No. 21-11715

In the United States Court of Appeals for the Eleventh Circuit

STATE OF FLORIDA,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees.

BRIEF OF APPELLANT STATE OF FLORIDA

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
CASE NO. 8:21-CV-541-CEH-SPF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant certifies that the following is a complete list of interested persons:

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30. United States Customs & Border Protection, *Defendant-Appellee*
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ORAL ARGUMENT STATEMENT

Appellant State of Florida respectfully submits that oral argument would assist the Court in resolving the issues in this case. To Florida's knowledge, no court of appeals has addressed the precise issue here. Further, the reasoning of several U.S. Supreme Court cases indicate that Defendants' conduct is unlawful. In granting Florida's motion to expedite, this Court already tentatively scheduled the case for oral argument.

TABLE OF CONTENTS

ORAL ARGUMENT STATEMENT i

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 2

INTRODUCTION 3

STATEMENT OF THE CASE AND FACTS 4

I. THE FEDERAL IMMIGRATION SCHEME. 4

II. STATE COOPERATION WITH FEDERAL IMMIGRATION ENFORCEMENT. 7

III. THE BIDEN ADMINISTRATION'S ILLEGAL ACTIONS. 9

IV. PROCEEDINGS BELOW 10

STANDARD OF REVIEW 16

SUMMARY OF THE ARGUMENT 16

ARGUMENT 19

I. FLORIDA HAS STANDING AND WILL BE IRREPARABLY HARMED. 19

A. The memos cause Florida financial harm. 20

1. *The memos cause Florida to spend money and resources on supervised release* 20

2. *The memos cause Florida to spend money and resources addressing criminal-alien crime* 21

B. The memos harm Florida's quasi-sovereign interests. 24

II. THIS COURT MAY REVIEW THE AGENCY ACTIONS IN THE MEMOS. 25

A. The memos are final agency action. 25

B. The memos are not committed to discretion by law. 27

III. FLORIDA IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS. 31

A. The memos violate the APA. 31

1. *The memos exceed DHS's and ICE's statutory authority and are not in accordance with law.* 32

2. *The memos are arbitrary and capricious.* 36

3. *Defendants failed to provide notice and comment.* 38

B. Compliance with the memos violates § 1226(c) and the Constitution. 39

IV. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST FAVOR PRELIMINARY INJUNCTIVE RELIEF 42

CONCLUSION 43

CERTIFICATE OF COMPLIANCE 45

CERTIFICATE OF SERVICE 46

TABLE OF CITATIONS

Cases

Alabama v. U.S. Army Corps of Eng'rs,
424 F.3d 1117 (11th Cir. 2005) 20

Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. OSHA,
965 F.2d 962 (11th Cir. 1992) 37

Am. Sch. of Magnetic Healing v. McAnnulty,
187 U.S. 94 (1902) 40

Appalachian Power Co. v. EPA,
208 F.3d 1015 (D.C. Cir. 2000) 26

Arizona v. DHS,
No. 21-cv-186 (D. Ariz. 2021) 14

Arizona v. United States,
567 U.S. 387 (2012) 7, 25, 30

Armstrong v. Exceptional Child Ctr., Inc.,
575 U.S. 320 (2015) 40

Arpaio v. Obama,
797 F.3d 11 (D.C. Cir. 2015) 23, 24

Bell v. New Jersey,
461 U.S. 773 (1983) 26

Bennett v. Spear,
520 U.S. 154 (1997) 25

Blackie's House of Beef, Inc. v. Castillo,
659 F.2d. 1211 (D.C. Cir. 1981) 42

Brower v. Evans,
257 F.3d 1058 (9th Cir. 2001) 36

Canal A Media Holding, LLC v. USCIS,
964 F.3d 1250 (11th Cir. 2020) 25, 27

Cent. United Life., Inc. v. Burwell,
128 F. Supp. 3d 321 (D.D.C. 2015) 42

Chiles v. Thornburgh,
865 F.2d 1197 (11th Cir. 1989) 20, 21

Chrysler Corp. v. Brown,
441 U.S. 281 (1979) 38

Citizens to Pres. Overton Park v. Volpe,
401 U.S. 402 (1971) 27

City of Arlington v. FCC,
569 U.S. 290 (2013) 32

City of Dania Beach v. FAA,
485 F.3d 1181 (D.C. Cir. 2007) 25

City of Los Angeles v. Barr,
929 F.3d 1163 (9th Cir. 2019) 42

Cmty. Nutrition Inst. v. Young,
818 F.2d 943 (D.C. Cir. 1987) 39

Commerce v. New York,
139 S. Ct. 2551 (2019) 21, 27, 28, 30

Demore v. Kim,
538 U.S. 510 (2003) 3, 5, 22, 29, 33, 37

DHS v. Regents of the Univ. of Cal.,
140 S. Ct. 1891 (2020) 27, 36, 37, 38

E. Bay Sanctuary Covenant v. Trump,
349 F. Supp. 3d 838 (N.D. Cal. 2018) 38

Encino Motorcars, LLC v. Navarro,
136 S. Ct. 2117 (2016) 36

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 36, 38

Ferrero v. Associated Materials Inc.,
923 F.2d 1441 (11th Cir. 1991) 20

Heckler v. Chaney,
470 U.S. 821 (1985) 28, 29

In re BFW Liquidation, LLC,
899 F.3d 1178 (11th Cir. 2018) 29

In re Rojas,
23 I. & N. Dec. 117 (BIA 2001) 5, 29, 35

Jean v. Nelson,
711 F.2d 1455 (11th Cir. 1983) 19, 39

Jean v. Nelson,
727 F.2d 957 (11th Cir. 1984) 27

Jennings v. Rodriguez,
138 S. Ct. 830 (2018) 29

La. Forestry Ass'n v. DOL,
745 F.3d 653 (3d Cir. 2014) 4

La. Pub. Serv. Comm'n v. FCC,
476 U.S. 355 (1986) 32

League of Women Voters v. Newby,
838 F.3d 1 (D.C. Cir. 2016) 32, 42

Make the Rd. NY v. Pompeo,
475 F. Supp. 3d 232 (S.D.N.Y. 2020) 41

Massachusetts v. EPA,
549 U.S. 497 (2007) 13, 17, 24

Michigan v. EPA,
576 U.S. 743 (2015) 36, 37

Moorhead v. United States,
774 F.2d 936 (9th Cir. 1985) 4

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 36, 37

Muransky v. Godiva Chocolatier, Inc.,
979 F.3d 917 (11th Cir. 2020) 13, 22

Nat'l Lifeline Ass'n v. FCC,
921 F.3d 1102 (D.C. Cir. 2019) 38

Nat'l Min. Ass'n v. McCarthy,
758 F.3d 243 (D.C. Cir. 2014) 39

Nat'l Treasury Emps. Union v. Horner,
854 F.2d 490 (D.C. Cir. 1988) 37

Nielsen v. Preap,
139 S. Ct. 954 (2019) 5, 6, 28, 30, 32

Nken v. Holder,
556 U.S. 418 (2009) 42

Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.,
715 F.3d 1268 (11th Cir. 2013) 20

