

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.

APPELLANT'S MOTION FOR EXPEDITED APPEAL

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

ASHLEY MOODY
Attorney General

JASON H. HILBORN
Assistant Solicitor General
jason.hilborn@myfloridalegal.com

JAMES H. PERCIVAL
Deputy Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
(850) 410-2672 (fax)
james.percival@myfloridalegal.com

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

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

1. ACLU of Florida, *Proposed Amicus Below*
2. Advocates for Victims of Illegal Alien Crime, *Proposed Amicus Below*
3. American Civil Liberties Union, *Proposed Amicus Below*
4. Bowen, Brigham J., *Attorney for Defendants-Appellees*
5. Boynton, Brian, *Attorney for Defendants-Appellees*
6. Cholera, Kuntal V., *Attorney for Defendants-Appellees*
7. Dunn, Kristian, *Attorney for Proposed Amicus Below*
8. Flynn, Sean P., *Magistrate Judge*
9. Guard, John, *Attorney for Plaintiff-Appellant*
10. Hilborn, Jason H., *Attorney for Plaintiff-Appellant*
11. Honeywell, Charlene Edwards, *District Judge*
12. Immigration Reform Law Institute, *Proposed Amicus Below*
13. Johnson, Tae, *Defendant-Appellee*
14. Kacou, Amien, *Attorney for Proposed Amicus Below*
15. Kamoutsas, Rachel, *Attorney for Plaintiff-Appellant*
16. Kirschner, Adam D., *Attorney for Defendants-Appellees*
17. Knapp, Michael F., *Attorney for Defendants-Appellees*

18. Mayorkas, Alejandro, *Defendant-Appellee*
19. Miller, Troy, *Defendant-Appellee*
20. Moody, Ashley, *Attorney General of Plaintiff-Appellant*
21. Patel, Anita, *Attorney for Plaintiff-Appellant*
22. Percival, James H., *Attorney for Plaintiff-Appellant*
23. Renaud, Tracy, *Defendant-Appellee*
24. Reuveni, Erez, *Attorney for Defendants-Appellees*
25. Rosen-Shaud, Brian C., *Attorney for Defendants-Appellees*
26. State of Florida, *Plaintiff-Appellant*
27. United States Citizenship & Immigration Services, *Defendant-Appellee*
28. United States Customs & Border Protection, *Defendant-Appellee*
29. United States Department of Homeland Security, *Defendant-Appellee*
30. United States Immigration & Customs Enforcement, *Defendant-Appellee*
31. United States of America, *Defendant-Appellee*
32. Zimolong, Walter Stephen, *Attorney for Proposed Amicus Below*

APPELLANT'S MOTION FOR EXPEDITED APPEAL

Pursuant to Federal Rule of Appellate Procedure 27 and Eleventh Circuit I.O.P. 3, the State of Florida respectfully asks this Court to expedite its interlocutory appeal of the district court's order denying its motion for preliminary injunction. *See* 28 U.S.C. § 1657 (requiring expedited consideration of such motions). Florida asks that the Court set an expedited briefing schedule, as detailed below, and schedule oral argument for the next available date following completion of the briefing schedule. As good cause Florida states as follows:

1. Congress requires that the executive branch arrest certain criminal aliens at the time they are released from criminal custody and detain them throughout their removal proceedings. 8 U.S.C. § 1226(c). The Biden Administration is refusing to do so, deciding instead to allow dangerous criminals to roam freely in Florida. As the district court recognized, that decision causes Florida harm. DE 38 at 19. And that harm grows by the day—every day the federal government shirks its mandatory obligations, Florida spends money supervising criminals who should be detained. Further, the federal government is releasing more and more dangerous criminals—including drug traffickers, burglars, aggravated stalkers, and other violent offenders—into Florida to reoffend. Nonetheless, the district court denied Florida's motion for a preliminary injunction, concluding that the federal government's reckless policies were not subject to judicial review. DE 38. Because Florida will

continue to suffer harm during the pendency of this appeal, it moves to expedite.

