on some or all of their claims, the district court's injunction—which entirely prohibits the government from implementing or relying on the memoranda in making any decision nationwide and

which also imposes onerous reporting requirements that plaintiffs never requested—is overbroad in a number of respects. First, as the stay panel recognized, even if plaintiffs were correct that the INA requires the government to detain certain noncitizens, that would not support an injunction prohibiting the government from using the memoranda to guide other enforcement decisions. Second, even if plaintiffs were successful on their arbitrary-and-capricious or notice-and-comment claims, remand without vacatur—not an injunction—would be the appropriate relief. Third, the nationwide scope of the district court's injunction contravenes Article III and traditional principles of equity. And fourth, the district court's reporting requirements should be vacated because they were imposed without notice and because compliance would be unduly burdensome (or potentially impossible).

STANDARD OF REVIEW

This Court reviews the "district court's grant of a preliminary injunction" for "abuse of discretion." *Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 418-19 (5th Cir. 2001). The district court's "[f]indings of fact are reviewed only for clear error" but "legal conclusions are subject to *de novo* review," and so a decision to grant a preliminary injunction "grounded in erroneous legal principles is reviewed *de novo*." *Id.* at 419.

ARGUMENT

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The movant must

show that it is "likely to succeed on the merits," that it "is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Id.* at 20. This Court has recognized that a preliminary injunction "should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 268 (5th Cir. 2012) (quotation omitted). Plaintiffs failed to carry their burden, and the district court erred in granting their motion for preliminary injunctive relief.

I. Texas And Louisiana Have Not Suffered Any Injury Sufficient To Confer Standing, Much Less To Warrant A Preliminary Injunction

To establish standing, a plaintiff must prove that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The injury alleged must be "concrete, particularized, and actual or imminent." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation omitted). The States have failed to make the requisite showing.

A. The States' Assertions That The Interim Priorities Will Increase Crime Are Insufficient To Support Standing

Notwithstanding that a litigant "lacks a judicially cognizable interest in the prosecution or nonprosecution of another," *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), the district court found standing. ROA.1304-40. That finding rested on the court's belief that the interim priorities would set off a chain of events resulting in

some unspecified financial harm to the States. According to the court, the interim priorities would result in the release into Texas and Louisiana of some number of noncitizens who would otherwise be detained or removed, some subset of those noncitizens might commit crimes, and the States would then be required to spend money to detain those reoffending noncitizens. ROA.1311-12 (stating that Texas spends an average of approximately $60 daily per inmate). And relying on the same predicate chain of events, the court also found that such crimes would harm plaintiffs' "quasi-sovereign" "*parens patriae*" interest in protecting their citizens. ROA.1317-18.

That analysis fails at every step. As an initial matter, plaintiffs' predictions are based solely on speculation. The memoranda do not require a reduction in enforcement against the particular noncitizens described in §§ 1226(c) and 1231(a)(2) with whom plaintiffs are concerned. They merely require agency officials to prioritize those noncitizens who, in the agencies' judgment, pose the greatest risks to national security, border security, and public safety—including many noncitizens who fall within the scope of those statutes. And indeed, consistent with that goal, the record demonstrates that the priorities have resulted in an increase of arrests of noncitizens convicted of aggravated felonies by approximately two-thirds. ROA.1465. Moreover, the priorities preserve the authority of officers to continue to arrest and detain noncitizens who fall outside the presumed priority categories, particularly when those noncitizens pose a threat to public safety. *See* ROA.56, 59 (ICE Memorandum);

ROA.50 (DHS Memorandum). Such "actions have regularly been approved." ROA.679.

Even assuming plaintiffs' argument about the necessary effect of the interim priorities on the raw number of enforcement actions were correct, the States still could not demonstrate the requisite concrete and imminent injury. To establish standing, the States must show not just that fewer noncitizens are being detained or removed by the agencies but that the "certainly impending," *Clapper*, 568 U.S. at 409 (emphasis and quotation omitted), result of that shift in enforcement resources will be additional criminal activity by noncitizens in Texas and Louisiana—and that such additional criminal activity will result in costs to the States that exceed whatever the costs would be under an alternative enforcement scheme. The district court principally relied on anecdotal evidence from one sheriff and congressional findings from decades ago about recidivism among released noncitizens, as well as one study relating to recidivism among all released state prisoners. *See* ROA.1322-23. None of that evidence suffices to establish standing.

First, recidivism rates across broad groups of released prisoners or noncitizens say nothing about the likelihood of criminal activity among the specific group of noncitizens who fall outside the agencies' interim priorities. Those priorities are designed to direct enforcement resources toward those noncitizens whom DHS and ICE have determined pose the greatest risk to public safety or national security. Without accounting for that specific prioritization of resources, the States' general

claims about recidivism are irrelevant. Second, that evidence discusses recidivism across a large population over a long period. But those assertions cannot establish the "certainly impending" increase in crime that is required to support States' theory of standing—much less the derivative financial harm that the States claim.

Plaintiffs contend that §§ 1226(c) and 1231(a)(2) require the arrest and detention of every noncitizen conceivably covered by those provisions. Under plaintiffs' reading, that expansive group would include many individuals in the removal process with only minimal, nonviolent criminal history (such as a decades-old theft conviction) under § 1226(c), or no criminal history at all under § 1231(a)(2). Given the agency's limited resources, such a requirement could preclude ICE from detaining other noncitizens who present more serious threats to the public, such as gang members and noncitizens who have been charged with, but not yet convicted of, violent sexual assaults. And indeed, the record demonstrates that the priorities have in fact resulted in a substantial increase in arrests of noncitizens convicted of aggravated felonies. ROA.1465. Nowhere have plaintiffs or the district court cited any evidence to justify the counterintuitive conclusion that expending limited resources in that way would decrease crime.