Philadelphia Co. v. Stimson,
223 U.S. 605 (1912) 40

Sackett v. EPA,
566 U.S. 120 (2012) 26

Scott v. Roberts,
612 F.3d 1279 (11th Cir. 2010) 16, 17

Sierra Club v. Johnson,
436 F.3d 1269 (11th Cir. 2006) 29, 31

Simmat v. BOP,
413 F.3d 1225 (10th Cir. 2005) 40

Sylvain v. Att'y Gen. of U.S.,
714 F.3d 150 (3d Cir. 2013) 33, 37

Texas v. EEOC,
933 F.3d 433 (5th Cir. 2019) 25

Texas v. United States,
809 F.3d 134 (5th Cir. 2015) 20, 23, 24

Texas v. United States,
2021 WL 2096669 (S.D. Tex. 2021) 9, 24, 25, 39, 41

U.S. Army Corps of Eng'rs v. Hawkes Co.,
136 S. Ct. 1807 (2016) 26

United States v. Garcia-Rodriguez,
640 F.3d 129 (5th Cir. 2011) 32

United States v. Quirante,
486 F.3d 1273 (11th Cir. 2007) 29

United States v. Texas,
136 S. Ct. 2271 (2016) 27

Warshauer v. Solis,
577 F.3d 1330 (11th Cir. 2009) 39

Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.,
139 S. Ct. 361 (2018) 28

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008) 16

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 40

Statutes

5 U.S.C. § 553 38

5 U.S.C. § 701(a)(2) 27

5 U.S.C. § 706(2)(A) 31

5 U.S.C. § 706(2)(C) 31

8 U.S.C. § 1182(a)(2) 5, 6, 33

8 U.S.C. § 1226 4

8 U.S.C. § 1226(a) 4, 5

8 U.S.C. § 1226(c) ..... passim

8 U.S.C. § 1227(a) 4, 5, 6, 33

8 U.S.C. § 1252(a)(2)(A) (1994) 5

8 U.S.C. § 1368 30

110 Stat. 3009 6

Ch. 908, Fla. Stat 8, 38

§ 908.105, Fla. Stat 8

§ 908.102(6), Fla. Stat 8

§ 908.103, Fla. Stat 8

Constitutional Provisions

U.S. Const. art. II, § 3 41

Other Authorities

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012)..... 29

Br. of DHS, *Nielsen v. Preap*, 139 S. Ct. 954 (2019) (No. 16-1363)..... 35

Joseph Story, *Commentaries on the Constitution of the United States* (Quid Pro Books 2013) (1833)..... 41

Oral Arg. Tr. 21:9–22, *United States v. Texas*, 136 S. Ct. 2271 (No. 15-674) 35

Reply Br. of DHS, *Nielsen v. Preap*, 139 S. Ct. 954 (2019) (No. 16-1363) 35

Revisions of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 20, 2021) 9

S. Rep. No. 104-48..... 5

The Shadow Code: Statutory Notes in the United States Code, 112 Law Libr. J. 213 (2020) 6

When is When?: 8 U.S.C. § 1226(c) & the Requirements of Mandatory Detention, 82 Fordham L. Rev. 285 (2013)..... 5

Wright & Miller, *Federal Practice and Procedure* § 2949 (3d ed. 2013) 22

STATEMENT OF JURISDICTION

Florida sued under 28 U.S.C. §§ 1331, 1346, 1361 and 5 U.S.C. §§ 702–03. The district court had jurisdiction under those statutes. The district court denied Florida's motion for preliminary injunction on May 18, 2021. DE 38. Florida filed a timely notice of appeal on May 19, 2021. DE 40. This Court therefore has jurisdiction under 28 U.S.C. § 1292(a).

STATEMENT OF THE ISSUES

In 8 U.S.C. § 1226(c), Congress commanded immigration authorities to arrest certain criminal aliens when they are released from jail or prison. Defendants issued two memoranda that defy this command. The issues are:

1. Are the memos—which instruct federal officials to ignore congressional commands and release dangerous criminals into the public—final agency action?

2. Is the decision whether to comply with § 1226(c) committed to agency discretion by law?

3. Is Florida likely to succeed on the merits of its claim that the memos violate the APA, including because they are contrary to law, arbitrary and capricious, and subject to notice and comment?

4. Is Florida likely to succeed on the merits of its claim that the memos otherwise violate federal statutes and the Constitution, including the separation of powers doctrine?

5. Do the equities and public interest favor a preliminary injunction?

INTRODUCTION

Congress enacted § 1226(c) in 1996 because it was "justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal proceedings in large numbers." *Demore v. Kim*, 538 U.S. 510, 513 (2003). The text, statutory context, purpose, legislative history, and case law all make clear that Congress enacted § 1226(c) to create a mandatory, non-discretionary duty to arrest and detain specified criminal aliens.

Shortly after taking office, however, President Biden's administration issued a memorandum instructing Department of Homeland Security ("DHS") officials to ignore this congressional command. These officials have already refused to take custody of several § 1226(c) aliens in Florida—including, for example, a cocaine dealer, an amphetamine trafficker, a habitual burglar, and an aggravated stalker—forcing Florida's prison officials to release those aliens into Florida upon completion of their criminal sentences, the precise result Congress sought to avoid.

The Biden Administration's acts are contrary to law. Further, and at a minimum, the APA requires a reasoned explanation for such a flagrant disregard of the will of Congress, which Defendants did not provide. For these reasons, and those that follow, the district court erred in denying Florida's motion for

preliminary injunction. This Court should reverse the district court and enter a preliminary injunction to prevent further irreparable harm to Florida.

STATEMENT OF THE CASE AND FACTS

I. THE FEDERAL IMMIGRATION SCHEME.

"[T]he Immigration and Nationality Act ('INA') establishes a comprehensive scheme for aliens' exclusion from and admission to the United States." *Moorhead v. United States*, 774 F.2d 936, 941 (9th Cir. 1985) (citation omitted). Relevant here, the INA specifies who is removable and the process for their removal. Section 1227(a) lays out the "classes of deportable aliens." Among others, these classes include any alien who is "[p]resent in violation of law." 8 U.S.C. § 1227(a)(1)(B). They also include aliens—even lawfully present aliens—who commit certain acts, including, for example, several criminal offenses. *Id.*§ 1227(a)(2).

Section 1226 governs the arrest and detention of aliens pending removal. Subsection (a) sets the default rule. It provides that DHS, including its interior enforcement arm, Immigration and Customs Enforcement ("ICE"), "may" arrest and detain an alien pending removal proceedings. *See id.* § 1226(a).[1]

[1] After the creation of DHS, many INA references to the "Attorney General" now refer to the Secretary of DHS. *La. Forestry Ass'n v. DOL*, 745 F.3d 653, 659 (3d Cir. 2014).

In 1996, however, Congress grew "concerned that deportable criminal aliens who are not detained continue to engage in crime," *Demore*, 538 U.S. at 513, and "frustrated with the ability of . . . criminal aliens" to "avoid deportation," *In re Rojas*, 23 I. & N. Dec. 117, 122 (BIA 2001) (en banc). It enacted § 1226(c) in a bipartisan fashion to address those concerns and ensure that federal authorities "det[ain] and remov[e] *all* criminal aliens." *Id.*; *accord Nielsen v. Preap*, 139 S. Ct. 954, 960 (2019). Through § 1226(c), Congress revoked the discretionary "may" language in § 1226(a) for criminal aliens, and directed that federal authorities "*shall* take into custody *any alien*" who qualifies as a "criminal alien[] . . . when the alien is released" from criminal custody.[2] 8 U.S.C. § 1226(c) (emphases added). The legislative history reflects "a consensus" that "there is just no place in America for non-U.S. citizens who commit criminal acts here." S. Rep. No. 104-48, at 6 (1995); *see* G. Savaresse, *When is When?: 8 U.S.C. § 1226(c) & the Requirements of Mandatory Detention*, 82 Fordham L. Rev. 285, 299 (2013).

Criminal aliens, for purposes of § 1226(c), include aliens who have committed specified crimes. As most relevant there, that includes aliens who have committed crimes of moral turpitude, 8 U.S.C. § 1182(a)(2)(A), *id.* § 1227(a)(2)(A)(i); crimes

[2] Before 1996, what is now § 1226(a) was codified in § 1252(a). *See Demore*, 538 U.S. at 519. Section 1252(a) contained a narrower mandatory arrest provision, which applied only to "aggravated felon[s]." *See* 8 U.S.C. § 1252(a)(2)(A) (1994).

involving controlled substances, *id.* § 1182(a)(2)(A), *id.* § 1227(a)(2)(B); human trafficking, *id.* § 1182(a)(2)(H); money laundering, *id.* § 1182(a)(2)(I); aggravated felonies, *id.* § 1227(a)(2)(A)(iii); and specified firearms offenses, *id.* § 1227(a)(2)(C).

