No. 21-11715

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF FLORIDA,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF FOR APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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

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STATEMENT REGARDING ORAL ARGUMENT

The district court's decision should be affirmed for the reasons stated by the district court. The government stands ready to present oral argument if the Court would find it useful.

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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 has constructed an immigration enforcement system whose "principal feature" is the "broad discretion exercised by immigration officials." *Id.* at 395-96. This reflects the reality that federal officials must deploy their 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 across multiple Administrations over many decades and with the Secretary of Homeland Security's responsibility to "establish[] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), laid out a framework to guide agency officials' exercise of their enforcement discretion. The memoranda state that, in light of the agencies' limited resources, officials should prioritize enforcement actions against noncitizens who pose the greatest threats to national security, border security, and public safety. And the memoranda recognize that federal immigration officials will continue to take enforcement actions against other noncitizens beyond the presumed priority groups, based on the facts and circumstances of individual cases.

Florida challenges the issuance of that framework, claiming primarily that the Immigration and Nationality Act (INA) requires the Secretary to detain every noncitizen who falls within a group that the statute refers to as "criminal aliens," 8 U.S.C. § 1226(c), and that the memoranda contradict that supposed statutory mandate. But Florida misreads federal law. There is no such mandate, and there has never been an expectation that DHS would detain all noncitizens in that expansive 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, Florida is wrong to contend that the memoranda will harm the State by causing it to expend additional resources. Florida's claims of harm rest on a chain of 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 the district court properly recognized, Florida's claims are not judicially reviewable because the priorities memoranda are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and do not represent "final agency action," *id.* § 704. And even beyond the threshold grounds relied on by the district court, each of Florida's claims fails on the merits.

STATEMENT OF JURISDICTION

Plaintiff invoked the jurisdiction of the district court under 28 U.S.C. § 1331.[1] The district court denied plaintiff's motion for a preliminary injunction on May 18, 2021. Dkt. No. 38. Plaintiff filed a notice of appeal on May 19, 2021. Dkt. No. 40. As explained below, *infra* pp. 17-25, this Court lacks jurisdiction over the appeal because plaintiff does not have standing to sue. *See Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008).

STATEMENT OF THE ISSUE

Whether the district court properly denied Florida's request for a preliminary injunction to prohibit the implementation of memoranda establishing a framework to guide DHS officials' exercise of enforcement discretion.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

The INA, 8 U.S.C. § 1101 *et seq.*, authorizes the United States to remove certain noncitizens from within its borders. *Id.* § 1182; *see id.* § 1227 (setting forth various "classes of deportable aliens"). The removal process usually begins when DHS initiates a removal proceeding against the noncitizen, *id.* § 1229(a), a discretionary decision that requires DHS to account for the enforcement policies and priorities that

[1] Plaintiff also cited the Tucker Act, 28 U.S.C. § 1346, and the Administrative Procedure Act's cause-of-action and venue provisions, 5 U.S.C. §§ 702-703. These statutes do not supply a basis for jurisdiction over the claims at issue.

Congress has directed the Secretary to establish, *see* 6 U.S.C. § 202(5). DHS has discretion to decide which of "any applicable ground" of removability to charge. 8 U.S.C. § 1229a(a)(2). An immigration judge then determines whether the noncitizen is removable on that basis, and if so, whether to enter an order of removal. *Id.* § 1229a(c)(1)(A); *see* 8 C.F.R. § 1240.12. The noncitizen can obtain review of such an order, first through an administrative appeal and then through a petition for review in the courts of appeals. *See* 8 U.S.C. § 1101(a)(47); 8 C.F.R. § 1003.1(b). But once an order of removal becomes administratively final (or once a stay pending judicial review expires), the noncitizen generally becomes subject to removal by DHS. 8 U.S.C. § 1231(a).

Section 1226 sets forth the framework for arresting and detaining noncitizens present in the United States "pending a decision on whether the alien is to be removed from the United States." 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) further 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 related to protection of witnesses in criminal investigations is satisfied, 8 U.S.C. § 1226(c)(2).

"A principal feature of th[is] 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.* (*AADC*), 525 U.S. 471, 483 (1999). 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 March 2021, ICE is "manag[ing] the caseload of over 3.2 million noncitizens currently in removal proceedings or who have been issued final orders of removal." Dkt. No. 23-3, ¶ 13. Yet Congress has appropriated money to fund just "34,000 detention beds." Dkt. No. 23-3, ¶ 14.

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* Dkt. No. 4-3 (DHS Memorandum). The memorandum explained that, because of the COVID-19 pandemic, the United States was "fac[ing] significant operational challenges at the southwest border." Dkt. No. 4-3, at 2. 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." *Id.*

Given those challenges and other factors, the memorandum instructed DHS components to conduct a "Department-wide review of policies and practices concerning immigration enforcement." Dkt. No. 4-3, at 3. In particular, the memorandum requested 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." *Id.*

The memorandum then set forth interim civil-enforcement guidelines "pending completion of that review." Dkt. No. 4-3, at 3. 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." *Id.* The memorandum therefore instructed DHS components to prioritize "national security, border security, and public safety" while the agency developed "detailed revised enforcement priorities." *Id.* 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. Dkt. No. 4-3, at 3.