2. On his first day in office, President Biden issued Executive Order 13993, Revisions of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 20, 2021). The same day, the Department of Homeland Security (“DHS”) issued a memorandum halting most immigration enforcement. *See* DE 4-3 (the “January 20 Memo”). As most relevant here, the January 20 Memo did two things.

3. *First*, 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 723856, at *4, *53 (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.

4. *Second*, the January 20 Memo, under the guise of “enforcement priorities,” halted the vast majority of interior immigration enforcement except as to those who entered the United States on or after November 1, 2020. As to 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. DE 4-3 at 3–4. On February 18, Immigration and Customs Enforcement (“ICE”) issued a second memorandum further implementing those “priorities.” DE 4-4 (the “February 18 Memo”).

5. The memos purport not to prohibit enforcement against other categories of

aliens, but they make doing so all but impossible by requiring advanced approval from senior officials, either the Field Office Director or Special Agent in Charge. *Id.* at 6–7. And while there is supposedly an exigent-circumstances exception, it is limited to “imminent threat[s] to life” or “imminent substantial threat[s] to property.” *Id.* at 7. Thus, even if an ICE officer encountered a removable alien who was about to cause great bodily injury, he would be precluded from acting. As former ICE Director Thomas Homan explained, the memos’ exceptions are “meaningless and the practical impact” of the memos is “to prohibit civil immigration enforcement that is not considered a ‘priority.’” DE 4-18 at 11.

6. On March 8, 2021, Florida filed this action in the Middle District of Florida. DE 1. The next day, Florida moved for a preliminary injunction. DE 4. As relevant to this appeal, Florida argued that 8 U.S.C. § 1226(c), which provides that DHS “shall take into custody” certain criminal aliens, creates a mandatory, non-discretionary duty to arrest, detain, and remove defined criminal aliens, and that 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 are inconsistent with a federal statute, *id.* at 24.

7. The record contains myriad examples of ICE refusing to take custody of

convicted drug traffickers, burglars, and other violent criminals at the time of their release from state custody, and emails from ICE admit that the sole reason for doing so is the challenged memos. *See* DE 4-1; DE 4-2; DE 28-1; DE 28-2. The federal government admits that many of these individuals are criminal aliens subject to § 1226(c). *See* DE 23-4; DE 30-1.

8. In support of its motion, Florida argued that § 1226(c) uses mandatory language with respect to criminal aliens, but discretionary language for other aliens. *Compare* 8 U.S.C. § 1226(a) (stating that “an alien may be arrested”), *with id.* § 1226(c) (stating that immigration officials “shall take into custody” criminal aliens). Moreover, a statutory note enacted with § 1226(c)—which is not legislative history but is part of the statute—makes clear that Congress intended to create a mandatory duty and even gave immigration officials a temporary reprieve from § 1226(c)’s requirements so they could increase detention capacity and hire additional officers. *See* DE 34-1 at 8–10 (discussing 110 Stat. 3009); *Preap v. Nielsen*, 139 S. Ct. 954, 969 (2019) (relying on this statutory note, which the Court refers to as the “Transition Period Custody Rules”).

9. Section 1226(c)’s legislative history shows the same. *See Demore v. Kim*, 538 U.S. 510, 513 (2003) (noting that Congress enacted § 1226(c) because it was “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”); S. Rep.

No. 104-48, at 6 (1995) (noting “a consensus” that “there is just no place in America for non-U.S. citizens who commit criminal acts here”).