Congress knew that creating a duty to arrest criminal aliens would tax resources. When it enacted § 1226(c), Congress included a statutory note designed to ensure officials could comply with this new duty. *See Preap*, 139 S. Ct. at 969 (discussing 110 Stat. 3009). The statutory note—which is part of the governing law and is not legislative history[3]—created what are often called the "Transition Period Custody Rules." *See, e.g.*, *id.* at 969. The Transition Period Custody Rules gave immigration officials, "not later than 10 days after the enactment" of § 1226(c), the option to "notif[y] in writing the Committees on the Judiciary" for the House and Senate "that there is insufficient detention space and [federal-immigration] personnel to carry out" § 1226(c). *See* 110 Stat. 3009. If immigration officials did so, they received a one-year reprieve from some requirements of § 1226(c), which they could renew for one more year by re-

[3] Shawn G. Nevers & Julie Graves Krishnaswami, *The Shadow Code: Statutory Notes in the United States Code*, 112 Law Libr. J. 213, 214 (2020) ("Statutory notes are provisions of law placed after the text of a *United States Code* section. They exist throughout the *United States Code* and are valid law despite their location in the Code.").

notifying Congress. *See id.* After that two-year period, however, Congress expected full compliance with the non-discretionary commands in § 1226(c).

II. STATE COOPERATION WITH FEDERAL IMMIGRATION ENFORCEMENT.

For decades, states like Florida have relied on the federal government's enforcement of and compliance with the INA in general and § 1226(c) in particular, especially after the Supreme Court clarified that states cannot "engage in" their own immigration "enforcement activities." *Arizona v. United States*, 567 U.S. 387, 410 (2012). Even though *Arizona* prevents Florida from taking matters into its own hands, *Arizona* also recognizes that states "bear[] many of the consequences of unlawful immigration." *Id.* at 397.

Nowhere are these consequences more obvious than when criminal aliens are released back into Florida's communities to reoffend rather than being removed from the country. According to former Acting ICE Director Thomas Homan, the consequences can be "dire." DE 4-18 at 5–8. He lists many examples in his declaration from when he was ICE Director, including, for example, criminal aliens California wrongly released who were later re-arrested for first-degree murder, second-degree murder, cruelty to a child, spousal battery, and killing a six-year-old girl. *Id.* at 7–8.

The previous two administrations understood this reality. Under President Trump, any removable alien convicted of a crime or with pending criminal

charges was a priority. DE 4-5 at 3. And although President Obama took a different approach to immigration enforcement overall, his administration recognized the importance of immigration enforcement against criminals, prioritizing aliens who committed any felony, any "significant misdemeanor," such as "domestic violence," "sexual abuse or exploitation," "burglary," "unlawful possession or use of a firearm," "drug distribution or trafficking," and "driving under the influence," and aliens who were repeat offenders of *even minor misdemeanors*. DE 4-6 at 4–5.

Relying on these consistent efforts by the federal government to remove criminal aliens from Florida, and to do everything possible to ensure their efficacy, Florida passed Senate Bill 168 in 2019.[4] The law requires all state and local officials to inform the federal government before they release aliens from criminal custody, § 908.105, Fla. Stat.; *id.* § 908.102(6)(b); *id.* § 908.103, and even to detain those aliens pursuant to an immigration warrant if federal officials cannot arrive in time, § 908.105, Fla. Stat.; *id.* § 908.102(6)(a); *id.* § 908.103. Florida's sheriffs have also made significant efforts to facilitate cooperation with ICE, including 47 sheriffs' offices entering formal cooperation agreements. DE 4-7 at 7–11.

[4] *See* Ch. 908, Fla. Stat.

III. THE BIDEN ADMINISTRATION'S ILLEGAL ACTIONS.

On January 20, 2021—the day he took office—President Biden issued Executive Order 13993, Revisions of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 20, 2021). That same day, DHS issued its stand-down order halting most immigration enforcement. *See* DE 4-3 (the "January 20 Memo"). The January 20 Memo did three things.

First, it required an internal "review of [all existing] policies and practices concerning immigration enforcement." *Id.* at 3.

Second, it ordered a 100-day stay of removals. *Id.* at 4. Almost immediately, Texas obtained a nationwide injunction against that part of the memo. *See Texas v. United States*, 2021 WL 2096669, at *3, *52 (S.D. Tex. 2021). The United States did not appeal that injunction, and that part of the memo has now expired by its own terms.

Third, the January 20 Memo, under the guise of "enforcement priorities," halted most interior immigration enforcement except for those who entered the United States on or after November 1, 2020. For the removable aliens who are already here, they receive amnesty—at least for practical purposes—unless they are a terrorist, a spy, or an aggravated felon whom DHS separately determines to be a public-safety risk (as that term is defined in the memo). DE 4-3 at 3–4.

On February 18, 2021, ICE issued a second memorandum implementing those "priorities." DE 4-4 (the "February 18 Memo"). This memo adds to the priority list removable aliens who are gang members, but only if ICE can prove that these gang members are furthering the illegal activity of the gang *and* determines them to be a "public-safety" risk (again, as defined in the memo). *Id.* at 5–6. This memo says that DHS "anticipates" issuing new guidelines by May 18, 2021, but emphasizes that the memos are the authoritative, operative documents governing immigration enforcement unless DHS says otherwise. *Id.* at 2.

The January and February memos purport not to prohibit enforcement against other categories of aliens, but they make doing so all but impossible by requiring ICE officials to secure advanced approval from senior officials—either the Field Office Director or Special Agent in Charge—after submitting "a written justification through the chain of command." *Id.* at 6–7. And while there is supposedly an exigent-circumstances exception, it is limited only to "imminent threat[s] to life" or "imminent substantial threat[s] to property." *Id.* at 7.

The memos try to justify their requirements based on "limited resources" and the COVID-19 pandemic. DE 4-3 at 2; DE 4-4 at 3.

IV. PROCEEDINGS BELOW.

Florida filed this action on March 8, 2021, DE 1, and moved for a preliminary

injunction the next day, DE 4; DE 7. On April 13, the court held the hearing.[5]

In its brief and at the hearing, Florida argued that 8 U.S.C. § 1226(c)—which provides that DHS "shall take into custody" certain criminal aliens—creates a mandatory duty to arrest, detain, and remove defined criminal aliens. The memos, on their face and based on record evidence, instruct immigration officials to violate that duty. *See* DE 4 at 13–15, 19–21. Florida also argued that the memos are arbitrary and capricious, *id.* at 21–23; subject to notice and comment, *id.* at 24; and unconstitutional and ultra vires because they conflict with a federal statute, *id.* at 24.

In support of its motion, Florida provided several emails from ICE officials to Florida corrections officers. In those emails, ICE officials refused to take custody of criminal aliens who were scheduled to be released from prison—and they admitted that their only reason for doing so was the challenged memos. *See* DE 4-1; DE 29-1.

Defendants have admitted that many of these aliens are subject to § 1226(c), DE 23-4 at 6–7; DE 30-1 at 1–3, and the behavior of these aliens is disturbing. One has repeatedly engaged in burglary and grand theft. DE 29-2 at 4–6. Another is an

[5] Before scheduling a hearing, the district court sua sponte entered a show-cause order, asking Florida to address "why venue [wa]s proper." DE 16 at 4. Even though venue is waivable and Defendants had raised no issue as to venue, the court explained that it thought Florida resided only in its capital, Tallahassee. *Id.* at 3. After Florida identified authorities showing that Florida resides everywhere within its borders, DE 17, the court discharged its show-cause order, DE 20.

aggravated stalker. DE 29-2 at 7. And several have serious drug convictions, including selling and trafficking drugs like cocaine and amphetamine. DE 4-2 at 5–7, 13, 18–20; DE 29-2 at 2–3; DE 30-1 at 2–3.