The memorandum expressly noted that "nothing" in the priorities "prohibits the apprehension or detention of" noncitizens "who are not identified as priorities." Dkt. No. 4-3, at 4. 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." Dkt. No. 4-3, at 5. The interim priorities went into effect on February 1,

2021, and will "remain in effect until superseded by revised priorities developed in connection with the review" discussed above. Dkt. No. 4-3, at 4.[2]

2. The ICE Memorandum

The second memorandum, which implemented the DHS Memorandum, was issued by ICE on February 18, 2021. Dkt. No. 4-4 (ICE Memorandum). The ICE Memorandum offered further guidance with respect to the removal priorities identified by the DHS 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." Dkt. No. 4-4, at 3. 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.

[2] The DHS Memorandum also directed a 100-day pause on removals of certain noncitizens subject to a final order of removal. Dkt. No. 4-3, at 4-5. A district court preliminarily enjoined the pause on a nationwide basis. *See* Dkt. No. 38, at 6 n.3 (citing *Texas v. United States*, No. 6:21-cv-3, 2021 WL 723856 (S.D. Tex. Feb. 23, 2021)). Because the pause expired in April 2021, Florida's claims respecting the pause are moot. Dkt. No. 38, at 12.

Id. "[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." Dkt. No. 4-4, at 4. Accordingly, the ICE memorandum instructed officers to focus enforcement efforts on the categories of noncitizens specified in the DHS memorandum. Dkt. No. 4-4, at 5-6. 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." Dkt. No. 4-4, at 2.

Like the DHS Memorandum, the ICE Memorandum reiterated that the interim priorities do not "prohibit the arrest, detention, or removal of any noncitizen." Dkt. No. 4-4, at 4. 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. Dkt. No. 4-4, at 7. 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. *Id.* 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." Dkt. No. 23-3, ¶ 9.

C. Procedural History

Plaintiff, the State of Florida, challenged the DHS Memorandum and the ICE Memorandum in district court. Florida moved for a preliminary injunction on the theory that the priorities violated the Administrative Procedure Act (APA) and the Constitution. The district court denied Florida's motion. Dkt. No. 38.

At the threshold, the district court rejected many of Florida's arguments with respect to the harms that the priorities allegedly cause. The court did not accept Florida's theory that the priorities would lead to higher crime rates and, in turn, more governmental expenditures. Dkt. No. 38, at 17 ("Even assuming that application of the interim policies results in decreased interior immigration enforcement, whether the challenged interim policies will thereafter result in an increase in criminal activity in Florida requires stacking assumptions and is speculative."); *accord Arpaio v. Obama*, 797 F.3d 11, 24-25 (D.C. Cir. 2015) (rejecting similar allegations of injury for identical reasons). Nor did the court accept Florida's argument that it had standing to vindicate its quasi-sovereign interests as a State. Dkt. No. 38, at 13-14 (recognizing that, despite Florida's invocation of its "special position" as a State, Florida was still required to "demonstrat[e] . . . an actual and imminent harm" to establish standing to sue (quotation omitted)).

The district court did conclude, based on allegations introduced for the first time at oral argument, that Florida has standing to challenge the priorities because it must spend money to supervise noncitizens who fall outside the presumed priorities

and who are, as a result, not taken into custody by DHS when they are released from criminal detention. Dkt. No. 38, at 17-19. But the court then held that Florida was unlikely to succeed on the merits of its claims. First, the court ruled that the memoranda are not subject to judicial review because they are not final agency action. The court emphasized that the memoranda "do not change anyone's legal status" and do not "prohibit the enforcement of any law or detention of any noncitizen." Dkt. No. 38, at 21. Thus, they are not subject to judicial review. *Id.*

Second, the district court held that, even if the priorities did constitute final agency action, they remain unreviewable under the APA because they "relate[] to the prioritization of immigration enforcement cases," which is committed to agency discretion by law. Dkt. No. 38, at 22-23; *see Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (recognizing that "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing," and that "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities").

D. Standard of Review

The district court's denial of a preliminary injunction is reviewed for abuse of discretion. *Forsyth County v. U.S. Army Corps of Eng'rs*, 633 F.3d 1032, 1039 (11th Cir. 2011). The court's factual findings are reviewed for clear error and its legal conclusions are reviewed de novo. *Id.*

SUMMARY OF ARGUMENT

The memoranda at issue simply exercised the Secretary's statutory authority to do what Administrations have done for decades: identify and articulate a set of principles to guide the agencies' allocation of limited resources. As the memoranda explain, DHS and ICE have "limited resources" and "cannot respond to all immigration violations or remove all persons unlawfully in the United States." Dkt. No. 4-3, at 3. 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. *Id.*; Dkt. No. 4-4, at 7. In attempting to argue that the courts should enjoin the Executive's exercise of discretion and prioritization of limited resources, Florida fails at every turn: the State has not demonstrated standing to sue, the memoranda are unreviewable under the APA, and each of the State's claims fails on the merits.