Accepting the States' argument would be especially anomalous in light of the Supreme Court's repeated admonition that courts should not lightly rely on the actions of third parties to establish that a plaintiff has standing. "[W]here a causal relation between injury and challenged action depends upon the decision of an

independent third party"—here, the decision of released noncitizens to commit future crimes—standing is "ordinarily substantially more difficult to establish." *California v. Texas*, 141 S. Ct. 2104, 2117 (2021) (quotation omitted); *see Clapper*, 568 U.S. at 414 (expressing "reluctance to endorse standing theories that rest on speculation about the decisions of independent actors"). The plaintiff's burden is heightened still further if the alleged future behavior involves unlawful conduct. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). And although the district court invoked *Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019), *see* ROA.1321-22, to support its conclusions relying on third-party conduct to establish standing, the Court there recognized only that an injury caused by third-party conduct may properly be traceable to a party's actions in the rare case where evidence demonstrates that the challenged action affects the third party's decisionmaking process—that is, where the third parties "will likely react in predictable ways" to the challenged actions. *Department of Commerce*, 139 S. Ct. at 2566. Here, however, there is no reason to believe that the memoranda are likely to have any direct effect on any noncitizen's decision to commit (or refrain from committing) any particular crime.

The D.C. Circuit's decision in *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015), illustrates the point. In *Arpaio*, the sheriff of Maricopa County challenged DHS's Deferred Action for Childhood Arrivals and Deferred Action for Parents of Americans policies. To establish standing, the sheriff relied on a chain of reasoning indistinguishable from the States' reasoning here: that "some portion of the six

million people who might benefit from deferred action will remain in Maricopa County rather than being removed, and some portion of those will commit crimes." *Id.* at 24. The D.C. Circuit rejected the sheriff's argument. As the court explained, the challenged programs were "designed to remove *more* criminals in lieu of removals of undocumented aliens who commit no offenses or only minor violations." *Id.* Accordingly, the court held that the sheriff's theory was nothing more than "unsupported assumption[s]" and "speculation." *Id.* That reasoning is fully applicable here. The challenged memoranda do not require any reduction in detention or removals of noncitizens within the particular group—those covered by §§ 1226(c) and 1231(a)(2) and residing in Texas and Louisiana—on which the States focus. Instead, the memoranda are intended to focus limited governmental resources on detaining and removing those noncitizens who pose the most significant threats to public safety, border security, and national security.

Plaintiffs have likewise failed to substantiate their assertion that any marginal increase in criminal activity would cause them financial harm. They have not introduced any evidence that either State has incurred or will imminently incur any financial cost tied to the priorities. To the contrary, the district court's finding that Texas's "budget for detention facilities has been set months or years in advance," ROA.1329 (quotation omitted), belies any assertion that the priorities will require Texas to spend more money.

Finally, the district court improperly credited plaintiffs' asserted *parens patriae* injury. At the outset, that injury relies on an increase in criminal activity in the States that is, for all the reasons explained above, improperly speculative. But in any event, the States' invocation of that doctrine cannot be reconciled with the settled principle that States cannot assert such an injury against the United States in this context, because "it is not part of" any State's "duty or power to enforce" its citizens' "rights in respect of their relations with the federal government." *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923). Instead, "[i]n that field it is the United States, and not the state, which represents them as parens patriae." *Id.*

B. The States' Asserted Injuries Fail To Support Preliminary Injunctive Relief

Even assuming that the States had demonstrated some sufficiently concrete and certainly impending financial injury to support standing, that injury could not support preliminary injunctive relief. To obtain a preliminary injunction, the States must demonstrate that "the balance of equities tips in [their] favor," outweighing the harm to the defendants, and that "an injunction is in the public interest." *Winter*, 555 U.S. at 20. These latter two factors "merge" where, as here, the government is the defendant. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

The States have demonstrated, at most, that the memoranda will require them to spend some unspecified additional resources on criminal enforcement. But the States have not (and cannot) quantify the magnitude of any financial harm. By

contrast, enjoining the priorities framework would work grave harm on the Executive. Such an injunction would "invade" the Executive's prosecutorial discretion, a "special province" that Article II commits to the President. *AADC*, 525 U.S. 471, 489 (1999). It would also "undermine[] the separation of powers," *Texas v. United States*, 14 F.4th 332, 340 (5th Cir. 2021), and impair the government's "weighty" "interest in efficient administration of the immigration laws," *Landon v. Plasencia*, 459 U.S. 21, 34 (1982), by undermining DHS's and ICE's expert determinations about the best way to advance the agencies' safety and security mission. *See* ROA.680-83.

This injury is not merely theoretical. The injunction forbids the Executive from implementing a policy that has led to positive results. As the agencies anticipated, the interim priorities have improved the agencies' ability to respond "in real time to pressing operational needs." ROA.1466. For example, ICE was able to "re-task[] several field operations teams" and over 300 officers to help states and localities "address increasing activity along the Southwest Border." ROA.1466. The priorities have also allowed the agencies to focus on "arresting and detaining the most dangerous noncitizens." ROA.1464. From February through July 2021, the government processed almost 26,000 administrative arrests, nearly 20% of which involved noncitizens convicted of aggravated felonies. ROA.1465. By contrast, from February through July 2020, although the government processed approximately 39,000 administrative arrests, only 8% involved noncitizens convicted of aggravated felonies. ROA.1465. In other words, after implementing the interim priorities and

focusing its resources on the most pressing public safety threats, the government was able to increase its total arrests of aggravated felons by approximately two-thirds.