For some of these criminal aliens, including a heroin trafficker, DE 4-2 at 15, Defendants conveniently decided to reissue the detainers before their response brief was due.[6] DE 23-4 at 5–6. And for one—a particularly frightening cocaine trafficker, DE 4-2 at 13—Defendants claimed to have made a mistake, DE 23-4 at 6, even though ICE told Florida it allowed his release pursuant to the challenged memos, DE 4-1 at 8. Of course, by the time Defendants realized their "mistake," the cocaine trafficker was at-large in Florida. DE 23-4 at 6.

Florida provided other examples of aliens who, while not subject to § 1226(c), demonstrate the reckless nature of the challenged memos, and show that the memos apply to those in local custody, not just state custody.[7] In Pasco County, for example, ICE has allowed the release of aliens accused of sexual assault of a minor and domestic violence (in that case, while the victim's young children watched). DE 4-16 at 3–4, 9, 15, 20–21, 24.

[6] Detainers are ICE's request for local officials to notify ICE before releasing a criminal alien from custody. DE 4-18 at 6.

[7] Along with criminal aliens in Florida's 67 counties, the memos also apply to aliens in federal custody. When Florida filed its motion, the federal prison population in Florida was 8,801, DE 4-9 at 3–7, around 21% of which are aliens, DE 4-10 at 3.

Florida advanced three arguments for how it has standing to challenge the memos and how they cause Florida irreparable harm.

First, Florida explained that it was only a matter of time before these dangerous criminals reoffended. DE 4 at 11; DE 32 at 17–21. Congress reached that conclusion in enacting § 1226(c). While congressional findings are not binding on courts, they are persuasive. *See Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 926 (11th Cir. 2020) (en banc). And Florida offered corroborating evidence to support Congress's conclusion. *See* DE 4-11 at 2–3; DE 4-18 at 5–8. These additional crimes, Florida explained, will cause it financial harm. For example, Florida spends around $120 million a year on criminal-alien incarceration alone, DE 4-13 at 4, and Florida spends millions on law-enforcement efforts, DE 4-15, victim services, DE 4-14 at 3–5; DE 4-12 at 21–26, and mental-health and substance-abuse treatment, DE 4-14 at 5–6.

Second, Florida pointed to the more direct, though less enormous, harm caused by the memos. When Florida releases criminal aliens into the public instead of into ICE custody, it spends more money and resources on supervised release. DE 32 at 15:17–16:18; DE 4-2 at 5 ("under community supervision"); DE 29-2 at 7 (same); DE 4-13 at 15, 68 (discussing and showing costs of community supervision).

Third, Florida relied on the "special solicitude" the Supreme Court recognized for states in *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). DE 4 at 12; DE 32 at

14–15. To show standing, Florida argued, it only must show a quasi-sovereign interest and a procedural right (and APA review qualifies as a procedural right under *Massachusetts*). As a quasi-sovereign interest, Florida relied on both its financial harm and the unlawful presence of people in its territory.

In their brief and at the hearing, Defendants argued that Florida lacked standing under any of these theories because it was speculative that the memos would reduce interior immigration enforcement. DE 23 at 7–8; DE 32 at 60–61, 65. According to Defendants, the memos were merely a reallocation of resources. DE 23 at 7–8; DE 32 at 60–61, 65. They also argued that the memos were not final agency action and that the decision whether to comply with § 1226(c) was committed to agency discretion by law.

Although they refused to do so in this case, a few weeks after the hearing Defendants produced the administrative record for the challenged memos in a related case. *Arizona v. DHS*, No. 21-cv-186 (D. Ariz. 2021). One of the documents in the administrative record, an email to Defendant Acting ICE Director Johnson, explains that the memos would likely reduce "individual[s] entering [ICE] custody" by "50% of historical numbers." DE 34-2 at 2. The email also explains that Defendants expected the reduction in ICE arrests—the arrests at issue here—to be far more than 50% because "the vast majority" of individuals entering ICE custody "would come from CBP transfers" rather than ICE arrests. *Id.* Florida brought this email to the

court's attention, DE 34, as well as ICE data showing that ICE's prediction had come true. DE 34 at 3–4; *see* DE 38 at 23 (making these materials part of the record).

On May 18, 2021, Florida requested a status conference to determine whether an evidentiary hearing or limited discovery was necessary because of these documents and Defendants' inconsistent representations at the hearing. DE 37. Within hours of Florida filing that request, the district court issued its order denying Florida's preliminary injunction motion. DE 38.

The court agreed with Florida that it has standing and is harmed by the memos,[8] *id.* at 19, and recognized that § 1226(c) "commands federal immigration authorities to arrest all criminal noncitizens," *id.* at 3. But the court held that the memos are not subject to judicial review under the APA because they are not final agency action. *Id.* at 20–22. The court reasoned that the memos say they are "short-term guidance with the anticipation of new guidelines" by May 18, 2021 (the day the court issued its opinion). *Id.* at 20–21. The court also reasoned that the memos did not "determine anyone's legal rights" because "they are not statutes and do not have the status of law." *Id.* at 21.

The court also concluded that, even if the memos were final agency action, the decision whether to comply with § 1226(c) is committed to agency discretion by

[8] The district court agreed only with Florida's supervised-release theory of standing. DE 38 at 19.

law because the memos "in no way prohibit any enforcement action" and instead "focus and prioritize the cases of immigration enforcement given the resources available in light of what DHS deems most pressing." DE 38 at 22–23.

The court did not address Florida's non-APA claims, but apparently assumed that its APA-reviewability analysis applied to all of Florida's claims. Florida appealed the next day, DE 40, and moved to expedite. This Court, over Defendants' objection, granted the motion.

STANDARD OF REVIEW

This Court reviews the denial of a preliminary injunction for abuse of discretion, but it reviews legal conclusions de novo. *Scott v. Roberts*, 612 F.3d 1279, 1289–90 (11th Cir. 2010). A plaintiff seeking a preliminary injunction must show (1) "that he is likely to succeed on the merits," (2) "that he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "that the balance of equities tips in his favor," and (4) "that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

SUMMARY OF THE ARGUMENT

The district court erred in denying Florida's motion for preliminary injunction. The memos are final agency action and whether to comply with § 1226(c)

is not committed to agency discretion by law. For those reasons, and because Florida has satisfied the other prerequisites for injunctive relief, the Court should reverse.[9]

1. Florida has demonstrated both standing and irreparable harm. The memos cause Florida to expend additional resources supervising the release of criminal aliens and their subsequent crimes cost Florida even more. Further, states are entitled to special solicitude to assert injuries to their quasi-sovereign interests. *Massachusetts*, 549 U.S. at 520. Florida has an interest in whether there are unauthorized people in its territory, especially because *Arizona* renders Florida powerless to remove them.

2(a). The memos are subject to judicial review as final agency action. The "interim" nature of the memos is a farce, as Defendants have now blown past their own May 18, 2021 deadline for new guidance. And even if it were not, the memos are still final agency action. They give immediate rights to criminal aliens to move freely throughout Florida that Congress took away, restrict ICE officials' discretion to arrest those aliens, and obligate Florida to supervise their release as well as pay to enforce the law and re-incarcerate them when they recidivate.

2(b). The memos also are subject to judicial review because they are not committed to agency discretion by law. Section 1226(c) removed Defendants'

[9] This Court can enter a preliminary injunction. It need not remand with instructions to do so. *See Scott*, 612 F.3d at 1298.

discretion to intentionally fail to arrest defined criminal aliens. It thus provides a standard against which to judge the agencies' decisions.

3. The memos violate the APA because they contradict clear commands from Congress. In 1996, Congress sought to change how the executive exercised its discretion. It added § 1226(c)—changing the word "may" to "shall"—to withdraw discretion and require immigration officials to arrest certain criminal aliens. But the memos remove those aliens from the "priority list"—which, as a practical matter, means they will not be arrested because the memos impose arbitrary barriers like written preapproval and "public-safety" analyses.