I.A. The district court properly rejected Florida's main theory of standing—that implementation of the priorities will decrease immigration enforcement against noncitizens covered by § 1226(c) in Florida, which will increase crime in Florida, and then require Florida to expend additional funds in response to that crime—because that theory 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 in Florida subject to § 1226(c), Florida has not established 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. The inadequacy of Florida's 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. Although the district court properly rejected Florida's primary theory of standing, it erroneously accepted a new theory Florida first raised at oral argument: that the memoranda will require Florida to expend additional resources on supervised release of certain noncitizens who fall outside the priorities. That alternative theory likewise rests on unsupported speculation. Florida has failed to demonstrate that the memoranda's certainly impending effect will be a reduction in the detention of noncitizens who are covered by § 1226(c) and who live in Florida. The State has also failed to prove that it will incur any specific additional cost related to increased supervision of noncitizens. And Florida has failed to show how any asserted injuries could be redressed by the relief sought here. The agencies' resource limitations will always require them to prioritize certain enforcement actions over others, whether or not the challenged memoranda are enjoined, and particularly in light of that reality, Florida has not established any concrete link between enjoining the priorities and decreased costs of supervision.

C. Even assuming that Florida had demonstrated some sufficiently concrete, impending, redressable financial injury sufficient to support standing, that injury could not support preliminary injunctive relief. In contrast to the modest financial harm claimed by Florida, 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, and sowing confusion among enforcement officials.

II.A. Florida has 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).

Florida's sole response is to contend that 8 U.S.C. § 1226(c) overrides the Executive's longstanding enforcement discretion by imposing a mandatory command to detain certain noncitizens. Florida points to the statute's use of the word "shall."

But that argument misunderstands the structure of the statute, which Congress designed to ensure that certain noncitizens whom the Secretary has decided to detain and pursue removal proceedings against may not obtain release on bond or parole. 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). Florida's contrary argument also ignores the structure of the INA, which reflects Congress's understanding that the exercise of enforcement discretion in this context is unreviewable.

B. For similar reasons, Florida fails 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 § 1226(c) suggests that Congress intended to permit Florida to proceed with a suit like this one. Florida thus falls outside the relevant zone of interests, and it may not invoke the APA's cause of action to obtain judicial review.

C. Finally, Florida's 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. Florida's APA claims also fail on the merits. The memoranda do not exceed the agencies' statutory authority, both because § 1226(c) cannot be read to impose a mandatory command on the Secretary (much less a command enforceable by Florida) and because the memoranda comport with the statute's requirements. The memoranda are not arbitrary and capricious because 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." *Miami-Dade County v. U.S. EPA*, 529 F.3d 1049, 1065 (11th Cir. 2008) (per curiam) (quotation omitted). And the memoranda are not subject to notice-and-comment requirements because they constitute "general statements of policy," 5 U.S.C. § 553(b)(3)(A), not binding legislative rules.

B. Florida's last-ditch attempt to bring statutory and constitutional claims other than through the APA fares no better. Those claims simply collapse into Florida's (incorrect) statutory claims. And Florida has failed to identify any non-APA cause of action on which it could rely. In any event, none of these additional claims furnishes any basis for injunctive relief.

ARGUMENT

A preliminary injunction is an "extraordinary and drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four requisites." *American Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009) (quotation omitted). 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." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Because Florida has failed to carry its burden with respect to each of those criteria, the district court properly denied Florida's motion for preliminary injunctive relief.

I. Florida Has 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*, 136 S. Ct. 1540, 1547 (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). Florida has failed to make the requisite showing.

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

The district court properly rejected the principal theory of injury that Florida advances (Br. 21-24): that the priorities will result in increased crime in Florida and cause Florida to expend additional funds in response to that crime. As the district court recognized, those predictions amount to nothing more than speculation. At the outset, Florida's contrary assertions notwithstanding, the memoranda do not legally require any overall reduction whatsoever in the number of enforcement actions undertaken, much less do they require a reduction in enforcement against the particular noncitizens described in § 1226(c) who Florida claims are more likely to commit crimes. 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 § 1226(c). Moreover, they 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* Dkt. No. 4-4, at 4, 7 (ICE Memorandum); Dkt. No. 4-3, at 4 (DHS Memorandum). Such "actions have regularly been approved." *See* Dkt. No. 23-3, ¶ 9.