The injunction would also interfere with day-to-day agency operations. As the record indicates, an injunction would impair the ability of ICE's legal office to represent DHS in administrative removal proceedings because the office relies on the memoranda "to focus its finite litigation resources on a clear, manageable continuum of cases." ROA.682. In the priorities' absence, the legal office may become unable "to meaningfully prepare for all cases set for hearings or even attend every such hearing," thus preventing the office from "litigat[ing] removal proceedings in a fashion that ensures the issuance of removal orders" to noncitizens who pose the gravest threats to national and border security and public safety. ROA.682.

An injunction would also sow confusion among the agencies' rank-and-file officers. Those officers would be forced to make resource-allocation determinations without the memoranda's guidance, resulting in "disparate prioritization across the country and a lack of consistency in enforcement actions." ROA.682. Such inconsistency would not only work unfair and inefficient results but could also "affect ICE's relationship with state and local stakeholders" and "undermine the authority of career leadership within ICE." ROA.682-83.

In light of those substantial harms both to the Executive and to the efficient administration of the immigration laws, it is clear that any potential marginal financial impact on the States does not tip the balance of the equities in their favor.

II. Texas And Louisiana's Claims Fail At The Threshold Because The Memoranda Are Judicially Unreviewable

A. Immigration Enforcement Decisions Are Committed To Agency Discretion

Under the APA, a plaintiff may not obtain judicial review of agency action "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The choice to refrain from pursuing particular enforcement actions is "generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Such decisions "often involve[] a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Id.* For example, an agency must assess not only the existence and severity of a violation but also "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action." *Id.* And particularly where an "agency generally cannot act against each technical violation of the statute it is charged with enforcing," it is DHS and ICE—not the courts or third parties like the States—that are best positioned "to deal with the many variables involved in the proper ordering of [their] priorities." *Id.* at 831-32.

Those concerns "are greatly magnified in the deportation context." *Crane v. Johnson*, 783 F.3d 244, 247 n.6 (5th Cir. 2015) (quotation omitted). That context presents the usual factors that require the exercise of discretion, such as resource limitations and achieving the agency's mission. Additionally, immigration policy may

"affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws." *Arizona v. United States*, 567 U.S. 387, 395 (2012); *cf. Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power[.]"). The Executive must also consider a host of other sensitive issues, including the "dynamic nature of relations with other countries" and the need for enforcement policies to be "consistent with this Nation's foreign policy with respect to these and other realities." *Arizona*, 567 U.S. at 397; *accord Jama v. ICE*, 543 U.S. 335, 348 (2005) (explaining that removal decisions touch on "our relations with foreign powers" and implicate the "customary policy of deference to the President in matters of foreign affairs" (quotation omitted)).

For these reasons, Congress constructed a removal system that has as a "principal feature" the "broad discretion exercised by immigration officials." *Arizona*, 567 U.S. at 396. That system gives the Executive Branch the discretion to decide "whether it makes sense to pursue removal at all," *id.*, and allows the Executive "to abandon the endeavor" at "each stage" of the removal process, *AADC*, 525 U.S. at 483. Consistent with that sweeping grant of discretion, Congress empowered the Secretary of Homeland Security to establish "national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), and to "issue such instructions" and

"perform such other acts as he deems necessary for carrying out his authority" under the INA, 8 U.S.C. § 1103(a)(3).

To underscore the extent of the Executive's enforcement discretion, Congress provided that, generally, "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary] to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g). That provision reflects Congress's desire to "protect[] the Executive's discretion from the courts" in general and from "attempts to impose judicial constraints upon prosecutorial discretion" in particular. *AADC*, 525 U.S. at 485-86, 485 n.9. Taken together with the Executive's longstanding enforcement prerogative, these statutes unmistakably establish that Congress committed immigration enforcement decisions to the Executive's unreviewable discretion.

The district court did not dispute that general rule. Instead, it concluded that Congress eliminated the Executive's discretion by enacting 8 U.S.C. §§ 1226(c) and 1231(a)(2) and using the word "shall" in both provisions. But that conclusion misinterprets both statutes, which do not require DHS to arrest and detain every covered noncitizen at all times following release from criminal custody or following the entry of an order of removal.

In brief, neither statute displaces the Executive's inherent, unreviewable authority to exercise enforcement discretion. As the Supreme Court has explained,

enforcement discretion has "long coexisted with apparently mandatory arrest statutes." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005). The "deep-rooted nature of law-enforcement discretion" persists "even in the presence of seemingly mandatory legislative commands." *Id.* at 761 Relying on that principle, the Supreme Court has repeatedly rejected arguments that a bare statutory "shall" overcomes enforcement discretion. *See, e.g.*, *id.* (determining that a statute providing that a police officer "shall arrest" or "seek a warrant" to arrest any violator of a restraining order was not "a true mandate of police action" (quotation omitted)); *City of Chicago v. Morales*, 527 U.S. 41, 62 n.32 (1999) (rejecting the notion that an ordinance providing that police officers "shall order" people to disperse in certain circumstances "affords the police no discretion" (emphasis and quotation omitted)); *Chaney*, 470 U.S. at 835 (confirming that a statute providing "baldly that any person who violates the Act's substantive provisions 'shall be imprisoned . . . or fined'" did not remove the Executive's enforcement discretion (alteration in original)). Instead, a "stronger indication" of congressional intent is required before a court may hold that Congress circumscribed Executive authority. *Castle Rock*, 545 U.S. at 761.