4. The memos are arbitrary and capricious. Even if § 1226(c) does not create a mandatory duty, it at least expresses a strong congressional preference to arrest criminal aliens. The memos do not consider § 1226(c), much less try to explain their departure from it. If the APA requires anything, it requires an agency to explain itself before thumbing its nose at Congress. The memos also point to no evidence that limited resources and the COVID-19 pandemic prompted the memos' priorities, nor do they explain why, almost a year into the pandemic, compliance with § 1226(c) became impossible. And they ignore costs to the states, lesser alternatives within the ambit of the Obama and Trump Administrations' approach, and states' reliance interests.

5. The APA requires the memos to go through notice and comment. They create new rights and obligations, particularly by cabining ICE officials' discretion to arrest criminal aliens whom Congress has commanded they arrest. ICE has even announced a process for detained aliens to invoke the memos as a basis for release. And if, as this Court has recognized, immigration officials must engage in rulemaking when changing a policy to detain more aliens, *see Jean v. Nelson*, 711 F.2d 1455, 1483 (11th Cir. 1983), they certainly must do so when changing decades-old policy to detain *less* criminal aliens.

6. Even if Florida's claims were unreviewable under the APA, Florida remains entitled to an injunction because the memos ignore federal law and violate the separation-of-powers doctrine and the take care clause.

7. The equities and public interest favor preliminarily enjoining the memos. The public interest in enforcing the immigration laws is significant, particularly for dangerous criminal aliens. So, too, is forcing federal agencies to comply with the law. And the harm to Florida and the public, including the public-safety nightmare created by the memos, outweighs any harm to Defendants.

ARGUMENT

I. FLORIDA HAS STANDING AND WILL BE IRREPARABLY HARMED.

The district court correctly concluded that Florida is irreparably harmed by the memos and has standing given the money it spends on supervised release of

criminal aliens. DE 38 at 18–19. Although this Court need not address them, the district court erred in rejecting Florida's other standing theories.

A. The memos cause Florida financial harm.

"[E]conomic detriment . . . is the epitome of an injury in fact." *Chiles v. Thornburgh*, 865 F.2d 1197, 1209 (11th Cir. 1989). Indeed, this Court has "readily conclude[d]" that Florida had standing to challenge allegedly illegal agency action that "*may* adversely impact" its "economy." *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1130 (11th Cir. 2005) (emphasis added). These injuries are also irreparable. Florida stands to suffer "injury in the form of millions of dollars of losses." *Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015). These losses "cannot be undone through monetary remedies," *Ferrero v. Associated Materials Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991), because the United States has sovereign immunity, *Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013).

1. *The memos cause Florida to spend money and resources on supervised release.*

As the district court agreed, the memos cause Florida to spend more resources on supervised released. DE 38 at 18. When ICE refuses to take custody of a criminal alien, Florida frequently must supervise the alien after release. *See* DE 4-2 at 5 (released on "community supervision"); DE 4-13 at 15, 68 (discussing and showing costs of community supervision). Florida thus has "expended . . . resources" because

of the memos and "[t]here can be no doubt that [Florida] has standing under Article III." *Chiles*, 865 F.2d at 1209.

2. *The memos cause Florida to spend money and resources addressing criminal-alien crime.*

For similar reasons, the district court erred in concluding that Florida lacks standing based on the crimes of released criminal aliens. There is no dispute that criminal-alien crime harms Florida. DE 4-13 at 4 (criminal-alien incarceration); DE 4-15 (law-enforcement efforts); DE 4-14 at 3–5 (victims' services); DE 4-14 at 5–6 (mental-health and substance-abuse treatment). Instead, Defendants claim this future criminal activity is speculative and not a basis for standing. DE 23 at 7–8; DE 32 at 60, 61, 65.

As the Supreme Court recently recognized, however, third party conduct can serve as a basis for standing, so long as third parties are "likely [to] react in predictable ways" that harm the plaintiff. *Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). Here, it is "likely" and "predictable" that criminal aliens released into Florida will commit further crimes.[10] *See id.*

[10] Even Defendants predict this, as the February 18 Memo assumes the states will pick up the slack when the federal government abdicates its duty. DE 4-4 at 4 (instructing ICE officers to consider "whether a threat" from aliens not within the enforcement priorities "can be addressed through other means, such as through recourse to criminal law enforcement authorities . . . and other civil authorities at the state or local level").

First, Congress concluded that they would in enacting § 1226(c). *See Demore*, 538 U.S. at 518–19 (discussing those findings and the evidence on which they were based). Although congressional findings are not binding, this Court "relie[s] on the judgment of Congress." *Godiva*, 979 F.3d at 927.

Second, Florida's evidence confirms Congress's finding. A Department of Justice study finds that "68% of released prisoners [are] arrested [again] within 3 years, 79% within 6 years, and 83% within 9 years." DE 4-11 at 2–3. And former Acting ICE Director Homan stated that the memos will cause more crime. According to him, "criminal aliens who are allowed to return to communities commit additional crimes." DE 4-18 at 6. He also said that the memos would cause "dire" consequences for "state and local governments and their citizens." *Id.*

Third, and most important, Defendants rebutted none of this evidence. They never offered evidence that released criminal aliens would not reoffend.[11] Defendants simply said it was speculative that they would.

While not rebutting Florida's facts, Defendants instead argued (1) that the memos "do not require a net reduction in enforcement actions" and thus might not cause an increase of criminal aliens in Florida; and (2) that, even if they will, Florida

[11] "[E]vidence" in preliminary-injunction proceedings "is presumed true if it is not contradicted." Wright & Miller, *Federal Practice and Procedure* § 2949 (3d ed. 2013).

must account for the benefits of the memos, and determine whether those benefits outweigh the costs on Florida. DE 23 at 8; DE 32 at 60, 61, 64. Defendants are wrong on both counts.

1. The memos cause a significant reduction in interior immigration enforcement. Internal ICE emails—which came out after the hearing but are in the record—show that Defendants have known that since at least January 27, 2021. DE 34; DE 34-2. And Florida's examples show that this reduction applies to criminal aliens too. *See* DE 4-1; DE 23-4; DE 29-1; DE 30-1. This makes sense because the memos are an intentional, drastic reduction in overall immigration enforcement, not a reallocation of resources as Defendants claim. DE 4-18 at 11–14.

2. Defendants' "accounting exercise" theory of standing similarly fails. *Texas*, 809 F.3d at 156. Florida need not account for every hypothetical "benefit" of the policies (whatever those might be) and balance them against the costs, it only need point to the imminent and obvious harm the memos cause. The federal government unsuccessfully made the same argument in defending its Deferred Action for Parents of Americans ("DAPA") memo. *See id.*

In rejecting this standing theory, the district court adopted Defendants' first argument, but not their second, and relied principally on *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015). DE 38 at 16. That case involved a challenge to DAPA and DACA. There, it was undisputed that DHS could remove only about 400,000

undocumented aliens per year, was continuing to remove all 400,000, and, in fact, was focusing more on "criminal aliens" and less on "non-dangerous immigrants." *Arpaio*, 797 F.3d at 24. On those facts, the D.C. Circuit rejected the plaintiff's theory that the policies meant "more crime." *Id.* at 22, 24.

The district court erred in applying *Arpaio* here. Unlike in that case, Florida has shown a reduction in enforcement. Further, Florida has shown that the reduction applies specifically to criminal aliens, and that those aliens will commit further crimes.

B. The memos harm Florida's quasi-sovereign interests.

States are entitled to "special solicitude" in the standing context. *Massachusetts*, 549 U.S. at 520.[12] To invoke special solicitude, states must show a procedural right and a quasi-sovereign interest. APA review is a sufficient procedural right. *Id.* at 517–20.