"Even assuming that application of the interim policies results in decreased interior immigration enforcement," Dkt. No. 38, at 17, Florida still cannot demonstrate the requisite concrete and imminent injury. To establish standing, Florida

must show not just that fewer noncitizens are being detained by the agencies but that the "certainly impending," *Clapper*, 568 U.S. at 409 (quotation omitted), result of that shift in enforcement resources will be additional criminal activity by noncitizens that Florida will be forced to spend additional resources combatting.

Florida's evidence falls short of that constitutional requirement. Florida relies principally (Br. 22) on a study suggesting that, in general, a majority of released prisoners (including both citizens and noncitizens) are rearrested within 3 years, and that the recidivism rate increases substantially within 9 years, as well as on congressional findings from the mid-1990s regarding recidivism rates among released noncitizens. That evidence does not suffice to establish standing for two reasons.

First, recidivism rates across the whole class 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. Without accounting for that specific prioritization of resources, Florida's general claims about recidivism are irrelevant. Second, Florida's 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 Florida's theory of standing—much less the derivative financial harm that Florida claims. Florida's additional reliance (Br. 22) on a declaration of a former ICE official, in which the

official opines that the memoranda could have serious consequences for state and local governments, fares no better. That declaration cites no evidence beyond a handful of anecdotes to support its conclusory opinion. *See* Dkt. No. 4-18, ¶¶ 23-24.

Accepting Florida's argument would be especially anomalous in light of the Supreme Court's repeated (and recently reiterated) 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); *accord 31 Foster Children v. Bush*, 329 F.3d 1255, 1266 (11th Cir. 2003) ("[F]uture injury that depends on . . . the . . . unauthorized acts of a third party is too speculative to satisfy standing requirements."). And although Florida invokes (Br. 21) *Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019), to support its attempt to rely 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. *Id.* Here, however, Florida has failed to show 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 Florida's 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 did not necessarily "contemplate[] the net removal of fewer individuals" than before. *Id.* Moreover, the 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 legally require any net reduction in removals. Nor do they require any reduction in detention or removals of noncitizens within the particular group—those covered by § 1226(c) and residing in the State—on which Florida focuses. 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.

Florida attempts to distinguish *Arpaio* by arguing (Br. 23-24) that it was "undisputed" that the challenged programs there did not lead to a reduction in enforcement. That argument lacks merit. As the D.C. Circuit explained, even assuming "that the challenged policies would mean more undocumented aliens remain in the country," the sheriff's theory still "depend[ed] on unsupported speculation" that the policies "will increase the number of crimes." *Arpaio*, 797 F.3d at 15. Florida also attempts to dismiss *Arpaio*'s reasoning as a mere "accounting exercise" that is irrelevant to the standing inquiry. *See* Br. 23 (quoting *Texas v. United States*, 809 F.3d 134, 156 (5th Cir. 2015)). But Florida's principal theory of harm—that the memoranda will lead to an increase in crime—requires just such an exercise. Unless Florida can show that the memoranda will cause more crime than would have occurred in their absence, it has failed to demonstrate that it will suffer any harm. The Fifth Circuit opinion that Florida relies on recognized that, when evaluating such a claim, it is proper to consider "offsetting benefits that are of the same type and arise from the same transaction as the costs." *Texas*, 809 F.3d at 155. The potential reduction in crime attributable to the memoranda's focusing resources on public-safety threats is precisely such a benefit.

Finally, Florida gestures (Br. 24) toward the "special solicitude" it should receive to protect its "quasi-sovereign interest in its sovereign territory and the

movement of people within it." Florida appears to suggest that a State can sue the United States whenever the federal government is uniquely positioned to prevent some harm to the State's abstract interests. But as the district court recognized, *see* Dkt. No. 38, at 14, that is not the law. The Supreme Court has made clear that a State, like any other litigant, must demonstrate the requisite "actual and imminent" injury. *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007) (quotation omitted). And for all the reasons described above, Florida has failed to connect the priorities framework to any concrete injury.

B. Florida's Assertions That The Interim Priorities Will Increase Supervised Release Costs Are Likewise Insufficient For Standing

Notwithstanding its correct rejection of Florida's principal theory of standing, the district court found standing based on a new theory raised by Florida at oral argument: that the memoranda will require Florida to expend additional resources on supervised release because "[w]hen ICE refuses to take custody of a criminal alien, Florida frequently must supervise the alien after release" from criminal detention. Br. 20-21; *see* Dkt. No. 38, at 18-19. That theory of standing fails because Florida has not demonstrated any financial impact related to the memoranda, much less an impact that would be redressed by a favorable decision.