Despite that clear precedent, the district court relied on two features of the INA to conclude that Congress had provided the requisite stronger indication here: first, the statute's legislative history indicating that the INA was intended to protect the "interests of innocent third parties," ROA.1357-60, and, second, the INA's "juxtapos[ition]" of the permissive "may" with the assertedly mandatory "shall" in

§§ 1226 and 1231, ROA.1364-65. But as the stay panel recognized, neither of those conclusions is "convincing." *Texas*, 14 F.4th at 339. The shall-arrest statute that the Court held not to circumscribe enforcement discretion in *Castle Rock* shared both of those features: the statute was a "protective order law" intended to "protect[] domestic violence victims," and it used "the permissive 'may'" in other subsections. *Id.* at 339-40. Similarly, although the district court relied on two Supreme Court cases from the 1930s to support its conclusion that the relevant INA provisions overcame enforcement discretion, *see* ROA.1357-58, neither case arose in "the context of purported limits on enforcement discretion" and thus they "say nothing" about the relevant question here. *Texas*, 14 F.4th at 340. And although the district court cited various cases describing § 1226(c) or § 1231(a)(2) in seemingly mandatory terms, ROA.1348-50, none of those cases involved a challenge to the Executive's exercise of enforcement discretion, and none presented the question whether the statutory provisions "eliminate the government's traditional prerogative to decide who to charge in enforcement proceedings (and thus who ends up being detained)." *Texas*, 14 F.4th at 338-39. It is improper to "extend[] a judicial decision beyond its holding, parsing the opinion as if it were a statute." *Mays v. Chevron Pipe Line Co.*, 968 F.3d 442, 448 (5th Cir. 2020).

Instead, the traditional tools of statutory interpretation confirm that Congress did not intend either § 1226(c) or § 1231(a)(2) as a judicially enforceable mandate. Most obviously, the INA precludes enforcement decisions under both provisions

from judicial review. In particular, Congress has explicitly provided that the Secretary's "discretionary judgment regarding the application of [§ 1226] shall not be subject to review" and has prohibited courts from "set[ting] aside any action or decision" by the Secretary "under this section regarding the detention or release of any alien." 8 U.S.C. § 1226(e). And Congress has similarly foreclosed suits to challenge applications of § 1231, providing that "[n]othing" in that section "shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." *Id.* § 1231(h). To amplify the point that the INA does not circumscribe the Executive's discretion, Congress has also authorized in § 1226 only the detention of noncitizens "pending the outcome of removal proceedings." *Jennings v. Rodriguez*, 138 S. Ct. 830, 838 (2018); *cf.* 8 U.S.C. § 1226(a) ("[A]n alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."). The INA vests the antecedent decision whether to initiate or continue to pursue removal proceedings against a particular noncitizen in the sole, unreviewable discretion of the Executive Branch. *See Arizona*, 567 U.S. at 396 (recognizing the Executive's discretion to decide "whether it makes sense to pursue removal at all"). Thus, by making that detention authority contingent on a separate, unreviewable exercise of prosecutorial discretion, the INA further confirms that the derivative decision whether to arrest and detain a particular noncitizen is similarly within the Executive's discretion. And that conclusion is further underscored by the fact that the INA is a highly reticulated

scheme, and DHS is charged with enforcing a wide range of provisions in the statute—many of which use the word "shall"—against different groups of noncitizens. As the INA recognizes, the agency much determine how best to allocate its limited resources to accommodate enforcement responsibilities across that entire scheme. *Cf.* 6 U.S.C. § 202(5). Finally, Congress has repeatedly declined—over many decades—to appropriate sufficient resources to allow for the detention of anywhere close to all of the noncitizens described in § 1226(c) or with a final order of removal—much less to allow the agency to detain all of those noncitizens while also fulfilling its responsibilities to enforce the many other parts of the INA. *See* ROA.680-81 (explaining that ICE is managing the cases of more than 3.2 million noncitizens in removal proceedings or who have been issued final orders of removal but that Congress has appropriated funds sufficient to detain only 34,000 noncitizens).

Those same provisions additionally confirm that the States' claims fail because they do not fall within the zone of interests of 8 U.S.C. § 1226(c) or § 1231(a)(2), the statutes they seek to enforce. This inquiry asks whether Congress intended for a particular plaintiff to invoke a particular statute to challenge agency action. *See Clarke v. Security Indus. Ass'n*, 479 U.S. 388, 399 (1987); *cf. Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014). If a plaintiff is not the object of a challenged regulatory action—which the States are not—the plaintiff has no right of review if its "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the

suit." *Clarke*, 479 U.S. at 399. For the reasons explained above, nothing in the text, structure, or purpose of the INA generally, or §§ 1226 and 1231 specifically, suggests that Congress intended to permit the States to invoke attenuated financial impacts of immigration enforcement policies to contest those policies. To the contrary, the INA throughout reflects the principle that immigration enforcement is exclusively the province of the Executive. *See supra* pp. 30-36. Moreover, that conclusion accords with the general rule that third parties, like the States here, have no cognizable legal interest in compelling the enforcement of immigration laws against others. *See Linda R.S.*, 410 U.S. at 619.