In addition to its financial harm, Florida has a quasi-sovereign interest in its sovereign territory and the movement of people within it, *id.*, particularly people whom Congress has excluded. In finding standing in *Massachusetts*, the Supreme Court relied on the autonomy states give up in entering the union and their reliance on the federal government to regulate emissions. *Id.* at 518–19. The same is true here, except that Massachusetts could at least regulate emission within its borders,

[12] *Accord Texas*, 809 F.3d at 153–54; *Texas*, 2021 WL 2096669, at *20.

while states "bear[] many of the consequences of unlawful immigration" but are powerless to control it. *Arizona*, 567 U.S. at 397.

The district court was wrong to conclude otherwise.

II. THIS COURT MAY REVIEW THE AGENCY ACTIONS IN THE MEMOS.

A. The memos are final agency action.

The actions taken through the memos are final.[13] The "agency has completed its decisionmaking process" and the memos "will directly affect the parties.'" *Canal A Media Holding, LLC v. USCIS*, 964 F.3d 1250, 1255 (11th Cir. 2020). They "mark the consummation of [the agencies'] decisionmaking process," *Bennett v. Spear*, 520 U.S. 154, 178 (1997), and determine "rights or obligations" and "legal consequences." *See id*.[14]

1. The memos determine rights and obligations for ICE officials, criminal aliens, and Florida. As to officials, the memos "provide[] new marching orders," *City of Dania Beach v. FAA*, 485 F.3d 1181, 1188 (D.C. Cir. 2007), that retract their ability to follow the law. And these officials are applying the memos "in a way that indicates [they] are binding," *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019), by lifting detainers for criminal aliens explicitly because of the memos, *see* DE 4-1; DE

[13] One court already held that the 100-day pause within the January 20 Memo was final agency action. *Texas*, 2021 WL 2096669, at *31.

[14] Florida need show only either (a) that the memos determine rights or obligations; or (b) that they determine legal consequences. But Florida has shown both.

29-1.

For criminal aliens, the memos create functional amnesty. ICE recognizes this. It has created a formal process for aliens who "believe they do not meet ICE's priorities" to "request a case review" under the memos' new legal regime. DE 4-17 at 3.

Finally, for Florida, rights may not be created, but "obligations certainly are." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000). As a direct result of the memos, ICE officials are instructing Florida's corrections officials to lift detainers, *see* DE 4-1; DE 4-2; DE 29-1; DE 29-2; DE 29-1, causing their release back into Florida where Florida must supervise them immediately and enforce the law against them in the future.

2. DHS's and ICE's decision-making over the memos is over. The "enforcement priorities" have been in effect since February 1. DE 4-3 at 4. And they will remain in effect until DHS says otherwise. DE 4-4 at 2. The "interim" label does not alter the memos' finality, which courts assess pragmatically. *Bell v. New Jersey*, 461 U.S. 773, 779 (1983). During the memos' indefinite "interim," they have the force of law. That an agency may "revise" its decision "is a common characteristic of agency action and does not make an otherwise definitive decision nonfinal." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1814 (2016); *accord Sackett v. EPA*, 566 U.S. 120, 127 (2012). Until Defendants issue new guidelines, the memos

are "the agency's final word on the matter." *Canal*, 964 F.3d at 1255.

And even if the Court were inclined to treat memos like these as non-final, it should not here because, as of May 18, Defendants have blown past the 90-day deadline to create new "priorities." DE 4-4 at 2. So the notion that these memos are only "interim" priorities is inaccurate.

Notably, the district court did not rely on the interim nature of the priorities but appeared to conclude that the illegal decisions at issue here are never reviewable because they "do not determine anyone's legal rights." DE 38 at 20–21. That view conflicts with the APA's presumption of judicial review, *Commerce*, 139 S. Ct. at 2567, this Court's holding that even "[t]he discretionary decisions of executive officials in the immigration area are . . . subject to judicial review," *Jean v. Nelson*, 727 F.2d 957, 976 (11th Cir. 1984) (en banc), and the Supreme Court's routine review of immigration policies. *See, e.g.*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020); *United States v. Texas*, 136 S. Ct. 2271 (2016).

The memos are final agency action.

B. The memos are not committed to discretion by law.

The APA creates a "basic presumption of judicial review." *Commerce*, 139 S. Ct. at 2567. "[A] very narrow exception" to that presumption exists when an action is "committed to agency discretion by law." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); 5 U.S.C. § 701(a)(2). But "to honor the presumption of

review," the Supreme Court reads that exception "quite narrowly." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). And this case is not one of those "rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 370.

That is so because at a minimum, § 1226(c) "do[es] not leave [the agencies'] discretion unbounded." *Commerce*, 139 S. Ct. at 2568. Congress "has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion." *Heckler v. Chaney*, 470 U.S. 821, 834 (1985). There "there[fore] is 'law to apply' under § 701(a)(2)" and the memos are reviewable. *Id.*

Congress did not commit the challenged agency actions to agency discretion because Congress removed discretion to intentionally fail to arrest criminal aliens. That is the whole point of § 1226(c). Congress added § 1226(c)—changing the word "may" to "shall"—to "*subtract* some of th[e] discretion" DHS possessed under § 1226(a)—specifically, the discretion not to "arrest . . . criminal aliens." *Preap*, 139 S. Ct. at 966 (emphasis in original). Congress instead "obligat[ed]" the agencies to arrest them. *Id.* at 969; *see id.* at 966 ("The Secretary *must* arrest those aliens guilty of a predicate offense.").

The Supreme Court has "emphasize[d]" that the "decision not to take

enforcement action" is "only presumptively unreviewable." *Heckler*, 470 U.S. at 832–33. This presumption "d[oes] not set agencies free to disregard legislative direction," *id.* at 832–33, and it "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers," *id.*

Section 1226(c) does just that. For one, "where Congress uses the word shall," it "intends to command rather than suggest." *United States v. Quirante*, 486 F.3d 1273, 1275 (11th Cir. 2007). "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018);[15] *see also, e.g.*, *Sierra Club v. Johnson*, 436 F.3d 1269, 1280 (11th Cir. 2006) (interpreting "shall" to create a mandatory requirement for the EPA).

But Congress did more than use a bare "shall." It amended permissive language ("may"), and "changes in statutory language generally indicate an intent to change the meaning of the statute." *In re BFW Liquidation, LLC*, 899 F.3d 1178, 1191 (11th Cir. 2018).[16] The point of this amendment was to withdraw immigration officials' discretion and instruct them to "det[ain] and remov[e] *all* criminal aliens." *In re Rojas*, 23 I. & N. at 122 (emphasis in original). In other words, the 1996

[15] *Accord Demore*, 538 U.S. at 513; *In re Rojas*, 23 I. & N. Dec. at 122.

[16] *See also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012) ("[A] change in the language of a prior statute presumably connotes a change in meaning.").

statutory change left "the Executive no discretion but to take the alien into custody." *Arizona*, 567 U.S. at 456–57 (Alito, J., concurring in part and dissenting in part).

On top of this change, Congress included a statutory note designed to ensure immigration officials could comply with this new duty. *See Preap*, 139 S. Ct. at 969 (discussing 110 Stat. 3009). This statutory note created a maximum two-year exception for the agencies to gather the necessary resources to comply with Congress's non-discretionary commands in § 1226(c). But after those two years, the executive had to comply with the new law. *See supra* 6–7 (discussing the Transition Period Custody Rules).

8 U.S.C. § 1368 confirms this reading. It requires DHS to report to Congress every six months "estimating the amount of detention space" required for three separate categories of aliens. § 1368(b)(1). One category is § 1226(c) aliens, another is "inadmissible or deportable aliens in accordance with priorities." *Id.* In other words, Congress assumes that § 1226(c) aliens are distinct from those whom DHS may prioritize or deprioritize.