Although Florida alleges that some noncitizens who are not detained by DHS and ICE will be subject to the State's supervision, Florida has not demonstrated that the memoranda will themselves have the certainly impending effect of a net reduction

in the detention or removal of noncitizens in the State who are subject to § 1226(c), let alone noncitizens in the State who are subject both to § 1226(c) and to Florida's supervised-release program. *See supra* pp. 18, 21-22. That is particularly true given that the agencies have only been appropriated funds sufficient to allow the detention of a small subset of the large group of removable noncitizens present in the country. *See* Dkt. No. 23-3, ¶¶ 13-14. (explaining that ICE is currently managing a caseload "of over 3.2 million noncitizens" but "is currently appropriated to fund 34,000 detention beds").

But even assuming that the group of noncitizens subject to Florida's supervision will increase as a result of the memoranda, Florida still has not demonstrated the requisite financial injury. For one, Florida has failed to demonstrate that the costs of supervision for the group of noncitizens who would otherwise be detained by DHS are greater than the costs of supervision for individuals who, under a different set of priorities, would not be detained. And in any event, Florida has cited no evidence proving that it has incurred (or will incur) any specific additional cost—by, for example, having to hire additional staff—related to any marginal increase in the number of noncitizens on supervised release.

Finally, even if Florida could show some such monetary cost, Florida has failed to show how those costs could be redressed by a favorable decision. It is undisputed that DHS and ICE have limited enforcement and detention resources, *see* Dkt. No. 4-3, at 3; Dkt. No. 4-4, at 3; Dkt. No. 23-3, ¶¶ 13-14, which means that "ICE has always

prioritized, and necessarily must prioritize, certain enforcement and removal actions over others," Dkt. No. 4-4, at 3. Even if the specific priorities contained in the memoranda were enjoined, the agencies could still pursue enforcement against only a fraction of removable noncitizens and would have to either implement a different priorities scheme or leave the necessary prioritization to the ad hoc decisions of individual officers. Florida has not explained how either alternative would address its alleged harm of having to supervise noncitizens who DHS and ICE are unable to arrest and detain.

The district court did not address these flaws in Florida's argument. *See* Dkt. No. 38, at 18. Instead, the court concluded that a State's "special solicitude" gives rise to a relaxed redressability requirement "in a procedural rights challenge such as this." *Id.* But Florida still must demonstrate "some possibility that the requested relief" will prompt the United States "to reconsider the decision that allegedly harmed" Florida. *Massachusetts*, 549 U.S. at 518. And here, Florida has failed to carry that burden because, no matter what relief Florida obtains, DHS and ICE will still be necessarily required, in light of their limited resources, to decline to pursue enforcement actions against some noncitizens.

C. Florida's Asserted Injuries Fail To Support Preliminary Injunctive Relief

Even assuming that Florida had demonstrated some sufficiently concrete, certainly impending, and redressable financial injury to support its standing, that injury

could not support preliminary injunctive relief. To obtain a preliminary injunction, Florida must demonstrate that "the balance of equities tips in [its] favor" and that "an injunction is in the public interest." *Winter*, 555 U.S. at 20. These factors "merge" where, as here, the government is the defendant. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Florida has demonstrated, at most, that the memoranda will require it to spend some additional resources on criminal enforcement or supervision. But Florida has never specified the magnitude of this 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 impair the Executive's "weighty interest in the efficient administration of the immigration laws," *Garcia-Mir v. Meese*, 781 F.2d 1450, 1454 (11th Cir. 1986), by undermining DHS's and ICE's expert determinations about the best way to advance the agencies' safety and security mission. *See* Dkt. No. 23-3, ¶¶ 11-23.

In addition, any injunction would have serious on-the-ground consequences for DHS and ICE. For example, an injunction would impair the ability of ICE's legal office to represent DHS in administrative removal proceedings because the office is relying on the memoranda "to focus its finite litigation resources on a clear, manageable continuum of cases." Dkt. No. 23-3, ¶¶ 16-19. 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. *Id.*

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." Dkt. No. 23-3, ¶ 20. 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." Dkt. No. 23-3, ¶¶ 21-22.

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 Florida does not tip the balance of the equities in its favor. The district court's denial of injunctive relief can be upheld on this alternative basis as well.

II. Florida's Claims Fail At The Threshold Because The Memoranda Are Judicially Unreviewable

Even if Florida could demonstrate standing and irreparable injury sufficient to support a preliminary injunction, it cannot establish a likelihood of success on the merits. At the threshold, Florida's claims fail for three independent reasons: the memoranda are unreviewable as "committed to agency discretion by law," 5 U.S.C.

§ 701(a)(2); Florida does not fall within the zone of interests of 8 U.S.C. § 1226(c); and the memoranda are not "final agency action" amenable to judicial review, 5 U.S.C. § 704.

A. Immigration Enforcement Decisions Are Committed To Agency Discretion By Law

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 in a world 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 Florida—that are best positioned "to deal with the many variables involved in the proper ordering of [their] priorities." *Id.* at 831-32.

This general principle applies with heightened force in the immigration context. 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 also "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.