B. The Memoranda Are Not Final Agency Action

The States' claims are also unreviewable because the challenged memoranda do not constitute final agency action subject to judicial review. 5 U.S.C. § 704. An action is "final" only if it represents "the consummation of the agency's decisionmaking process" and determines legal "rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quotation omitted). The immigration priorities are not final because they do not determine any legal rights or obligations.

The memoranda articulate a set of priorities and related internal procedures to guide agency officials' exercise of enforcement discretion. The mere existence of agency priorities and procedures does not alter any noncitizen's rights or obligations. Indeed, both memoranda state that they do not "create any right or benefit, substantive or procedural, enforceable at law." ROA.51, 60; *cf. National Mining Ass'n v.*

McCarthy, 758 F.3d 243, 252 (D.C. Cir. 2014) (explaining that similar language weighs in favor of nonfinality). The memoranda do not confer lawful presence or work authorization on any noncitizen. And no noncitizen may invoke the memoranda as a defense in any enforcement action. In short, the interim priorities do not "require" any State or noncitizen "to do anything" and do not "prohibit" any State or noncitizen "from doing anything." *National Mining Ass'n*, 758 F.3d at 252. They simply offer guidance to federal officers charged with exercising enforcement discretion in individual cases.

This is not to say that the memoranda will never have downstream practical consequences. For example, the priorities might lead individual federal officers to exercise their enforcement discretion in particular ways in different circumstances, perhaps pursuing enforcement action against some noncitizens with whom they would otherwise not have engaged or deferring actions that they might otherwise have taken. But whatever the practical effects of the priorities might be, they do not constitute the "direct and appreciable legal" consequences that the APA's finality inquiry requires. *Bennett*, 520 U.S. at 178; *see Louisiana v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 583 (5th Cir. 2016) (explaining that "practical, as opposed to legal," consequences do not satisfy the finality inquiry).

The district court concluded that the memoranda are final agency actions because, in the court's view, the priorities alter legal obligations by directing line-level officers to make enforcement decisions that the court believed were incompatible

with §§ 1226(c) and 1231(a)(2). ROA.1341-42. And the court also emphasized that a noncitizen who is spared from enforcement as a result of the memoranda's implementation might become eligible for ancillary benefits, such as Emergency Medicaid or release from custody into the United States. ROA.1343-44. Those conclusions are mistaken.

First, with respect to the court's conclusion that the priorities direct line-level officers to take actions incompatible with the INA, the court's interpretation of the statute as imposing mandatory duties that circumscribe discretion is incorrect, as explained above. And in any event, agency action that does no more than provide instructions to agency employees is not final. Thus, in determining whether agency action is final, courts have properly focused on "the actual legal effect (or lack thereof) of the agency action in question on regulated entities," *National Mining Ass'n*, 758 F.3d at 252, and on whether the action legally binds "the agency and its decisionmakers," *CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) (quotation omitted)—not merely whether an agency's rank-and-file officers are obliged to follow a superior's policy directives. Agency guidance that does not create legal rights for, or impose legal obligations on, third parties is nonfinal, even where that guidance provides "instruction[s] to [agency] staff," *National Mining Ass'n*, 758 F.3d at 250, or expresses the agency's official "view of what the law requires," *AT&T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001). So long as the agency retains the discretion to alter or revoke the guidance at will—as DHS and ICE have expressly done here—the

guidance is nonfinal notwithstanding any expectation that rank-and-file officers will comply with the guidance while it is in effect. *Cf. Wilderness Soc'y v. Norton*, 434 F.3d 584, 596 (D.C. Cir. 2006) (explaining that a particular guidance document did not create rights or obligations because "the agency's top administrators clearly reserved for themselves unlimited discretion to order and reorder all management priorities," even though adherence was generally "mandatory" for rank-and-file staff (quotation omitted)).

Second, the potential for noncitizens to receive ancillary benefits does not transform the memoranda into final agency action. To reiterate, nothing in the memoranda determines any individual's rights. And the speculative downstream consequences that the district court pointed to would, in any individual case, arise from the independent operation of other provisions of law; they are not "direct and appreciable legal" consequences of the memoranda, *Bennett*, 520 U.S. at 178, required to establish finality.

III. Texas And Louisiana Cannot Prevail On The Merits

The district court concluded that the agencies' promulgation of the interim priorities violated the APA because, in the court's view, the memoranda violate §§ 1226(c) and 1231(a)(2), are arbitrary and capricious, and should have been preceded by notice-and-comment procedures. Each of those conclusions is incorrect.

A. The Memoranda Do Not Violate The Immigration And Nationality Act

The district court first concluded, based on its view that §§ 1226(c) and 1231(a)(2) establish mandatory, enforceable commands, that the interim priorities violate those provisions and so are contrary to law. That conclusion is wrong for four reasons.

First, as explained in detail above, *see supra* pp. 30-36, §§ 1226(c) and 1231(a)(2) do not contain any mandatory command overcoming the agency's enforcement discretion. Particularly in light of the statutory structure and context, Congress's use of the word "shall" in either provision cannot overcome the "deep-rooted nature of law-enforcement discretion." *Castle Rock*, 545 U.S. at 760-61.