* * *

For these reasons, DHS does not have "unbounded" discretion to ignore § 1226(c). *Commerce*, 139 S. Ct. at 2568. DHS admitted as much in *Preap*, though, without explanation, takes a different position here. *See* Br. of DHS 23

("Congress eliminated all discretion" for criminal aliens.);[17] *see also* Reply Br. of DHS 2 (discussing "[t]he Secretary's *duty* to arrest . . . criminal alien[s]" (emphasis added)).[18]

III. FLORIDA IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS.

A. The memos violate the APA.

Courts must conduct a "searching and careful" review of agency action, *Sierra Club*, 436 F.3d at 1273–74 (quotations omitted). Under the APA, they must "hold unlawful and set aside" agency action that is "in excess of statutory jurisdiction, authority, or limitations"; that is "not in accordance with law"; or that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A), (C).

The memos violate the APA because (1) they instruct DHS and ICE officers to ignore the clear commands of Congress in the INA—particularly 8 U.S.C. § 1226(c); (2) they are arbitrary and capricious and do not reflect reasoned decision-making—especially in ignoring issues that the APA requires agencies to consider; and (3) the actions contemplated by the memos require notice and comment rulemaking.

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[17] https://www.supremecourt.gov/DocketPDF/16/16-1363/49018/20180601171509498_16-1363tsNielsen.pdf.

[18] https://www.supremecourt.gov/DocketPDF/16/16-1363/62824/20180905175727148_16-1363rbUnitedStates.pdf.

1. *The memos exceed DHS's and ICE's statutory authority and are not in accordance with law.*

DHS and ICE have "gone beyond what Congress has permitted [them] to do." *City of Arlington v. FCC*, 569 U.S. 290, 298 (2013). They have no "power to act . . . unless and until Congress" gives it to them. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986). And they are especially powerless to disregard express statutory commands. *See League of Women Voters v. Newby*, 838 F.3d 1, 9–12 (D.C. Cir. 2016).

Before 1996, as discussed above, Congress gave the agencies discretion to decide whether to arrest criminal aliens. But Congress, frustrated with the way the executive branch was exercising that discretion, added § 1226(c)—changing the word "may" to "shall"—to withdraw that discretion and "obligat[e]" the agencies to arrest criminal aliens. *See Preap*, 139 S. Ct. at 969.[19] The memos ignore § 1226(c), both on their face and in practice.

a) The memos violate § 1226(c) on their face.

On their face, the memos violate section 1226(c) in at least four ways.

First, they limit DHS's and ICE's enforcement to terrorists, spies, aggravated felons, and certain gang members. DE 4-3 at 3; DE 4-4 at 5–6. But § 1226(c)'s

[19] *See also United States v. Garcia-Rodriguez*, 640 F.3d 129, 133 (5th Cir. 2011) ("[T]he Attorney General is *required* to take aliens who have committed felonies into custody." (emphasis added)).

commands apply to aliens who commit many other crimes.[20] The memos do not prioritize aliens who commit those crimes, and so are contrary to law.[21]

Second, even for aggravated felons and specified gang members, the memos require a separate public-safety analysis. DE 4-3 at 6; DE 4-4 at 5–6. This added requirement contradicts the mandatory nature of § 1226(c). One of the purposes of § 1226(c) was to stop immigration officials' evaluating whether criminal aliens posed a public-safety threat. *See Demore*, 538 U.S. at 518–19. "[I]mmigration officers often underestimate those risks, which is why Congress eliminated their discretion" with § 1226(c). *Sylvain v. Att'y Gen. of U.S.*, 714 F.3d 150, 161 n.11 (3d Cir. 2013).[22]

Third, the memos flip the law on its head by not prioritizing mandatory § 1226(c) criminal aliens and instead prioritizing discretionary, *non-criminal* § 1226(a) aliens. The memos prioritize aliens who enter the United States after November 1, 2020. DE 4-4 at 5. So if an alien arrives after that date with a valid

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[20] 8 U.S.C. § 1182(a)(2)(A) (moral turpitude); *id.* § 1227(a)(2)(A)(i) (same); *id.* § 1182(a)(2)(A) (controlled substances); *id.* § 1227(a)(2)(B) (same); *id.* § 1182(a)(2)(H) (human trafficking); *id.* § 1182(a)(2)(I) (money laundering); *id.* § 1227(a)(2)(C) (firearms offenses).

[21] In fact, in focusing on aggravated felonies, the agencies have essentially reverted to the pre-1996 version, then codified in § 1252(a)(2)(A). *See supra* note 2.

[22] Even accepting that Defendants could add a separate "public-safety" analysis to § 1226(c), the "public-safety factors" are a poor fit. Many rest on humanitarian concerns. DE 4-4 at 6.

visa, commits no crimes, and overstays that visa, the memos require ICE officials to prioritize *that* alien rather than, for example, the amphetamine trafficker Florida identified. DE 29-2 at 2–3.

Fourth, even assuming approval to arrest non-priority § 1226(c) aliens will ever be granted, *see* DE 4-4 at 7, the requirement of a written justification through the chain of command contemplates that approval will sometimes be denied. That alone violates § 1226(c).

b) The memos violate § 1226(c) based on the evidence.

The memos on their face purport not to forbid immigration enforcement because they contain "exceptions" that allow enforcement against non-priorities. DE 4-4 at 7. But the record, especially ICE's emails, shows that ICE is treating the memos as a prohibition. *See* DE 4-1; DE 29-1.

More importantly, the "exception" is designed to frustrate, not facilitate, non-priority enforcement. To arrest a "non-priority," the memos require ICE officials to submit a written justification "through the chain of command" and to receive approval by the Field Office Director or Special Agent in Charge. DE 4-4 at 7. According to former Acting ICE Director Homan, this exception is "meaningless." DE 4-18 at 11. The Field Office Director and Special Agent in Charge are senior positions, have "hundreds of officers" working for them, and work 12-hour days or longer. *Id.* Meanwhile, ICE officers often make arrest decisions "within hours or

even minutes," *id.*, and criminal aliens flee, as Congress recognized. *In Re Rojas*, 23 I. & N. Dec. at 122 (citing S. Rep. No. 104-48 (1995)). In short, the exception's "practical impact" is "to prohibit civil immigration enforcement that is not considered a 'priority.'" DE 4-18 at 11.

The exception to the exception only makes matters worse. It allows immediate arrests—with a process for the arresting officer to explain his failure to seek preapproval—only in situations posing "an imminent threat to life" or "imminent and substantial risk to property." DE 4-4 at 7. This exception is narrow. It does not even allow actions to prevent serious bodily injury. Consider a particularly stark example. Suppose a removable drug trafficker is standing on a street corner torturing a rival gang member. An ICE officer cannot invoke the exception unless that torture is likely to kill the rival gang member.

* * *

President Obama's Solicitor General said it best: "Congress has told DHS that it has to prioritize the removal of criminal aliens." Oral Arg. Tr. 21:9–22, *United States v. Texas*, 136 S. Ct. 2271 (No. 15-674).[23] Defendants' affirmative failure to do so is contrary to law.

[23] https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/15-674_b97d.pdf.

2. *The memos are arbitrary and capricious.*

Defendants ignored Congress; failed to provide adequate reasoning behind the factors they purported to consider, *see Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); ignored important aspects of the problem, *see Michigan v. EPA*, 576 U.S. 743, 751–53, 759–60 (2015); and failed to justify departing from decades-old policy by considering lesser alternatives and reliance interests, *see Regents*, 140 S. Ct. at 1913; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Their actions therefore are arbitrary and capricious and should be set aside. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

1. Even if § 1226(c) does not create a mandatory duty, at a minimum the statute reflects a strong congressional preference for arresting § 1226(c) criminal aliens. The memos never acknowledge § 1226(c)—whether as a preference or a command—and provide no reasoning for defying it. Even if not contrary to law, that renders the memos arbitrary and capricious. If the APA requires anything, it requires an agency to explain itself before thumbing its nose at Congress. *See Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001) ("[T]he agenc[ies] may not ignore Congress.").