In recognition of these uniquely complex considerations, 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; *cf. Chiles v. United States*, 69 F.3d 1094, 1096 (11th Cir. 1995) ("The overall statutory scheme established for immigration demonstrates that Congress intended whether the Attorney General is adequately guarding the borders of the United States to be committed to agency discretion by law and, thus, unreviewable." (quotation omitted)). 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.

Florida does not appear to dispute that general rule. It argues instead that Congress has constrained that discretion through 8 U.S.C. § 1226(c). That provision states that the Secretary of Homeland Security "shall take into custody" noncitizens who fall within certain specified categories. Florida argues (Br. 29) that the word "shall" transforms this provision into a mandatory command that withdraws the

Secretary's discretion. Florida also gestures (Br. 30) at scattered inferences from the statutory history and context that allegedly support its interpretation.

These arguments misapprehend the statutory scheme establishing the Executive Branch's immigration detention and removal authority. Contrary to Florida's apparent (although implicit) understanding of § 1226(c), the INA does not mandate the detention of every "criminal alien" at all times following release from criminal custody. Section 1226 instead authorizes the detention of a noncitizen only "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."). To reiterate, § 1226(a) provides a general grant of detention authority to the Secretary to detain any removable noncitizen pending removal proceedings, while § 1226(c) provides additional constraints on the Secretary's exercise of that authority in the event that a defined group of noncitizens has been detained during pending removal proceedings.

Neither provision of the statute contemplates that DHS should, or must, arrest and detain noncitizens who are not subject to removal proceedings or initiate such proceedings. And in "distinguish[ing] between two different categories of aliens" in § 1226(a) and § 1226(c), *Jennings*, 138 S. Ct. at 837, Congress addressed differing detention authority within the same overarching circumstance: when a noncitizen's removal proceedings are pending. *See Nielsen v. Preap*, 139 S. Ct. 954, 966 (2019) ("Although the Ninth Circuit viewed subsections (a) and (c) as establishing separate

sources of arrest and release authority, in fact subsection (c) is simply a limit on the authority conferred by subsection (a)."); *cf. Jennings*, 138 S. Ct. at 846 ("[Section] 1226(c) makes clear that detention of aliens within its scope *must* continue pending a decision on whether the alien is to be removed from the United States." (quotation omitted)); *id.* ("[D]etention under § 1226(c) has a definite termination point: the conclusion of removal proceedings. . . . [That point] marks the end of the Government's detention authority under § 1226(c)." (quotation omitted)).

Sections 1226(a) and (c) are therefore designed to distinguish between noncitizens whom the Secretary "may release" on bond or conditional parole (those detained under § 1226(a)) and those who, once detained and in removal proceedings, "may not be released" except in narrow enumerated circumstances (those detained under § 1226(c)). *Jennings*, 138 S. Ct. at 837-38 (emphasis and quotation omitted). But the antecedent decisions whether to initiate or pursue removal proceedings and whether to arrest the noncitizen are themselves separate, discretionary, unreviewable decisions of the Secretary—and Florida has never argued (and could not reasonably contend) that the courts may require the Executive to initiate such proceedings against any particular noncitizen, including those described in § 1226(c). *Cf. Arizona*,

567 U.S. at 396 (recognizing the Executive's discretion to decide "whether it makes sense to pursue removal at all").[3]

The structure of § 1226(c) thus confirms that Congress did not intend that provision to constrain the Secretary's deep-rooted enforcement discretion. Instead, § 1226(c) is designed to ensure that the specified noncitizens be "detained without a chance to apply for release on bond or parole" if the Secretary exercises his discretion to arrest and initiate removal proceedings against them. *Preap*, 139 S. Ct. at 960. This conclusion is buttressed by the fact that, "[a]ssessing the situation in realistic and practical terms, it is inevitable that" many noncitizens described in § 1226(c) will not be immediately detained following their release from criminal custody. *Id.* at 968 (quotation omitted). Consistent with that fact—and recognizing the Secretary's broad enforcement discretion notwithstanding § 1226(c)—Congress has made clear that the focus of § 1226(c) is its restriction on a noncitizen's entitlement to a bond hearing once arrested, which applies to any noncitizen with the requisite criminal history, no

[3] Florida incorrectly asserts (Br. 30-31), relying on cherry-picked phrases from the government's briefs in *Preap*, that the government has "admitted" that § 1226(c) requires the government to detain all covered noncitizens. But those briefs confirm that § 1226(c) is directed solely at the question whether covered noncitizens may apply for release on bond once they are arrested and in removal proceedings. *E.g.*, Brief of DHS at 2, *Preap*, 139 S. Ct. 954 (No. 16-1363) ("Section 1226(c) requires the Secretary to detain certain criminal and terrorist aliens during their removal proceedings, without the potential for release on bond."); *id.* at 23 ("Congress . . . mandated the detention of aliens with the requisite criminal history during their removal proceedings.").

matter when the Secretary decides to arrest the noncitizen and initiate removal proceedings. *See id.* at 965.