10. In addition, Florida relied on case law stating that § 1226(c) creates a duty to arrest. *E.g.*, *Preap*, 139 S. Ct. at 966 (“The Secretary *must* arrest those aliens guilty of a predicate offense.” (emphasis in original)); *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (“Unlike the word ‘may,’ which implies discretion, the word ‘shall’ usually connotes a requirement.”).¹

11. While its motion was pending, Florida became aware of a document produced in a related case, *Arizona v. DHS*, No. 21-cv-186 (D. Ariz. 2021), showing that Defendants knew from the beginning that the challenged memos were an intentional, drastic reduction in interior immigration enforcement, not a reallocation of resources (as Defendants argued in opposition to Florida’s motion). *See* DE 34 at 2–3; *see also* DE 38 at 23 (granting Florida’s motion to supplement the preliminary injunction record to include this document).

12. On May 18, 2021, the district court denied Florida’s motion. DE 38. It held

¹ *Accord In re Rojas*, 23 I. & N. Dec. 117, 122 (BIA 2001) (en banc) (noting that Congress enacted § 1226(c) to ensure that federal authorities “det[ain] and remov[e] all criminal aliens” (emphasis in original)); *Arizona v. United States*, 567 U.S. 387, 456–57 (2012) (Alito, J., concurring in part and dissenting in part) (describing § 1226(c) as leaving “the Executive no discretion but to take the alien into custody”); *United States v. Garcia-Rodriguez*, 640 F.3d 129, 133 (5th Cir. 2011) (noting that § 1226(c) “provid[es] that the [Secretary] is required to take aliens who have committed felonies into custody”).

that Florida was harmed by the memos, *id.* at 19, but concluded that the memos are not subject to judicial review under the Administrative Procedure Act (“APA”) because they are not final agency action and because the decision whether to comply with § 1226(c) is committed to agency discretion by law, *id.* at 22–23. The court did not address Florida’s statutory or constitutional claims but denied Florida’s motion in its entirety based on its APA analysis. *Id.* at 23.

13. Florida now asks this Court to expedite its appeal to mitigate the monetary harm it is suffering by the day, which is unrecoverable due to Defendants’ sovereign immunity, *see Odebrecht Const., Inc. v. Sec’y, Fla. Dep’t of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013). Florida also believes, as Congress did when it passed § 1226(c), that it is only a matter of time before a criminal alien—such as the aggravated stalker or the amphetamine trafficker that Defendants admittedly refuse to take into custody, DE 30-1 at 1–3—hurts someone, or worse.

For the foregoing reasons, Florida asks the Court to grant its motion to expedite. Florida proposes the following briefing schedule, and asks the Court to schedule oral argument for the next available date following completion of the briefing schedule. Defendants oppose the relief requested in this motion, but have agreed to file their response within four days. Florida will file its reply, if any, two days after.

- Florida's initial brief will be due ten (10) days after the Court grants this motion.
- Amicus briefs supporting Florida will be due three (3) days after Florida files its initial brief.
- Defendants' response brief will be due fifteen (15) days after Florida files its initial brief.
- Amicus briefs supporting Defendants will be due three (3) days after Defendants file their response brief.
- Florida's reply brief will be due ten (10) days after Defendants file their response brief.

WHEREFORE, Florida respectfully asks the Court to grant its motion to expedite.

Respectfully submitted.

ASHLEY MOODY
Attorney General

/s James H. Percival

JAMES H. PERCIVAL
Deputy Attorney General

JASON H. HILBORN
Assistant Solicitor General
Office of the Attorney General

PL-01, The Capitol
Tallahassee, FL 32399-1050

(850) 414-3300

(850) 410-2672 (fax)

james.percival@myfloridalegal.com

jason.hilborn@myfloridalegal.com

CERTIFICATE OF COMPLIANCE

14. This document complies with the type-volume limits of Fed. R. App. P. 27(d)(2) because this document contains 1,601 words.

15. This document complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ James H. Percival

JAMES H. PERCIVAL
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 26, 2021, I electronically filed the foregoing 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, and I otherwise served the foregoing by email to counsel for Defendants.

/s/ James H. Percival

JAMES H. PERCIVAL
Deputy Attorney General