2. Relatedly, before ICE officials can arrest even aggravated felons, the § 1226(c) aliens who are "priorities," the memos mandate a public-safety

analysis. Again, one of the purposes of § 1226(c) was to stop immigration officials' evaluating whether criminal aliens posed a public-safety threat. *See Demore*, 538 U.S. at 518–19; *Sylvain*, 714 F.3d at 161 n.11.

3. Defendants "point[ed] . . . to [no] data," *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 499 (D.C. Cir. 1988), to "explain why" they took the actions in the memos, *State Farm*, 463 U.S. at 48. The agencies asserted that limited resources and COVID-19 justified their actions. But "[m]ere conclusory statements . . . are simply inadequate." *Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. OSHA*, 965 F.2d 962, 976 (11th Cir. 1992). The agencies provided no evidence of scarce resources and made no attempt to explain why, after almost a year of enforcing the immigration laws despite COVID-19, the pandemic suddenly rendered compliance with § 1226(c) impossible.[24]

4. DHS and ICE ignored an important aspect of the problem: the massive costs imposed by their actions, including on states like Florida. These are "a centrally relevant factor when deciding whether to regulate," *Michigan*, 576 U.S. at 752–53, especially costs to "States and local governments," *Regents*, 140 S. Ct. at 1914. The memos do not mention costs at all.

[24] The sole declarant for Defendants who even mentioned resource constraints alluded to them only in vague terms, DE 23-3 at 7, leaving the distinct impression that no officer of the United States would swear under oath that ICE lacks the resources to arrest the dangerous criminals at issue.

5. DHS failed to explain its "extreme departure from prior practice," *see E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 858 (N.D. Cal. 2018), as required by the APA, *Regents*, 140 S. Ct. at 1913. The memos barely even "display awareness that [DHS] *is* changing position." *Fox Television*, 556 U.S. at 515 (emphasis in original). And DHS ignored lesser alternatives to its extreme departure that would still fall within the ambit of the Obama and Trump Administrations' approach. DE 4-5 at 3; DE 4-6 at 4–5.

6. DHS also ignored the "serious reliance interests" of states like Florida. *See Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1114 (D.C. Cir. 2019). Florida has relied on the federal government to protect it from criminal-alien crime, including enacting a statutory scheme to support the federal government, *see* Ch. 908, Fla. Stat., and entering into dozens of agreements with the federal government. DE 4-7 at 7–11. "Ignor[ing]" these reliance interests and disregarding lesser alternatives is "arbitrary and capricious." *Regents*, 140 S. Ct. at 1913.

For all these reasons, the memos are arbitrary and capricious.

3. *Defendants failed to provide notice and comment.*

The APA required DHS and ICE to provide notice of, and comment on, the memos because they are legislative rules that "affect individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979); *see* 5 U.S.C. § 553(b)–(d). Put differently, the memos create "new law, rights, or

duties." *Warshauer v. Solis*, 577 F.3d 1330, 1337 (11th Cir. 2009).[25]

Together with the rights and obligations discussed above, *supra* 25–27, the memos limit ICE officials' discretion. "[T]his type of cabining of an agency's prosecutorial discretion" suggests a legislative rule. *See Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987).

This Court has also held that federal immigration officials must engage in rulemaking when changing a policy to detain *more* aliens. *See Jean*, 711 F.2d at 1469, 1476, 1478. Changing a decades-old policy to detain *less* aliens—especially when doing so violates clear statutory commands—is no different.

Finally, "post-guidance events" like ICE officials' lifting detainers explicitly because of the memos, *see* DE 4-1, "suggest[s] that [ICE] has applied the [memos] as if [they] were binding." *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014) (Kavanaugh, J.). So, too, does ICE's creating a formal process for aliens to request a case review to argue that "they do not meet ICE's priorities" under the memos. DE 4-17 at 3.

B. Compliance with the memos violates § 1226(c) and the Constitution.

Even if Florida's claims were unreviewable under the APA—and they are not—Florida remains entitled to an injunction. Courts have "a long history of

[25] One court has already held that the memos' 100-day pause on removals required notice and comment, *Texas*, 2021 WL 2096669, at *42–47.

judicial review of illegal executive action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). And they "have long exercised the traditional powers of equity . . . to prevent violations of constitutional rights." *Simmat v. BOP*, 413 F.3d 1225, 1231 (10th Cir. 2005) (McConnell, J.). Indeed, when illegal executive action threatens injury, federal "officer[s] cannot claim immunity from injunction[s]." *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619–20 (1912).[26]

Even outside the APA, the memos are illegal and should be enjoined. They violate § 1226(c), the separation-of-powers doctrine, and the take care clause. Where, as here, the executive branch "takes measures incompatible with the expressed or implied will of Congress, [its] power is at its lowest ebb" and it must rely on its "own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring). Defendants have no constitutional powers that would allow them to ignore § 1226(c). And if they rely on the Constitution's take care clause, not only is

[26] *See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) (affirming injunction against federal officials); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110–11 (1902) (reversing with instructions to grant injunctive relief against federal officer).

that not a sufficient Article II power under *Youngstown*, but it cuts the other way here.

The executive's duty to "faithfully execute[]" the laws, U.S. Const. art. II, § 3, "follows out the strong injunctions of [the President's] oath of office, that he will 'preserve, protect, and defend the constitution.'" Joseph Story, *Commentaries on the Constitution of the United States* 316 (Quid Pro Books 2013) (1833). This constitutional duty "means that the [P]resident is not permitted to dispense with or suspend statutes the way King James II did before the Glorious Revolution of 1688." *Texas*, 2021 WL 2096669, at *36 (emphasis in original) (quoting Michael Stokes Paulsen, Steven G. Calabresi, Michael W. McConnell & Samuel L. Bray, *The Constitution of the United States* 317 (Robert C. Clark et al. eds., 2d ed. 2013)).

Suspending statutes is exactly what the Biden Administration is doing through the memos—even if on an "interim" basis. Defendants' actions "affirmatively displace[] a congressional[] mandate[]" and thus at a minimum "implicate[] constitutional separation of powers concerns"—if not outright violate them. *Make the Rd. NY v. Pompeo*, 475 F. Supp. 3d 232, 258 (S.D.N.Y. 2020).

Florida's take care and separation of powers claims, DE 1 ¶¶ 94–101, then, are "appropriately considered as constitutional claims subject to judicial review," *Pompeo*, 475 F. Supp. At 258–59. Yet the district court did not pass on these claims below.

IV. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST FAVOR PRELIMINARY INJUNCTIVE RELIEF.

The equities and public-interest factors merge for federal-government action. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Both favor an injunction here. "The Supreme Court has recognized that the public interest in enforcement of the immigration laws is significant." *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d. 1211, 1221 (D.C. Cir. 1981) (collecting cases). Thus, "[t]here is always a public interest in prompt execution of removal orders," especially if "the alien is particularly dangerous," *Nken*, 556 U.S. at 436, as are many § 1226(c) criminal aliens. And the aliens at issue here cause "safety risks." *City of Los Angeles v. Barr*, 929 F.3d 1163, 1178 (9th Cir. 2019) (quoting *Arizona*, 567 U.S. at 398).

There also "is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters*, 838 F.3d at 12.[27] And Florida's harm, combined with the "public safety nightmare" created by the memos, DE 4-18 at 9, far outweighs any harm to Defendants, who enforced § 1226(c) for almost the entire first year of the pandemic.

[27] *See also Cent. United Life., Inc. v. Burwell*, 128 F. Supp. 3d 321, 330 (D.D.C. 2015) ("Forcing federal agencies to comply with the law is undoubtedly in the public interest.").

CONCLUSION

For all these reasons, this Court should reverse the district court's decision denying Florida's motion for a preliminary injunction and preliminarily enjoin Defendants from enforcing the memos.

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June 14, 2021

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I certify that on June 14, 2021, I electronically filed this brief with the Clerk of Court by using the Court's CM/ECF system, which will send a notice of electronic filing to all parties in the case who are registered through CM/ECF.

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