Florida's contrary interpretation—that the State may invoke § 1226(c) to force the Secretary to arrest, detain, and initiate removal proceedings against a broad class of noncitizens—would arrogate to Florida the discretion that is committed solely to the Executive. And given the severe resource limitations with which DHS and ICE must contend, granting Florida authority over the Executive's application of § 1226(c) would inappropriately constrain the Secretary's ability to make other immigration-enforcement decisions. Nothing in § 1226(c) requires or permits that result.

Even if § 1226(c) could be viewed at first glance as directing the Secretary to arrest specified noncitizens, nothing in the language of that provision displaces the Executive's inherent, unreviewable authority to exercise enforcement discretion in this area. The Supreme Court has explained that enforcement discretion has "long coexisted with apparently mandatory arrest statutes" and that the "deep-rooted nature of law-enforcement discretion" persists "even in the presence of seemingly mandatory legislative commands." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-61 (2005). Relying on that principle, the Supreme Court has repeatedly rejected arguments that a bare statutory "shall" overcomes enforcement discretion. *See, e.g.*, *id.* at 761 (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, 65 (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)); *Heckler*, 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)).

Florida additionally relies on scattered references to the statute's history and context to argue that § 1226(c) carries mandatory force. But those atextual references cannot provide the requisite "stronger indication," *Gonzales*, 545 U.S. at 761, to circumscribe enforcement discretion. At most, Florida's arguments suggest that Congress enacted § 1226(c) in part to "exhort[] the Secretary to act quickly," *Preap*, 139 S. Ct. at 969. But such an exhortation is not a judicially enforceable constraint on the Executive's discretion. *Cf. id.* at 969 n.6 (suggesting in the context of § 1226(c) that even if there were evidence "that Congress expects the Executive to meet a deadline," it does not necessarily follow that "Congress wanted the deadline enforced by courts" (emphases omitted)).

The traditional tools of statutory interpretation confirm that conclusion. First, § 1226 authorizes the detention of a noncitizen only "pending the outcome of removal proceedings." *Jennings*, 138 S. Ct. at 838. Because the Secretary's decision whether to exercise his detention authority is itself contingent on a separate unreviewable determination whether to initiate removal proceedings, the text of

§ 1226 confirms that Congress did not intend to displace the Secretary's traditional enforcement discretion. To amplify that point, Congress explicitly provided that the Secretary's "discretionary judgment regarding the application of this section 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). Finally, Congress has repeatedly declined—over many decades—to appropriate sufficient resources to allow for the detention or removal of anywhere close to all of the removable noncitizens present in the United States. *See* Dkt. No. 23-3, ¶¶ 13-14 (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).

B. Florida Falls Outside The Zone Of Interests Of The Statute It Seeks To Vindicate

Florida's APA claims fail at the threshold for the independent reason that Florida does not fall within the zone of interests of 8 U.S.C. § 1226(c), the statute the State seeks 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 Florida is 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. And to invoke the cause of action in the APA, a plaintiff must show that Congress intended that the "particular plaintiff should be heard to complain of a particular agency decision." *Id.*

Nothing in the text, structure, or purpose of the INA or § 1226 suggests that Congress intended to permit Florida 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. 28-30. And the INA gives no indication that Congress intended § 1226(c) to undermine the Executive's plenary authority over immigration by giving States the power to enforce the immigration laws or to second-guess the Executive's discretionary enforcement decisions.

C. The Memoranda Are Not Final Agency Action

Finally, as the district court properly concluded, Florida's APA claims fail 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." Dkt. No. 4-3, at 5; Dkt. No. 4-4, at 8; *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.

This is not to say that the memoranda will never have downstream practical consequences. For example, the priorities might lead federal officers to pursue enforcement action against a set of noncitizens with whom DHS and ICE would otherwise not have engaged. The priorities might also lead officers to defer action 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.

This Court's decision in *National Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1237 (11th Cir. 2003), underscores the point. In that case, the Court explained that agency action that "does not itself adversely affect" a party but instead "only affects his rights adversely on the contingency of future administrative action" is "nonfinal." *Id.* (quotation omitted). Here too, the priorities do not themselves affect

Florida. Any harm to Florida is contingent on future administrative action—the decisions of immigration officials in Florida to pursue (or not pursue) individual enforcement actions against specific noncitizens.

Florida asserts the memoranda are final because, in the State's view, they determine rights or obligations for agency employees, for noncitizens, and for Florida. These arguments lack merit. With respect to agency employees, Florida claims (Br. 25-26) that the memoranda provide instructions to those employees that they have treated as binding. But the extent to which subordinate agency officials are expected to follow their superiors' instructions is irrelevant to the finality inquiry. Congress has vested the Secretary with discretion to administer the INA, *see* 8 U.S.C. § 1103(a), and subordinate DHS officers exercise only the authority that the Secretary has chosen to delegate, *see id.* § 1103(a)(5); 8 C.F.R. § 2.1. The Secretary (or, at the Secretary's choosing, other senior DHS officials like the Director of ICE) may validly direct rank-and-file officers to exercise that delegated authority in the manner he concludes is most appropriate, and that direction no more represents final action than it would if the Secretary himself made individual enforcement determinations and chose to first articulate a set of principles to guide those determinations.