Second, even if §§ 1226(c) and 1231(a)(2) could be read to contain some mandatory command, the States would be unable to enforce that command through litigation. Congress has provided that the Secretary's "discretionary judgment regarding the application of [§ 1226] shall not be subject to review" and has prohibited courts from "set[ting] aside any action or decision" by the Secretary "under [§ 1226] regarding the detention or release of any alien." 8 U.S.C. § 1226(e). Congress has further provided that "[n]othing" in § 1231 "shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers." *Id.* § 1231(h). Yet plaintiffs seek to accomplish through this lawsuit exactly what §§ 1226(e) and 1231(h) are designed

to guard against. Plaintiffs disagree with the federal government's judgment about how best to allocate the government's limited resources when implementing the INA and have initiated this lawsuit to compel the government to exercise its discretionary judgment differently based on an asserted right to have certain noncitizens detained. But the statute itself bars the States' effort to enforce §§ 1226(c) and 1231(a)(2) in that way.

Third, even if §§ 1226(c) and 1231(a)(2) contained a mandatory command that the States could judicially enforce, the statutes only prohibit the release of certain noncitizens who were taken into custody and detained "pending the outcome of removal proceedings," *Jennings*, 138 S. Ct. at 838; *cf.* 8 U.S.C. § 1226(a) ("[A]n alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."), or who are within the removal period and fall within a specific provision limiting release of certain detained noncitizens, 8 U.S.C. § 1231(a)(2). The States have failed to explain how the memoranda violate either directive. To the contrary, nothing in the memoranda purports to authorize the release of either group of noncitizens, which is the most that either statute might be read to prohibit.

Finally, the States cannot prevail even if the Court were to assume that §§ 1226(c) and 1231(a)(2) require the government to pursue enforcement action against all of the noncitizens described in either provision. The memoranda do not forbid the arrest or detention of any particular noncitizen. Instead, they explicitly

provide a process for rank-and-file officers to request and obtain supervisory approval to pursue enforcement actions against any noncitizen who falls outside the presumed priorities when such enforcement constitutes a "justified allocation of limited resources" (and to pursue such actions without preapproval in exigent circumstances). ROA.59. And the record demonstrates that, in fact, requests for approval have "regularly" been granted. ROA.679. The memoranda thus do not violate even the States' (incorrect) interpretation of §§ 1226(c) and 1231(a)(2) because they do not prohibit, legally or practically, any official from taking any of the actions that the States think those provisions require.

B. The Memoranda Are Not Arbitrary And Capricious

The district court next concluded that the interim priorities were arbitrary and capricious, in violation of the APA. ROA.1389-411. That is so, according to the district court, primarily because (in the court's view) the interim priorities "fail to establish any rational connection or logical link" between the resource constraints identified in the memoranda and the prioritization scheme, ROA.1393-96, and do not address additional factors, including the possibility of recidivism and the costs to the States of the guidance, or narrower policy alternatives, ROA.1400-11. That analysis is wrong.

The "arbitrary and capricious standard is highly deferential," requiring only "a rational connection between the facts found and the decision made." *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 453 (5th Cir. 2015) (quotation omitted). And even if an

agency decision is "of less than ideal clarity," this Court must uphold it so long as "the agency's path may reasonably be discerned." *Garland v. Ming Dai*, 141 S. Ct. 1669, 1679 (2021) (quotation omitted).

Here, the agencies plainly provided a rational explanation for the interim priorities. The memoranda explain that DHS and ICE have "limited resources" and "cannot respond to all immigration violations or remove all persons unlawfully in the United States." ROA.49. Given the agencies' mission to "protect[] national security, border security, and public safety," the memoranda identify enforcement priorities that focus resources on those noncitizens who represent the greatest threats to those values. ROA.49. And recognizing that, in particular cases, enforcement actions against noncitizens who fall outside the presumed priorities will warrant expending scarce resources, the memoranda allow for case-by-case approvals of other enforcement actions. ROA.59. In short, the agencies identified a particular problem (limited resources) and explained their solution in a rational way, with reference to their overarching mission and most important goals. That explanation more than satisfies the required "minimal standards of rationality." *Luminant Generation Co. LLC v. U.S. EPA*, 714 F.3d 841, 850 (5th Cir. 2013) (quotation omitted).

In nevertheless concluding that the priorities fail to establish a rational link between the relevant facts and the policy adopted, the district court misunderstood the relationship between the identified resource constraints and the priorities. As the memoranda make clear, the agency's severe resource limitations explain why the

agency is required to implement a prioritization scheme in the first place, and the specific contours of that scheme are justified not by the resource constraints but by the agency's overarching mission to protect national security, border security, and public safety. Understood in that light, it is plain that the connection between the agency's explanation and its ultimate decision "may reasonably be discerned." *Ming Dai*, 141 S. Ct. at 1679 (quotation omitted). Moreover, the agencies' experience since implementing the interim priorities only confirms the rationality of the agencies' choice. As explained above, *see supra* pp. 28-29, the prioritization scheme has worked as designed, allowing the agency to focus its limited resources on the most pressing safety and security threats and resulting in the arrest of substantially larger numbers of aggravated felons.

Similarly, although the district court faulted the agency for not specifically addressing various factors such as monetary costs to the States, plaintiffs have nowhere explained why any particular unaddressed factor or policy alternative warranted special discussion. *Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50-51 (1983) (explaining that the APA does not "require an agency to consider all policy alternatives in reaching [a] decision"). The memoranda address the broad range of agency enforcement decisions, not just those that plaintiffs focus on in this case, and the agency need not specifically address every conceivable circumstance that could arise under the comprehensive, reticulated scheme of the INA. As the memoranda reflect, the agency determined the most important factors

informing its decision—its overarching mission of ensuring national security, border security, and public safety, *see* ROA.49—and justified its policy in light of those most important factors. The APA demands no more.

C. The Memoranda Were Not Required To Go Through Notice And Comment

The district court also concluded that the interim priorities were subject to notice-and-comment requirements. ROA.1411-28. But those procedures are not required when an agency issues "general statements of policy," 5 U.S.C. § 553(b)(A), that "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power," *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (quotation omitted). An agency action is a general statement of policy if it does not "impose any rights and obligations" and if it leaves "the agency and its decisionmakers free to exercise discretion" in individual cases. *Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) (quotation omitted). And "[i]n analyzing whether an agency pronouncement is a statement of policy or a substantive rule, the starting point"—to which this Court gives "some deference"—is "the agency's characterization of the rule." *Id.* at 595-96 (quotation omitted).

Here, every relevant consideration indicates that the memoranda are general statements of policy. The agencies have characterized the memoranda as mere guidance that do not create any rights or obligations, *see* ROA.51, 60, consistent with the Executive's decades-long unbroken practice of issuing similar immigration

enforcement guidance without going through notice and comment. And to underscore the point, the memoranda were not published in the Federal Register or the Code of Federal Regulations. *Cf. National Mining Ass'n v. Secretary of Labor*, 589 F.3d 1368, 1371 (11th Cir. 2009) (taking that factor into account in this analysis). Moreover, as explained above, *see supra* pp. 37-40, the memoranda do not impose any rights or obligations— both because they permit substantial discretion in their implementation and because the agencies may amend or revoke them at any time.

In concluding otherwise, the district court primarily relied on two determinations: first, the determination it made in assessing the memoranda's finality that the memoranda affect legal rights and obligations, *see* ROA.1417-18; and second, a determination that the memoranda do not leave the agency free to exercise discretion because the preapproval process "*greatly* constricts the normal discretion ICE agents enjoy." ROA.1418-23. But neither of those conclusions withstands scrutiny. With respect to the first, as explained above, *see supra* pp. 38-40, none of the asserted effects is actually a direct legal effect of the memoranda. With respect to the second, the record establishes that the preapproval process does not meaningfully constrict line agents' discretion and that requests to pursue nonpriority targets have "regularly" been granted through that process. ROA.679. And in any event, the relevant question is whether the guidance here in fact binds the *agencies*, not whether individual line agents will feel constrained to follow it, and it is undisputed that the agencies remain free to (and have already exercised their ability to) revoke or amend

the guidance at any time or to authorize departure from it in any individual case. Finally, the memoranda establish a process for agents to follow, and rules establishing such internal processes are exempt from notice-and-comment requirements as rules "of agency organization, practice, or procedure," even if agency employees must follow those processes. *See* 5 U.S.C. § 553(b)(A).

IV. Even If The States Were Correct On The Merits, The Relief Entered By The District Court Is Improper

Finally, even assuming the States were correct on the merits of some or all of their arguments, the preliminary injunction is overbroad.

First, as the stay panel recognized, plaintiffs' claims that §§ 1226(c) and 1231(a)(2) impose mandatory duties on the government cannot support the injunction. *See Texas*, 14 F.4th at 337. At most, those claims would support an injunction prohibiting the government from relying on the interim priorities to not detain noncitizens covered by the relevant statutory provisions. But the district court's preliminary injunction prohibits the government from relying on the interim priorities to make any prioritization decision, including detention decisions for noncitizens who are indisputably not covered by the statutory provisions and including a range of non-detention discretionary enforcement determinations. *See id.* (explaining that the memoranda "guide decisions on, among other things, 'whether to issue a detainer,' 'whether to issue, reissue, serve, file, or cancel a Notice to Appear,' and 'whether to stop, question, or arrest a noncitizen'"). Even if plaintiffs succeed on one or both of

their statutory claims, the injunction should be narrowed to reflect the specific mandatory duty that the Court believes the statute imposes.

Second, even if the plaintiffs were likely to succeed on some of their other APA arguments, that would not justify a preliminary injunction. "Remand, not vacatur," and certainly not an injunction, is "generally appropriate" relief in an APA suit where there "a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Texas Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389-90 (5th Cir. 2021). And remand without vacatur is particularly appropriate where vacatur or injunctive relief "would be disruptive." *Central & S.W. Servs., Inc. v. U.S. EPA*, 220 F.3d 683, 692 (5th Cir. 2000). In this case, even assuming plaintiffs' APA arguments were correct, plaintiffs identify precisely the sort of defects amenable to correction on remand: the failure to fully articulate the agency's decisionmaking path or to explicitly consider all relevant factors or employ certain procedures. *See, e.g.*, *id.* at 702 (remanding without vacatur where the agency had failed to properly respond to all comments or explain one aspect of its decision); *Texas Ass'n of Mfrs.*, 989 F.3d at 389-90 (remanding without vacatur where the agency had not properly employed notice-and-comment procedures and had failed to consider relevant factors). And, as explained in detail above, *see supra* pp. 28-29, the disruptive consequences of vacatur and the injunction in this case are immense. Thus, even assuming plaintiffs were likely to succeed on their APA claims, they would be

unlikely to succeed on any request for vacatur or injunctive relief. Therefore, this Court should, at the least, vacate the preliminary injunction.

Third, the district court erred in entering a nationwide injunction. Article III "limits the exercise of the judicial power to 'Cases' and 'Controversies,'" *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017), and consistent with that limitation, a court may grant relief only to remedy "the inadequacy that produced [the plaintiff's] injury," *Gill v. Whitford*, 138 S. Ct. 1916, 1929-30 (2018) (quotation omitted).

Those constitutional limitations are reinforced by principles of equity. A court's authority to award equitable relief is generally confined to the relief "traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). And it is a longstanding principle of equity that injunctive relief may "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs" in a given case. *Califano v. Yamaski*, 442 U.S. 682, 702 (1979).

Nationwide injunctions also create legal and practical problems. They circumvent the procedural rules governing class actions, which permit relief to absent parties only if rigorous safeguards are satisfied. Fed. R. Civ. P. 23. They enable forum shopping and empower a single district judge to effectively nullify the decisions of all other lower courts by barring application of a challenged policy in any district nationwide. *Department of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020)

(Gorsuch, J., concurring). And they operate asymmetrically. A nationwide injunction anywhere freezes the challenged action everywhere, such that the government must prevail in every suit while any plaintiff can derail a federal regulation nationwide with a single district-court victory. *See id.* And the prospect of a single district court decision blocking government policy nationwide while the ordinary appellate process unfolds often leaves the Executive Branch with little choice but to seek emergency relief, which deprives the judicial system of the benefits that accrue when numerous courts are able to grapple with complex legal questions. *See id.* at 600-01.

The circumstances of this case only reinforce the inappropriate scope of the district court's injunction. The alleged harm identified by the plaintiffs is primarily connected to the possibility for recidivism among noncitizens who the federal government chooses not to arrest after their release from criminal custody. *See supra* pp. 21-22. And a tailored injunction limited to the plaintiff States would more than suffice to ameliorate that alleged harm. In concluding otherwise, the district court primarily focused on the possibility that some number of noncitizens covered by the relevant provisions may move into Texas or Louisiana. *See* ROA.1435-36. But that possibility is disconnected from the asserted injury that the States have relied on to support standing, and, in any event, they have produced no evidence that any material number of noncitizens covered by the detention provisions would choose to move to the States if a geographically limited injunction were entered. Nor have the States ever

explained how any residual harm from that speculative possibility could outweigh the immense harm to the government from the district court's overbroad injunction.

Moreover, this case embodies the practical problems created by the availability of nationwide injunctions. Several States have brought three separate lawsuits in three different circuits raising similar claims against the interim priorities, and the government prevailed in district court in each of the other two suits. *See Florida v. United States*, -- F. Supp. 3d --, 2021 WL 1985058 (M.D. Fla. May 18, 2021); *Arizona v. U.S. Dep't of Homeland Sec.*, 2021 WL 2787930 (D. Ariz. June 30, 2021). But because of the asymmetric nature of nationwide injunctions, the courts' decisions in those lawsuits would be effectively nullified by the district court's injunction here, which awards Florida and Arizona the relief they sought and failed to obtain in their own suits.

Finally, the district court erred in including as part of its injunction onerous reporting requirements, purportedly "[t]o ensure compliance" with the injunction. ROA.1442. Those requirements direct the government to file monthly reports providing the number of known noncitizens covered by § 1226(c) or § 1231(a)(2) who were not detained in the previous month and each covered noncitizen's address and (if applicable) the crime for which he was detained. ROA.1442. And the government must also make and retain contemporaneous records of the rationale for each nondetention decision and the deciding official. ROA.1442.

Regardless whether plaintiffs succeed on their claims, those reporting requirements should be vacated for two reasons. First, plaintiffs never requested the requirements, and the district court never provided notice of the requirements before issuing the injunction. That lack of notice means that the requirements fail to comply with Fed. R. Civ. P. 65(a)(1) and should be vacated. *See Harris County v. CarMax Auto Superstores Inc.*, 177 F.3d 306, 326 (5th Cir. 1999) ("Because compliance with Rule 65(a)(1) is mandatory, a preliminary injunction granted without adequate notice and a fair opportunity to oppose it should be vacated and remanded to the district court." (alteration and quotation omitted)).

Second, the requirements are unduly burdensome, and it may well be impossible for the government to comply with them. "ICE simply does not collect and retain data in the way that the court has requested" because, "with respect to noncitizens against whom no enforcement action has been taken, ICE's databases and systems do not (and cannot) capture information pertaining to the detention authority that would have applied to those noncitizens." ROA.1470. Moreover, even if the government could develop and implement a reporting system capable of capturing the relevant information, ICE is often unable to determine whether a particular noncitizen is covered by § 1226(c) before assuming custody of the individual and conducting an intake screening, and is often unaware when an individual possibly subject to that provision (or to § 1231(a)(2)) is released from state criminal custody. ROA.1467-68. Moreover, attempting to provide the data required by the injunction

"would significantly strain ICE's capacity to manage and track statistical data for any other purpose, including its mandatory congressional reporting requirements, statutory FOIA obligations, and myriad reporting requirements in this and other litigation" and would "impose a serious administrative burden on the line officers making" detention decisions, "diverting them from other important duties, including other enforcement efforts." ROA.1469. In light of those realities, it is plain that the district court's imposition of these onerous reporting requirements constituted an abuse of discretion, and those requirements should be vacated even if plaintiffs succeed on their claims.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the preliminary injunction should be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system and service will be accomplished on all parties through that system.

/s/ Sean Janda
Sean Janda

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,986 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Sean Janda
Sean Janda

ADDENDUM

TABLE OF CONTENTS

8 U.S.C. § 1226

§ 1226. Apprehension and detention of aliens

(a) Arrest, detention and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system—

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available—

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

8 U.S.C. § 1231

§ 1231. Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or

1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

. . .

(h) Statutory Construction

Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.