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).

In any event, the memoranda do not in fact require rank-and-file officials to reach any particular conclusion in any given case. That much is clear on the face of the memoranda, which state that the priorities "do not require or prohibit the arrest, detention, or removal of any noncitizen." Dkt. No. 4-4, at 4. To the contrary, the memoranda instruct "officers . . . to exercise their discretion thoughtfully, consistent with ICE's important national security, border security, and public safety mission." *Id.* To bolster that reaffirmation of discretion, the memoranda establish a process by

which officers can request approval to pursue enforcement actions against any noncitizen outside the presumed priorities. Dkt. No. 4-4, at 7. And officers have "regularly" used that process. Dkt. No. 23-3, ¶ 9.

Florida contends (Br. 26) that some agency officials have lifted "detainers"—that is, notifications to the State that ICE intends to assume custody of particular noncitizens upon their release from State custody and requests for the State's assistance in facilitating ICE's assumption of custody—on noncitizens based on the priorities' guidance, but that argument does not establish finality. Of course, in some number of cases, officers will exercise their discretion, as informed by the priorities, to defer enforcement action against particular noncitizens who are not identified as priorities. But that fact says nothing about the extent to which officers remain free to exercise their discretion in any particular case—discretion which the memoranda neither eliminates nor disturbs.

Florida argues (Br. 26) that the memoranda determine rights by creating "functional amnesty" for non-priority noncitizens. That too is incorrect. To reiterate, nothing in the memoranda determines any individual's rights. As a legal matter, a noncitizen who was not authorized to remain in the United States before the memoranda were issued is still unauthorized to remain in the United States after the memoranda. If the government were to initiate an enforcement action against such a person now or in the future, the memoranda would not supply any defense.

Similarly, Florida cannot prevail by focusing (Br. 26) on the process allowing noncitizens to request a review if they believe they fall outside the presumed priorities. The fact that noncitizens may request a particular exercise of enforcement discretion based on the priorities does not mean that the priorities create any legal right to a favorable exercise of that discretion.

Finally, Florida claims (Br. 26) that the memoranda create obligations with respect to the State itself because they have resulted in DHS's lifting detainers and the subsequent release of noncitizens into Florida. But the placement or the lifting of any particular detainer is an individualized agency decision wholly separate from the promulgation of the priorities in the memoranda. Any consequences that might flow from that decision are not "direct and appreciable" consequences of the memoranda. Moreover, the agencies' choice to refrain from exercising their enforcement authority to detain any particular noncitizen does not "require [Florida] to do anything," nor does it "prohibit [Florida] from doing anything." *National Mining Ass'n*, 758 F.3d at 252. The agencies' exercise of enforcement discretion, like the memoranda themselves, imposes no legal obligations on Florida.

III. Florida Cannot Prevail On The Merits

A. The Priorities Do Not Violate The APA

Florida contends (Br. 32-39) that the agencies' promulgation of the priority framework violated the APA because, in Florida's view, the memoranda violate § 1226(c), are arbitrary and capricious, and should have been preceded by notice-and-

comment procedures. Because Florida is not likely to succeed on the merits of those APA claims, the district court correctly declined to enter a preliminary injunction.

1. The Memoranda Do Not Violate 8 U.S.C. § 1226(c)

Florida principally argues (Br. 32-35) that the memoranda violate 8 U.S.C. § 1226(c) because the memoranda's enforcement priorities do not extend to all of the individuals covered by that provision. This argument is flawed for at least four reasons.

First, as explained in detail above, *see supra* pp. 28-36, § 1226(c) does 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" cannot overcome the "deep-rooted nature of law-enforcement discretion." *Gonzales*, 545 U.S. at 760-61.

Second, even if § 1226(c) could be read to contain some mandatory command, Florida 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." 8 U.S.C. § 1226(e). Congress has further prohibited courts from "set[ting] aside any action or decision" by the Secretary "under [§ 1226] regarding the detention or release of any alien." *Id.* Yet Florida seeks to accomplish through this lawsuit exactly what § 1226(e) forbids. Florida disagrees with the federal government's judgment about how best to allocate the government's limited resources when implementing § 1226. Florida has initiated this lawsuit to

compel the government to exercise its discretionary judgment differently. But the statute itself bars Florida's effort to enforce § 1226(c).

Third, even if § 1226(c) contained a mandatory command that Florida could judicially enforce, the statute only prohibits 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."). Florida has failed to explain how the memoranda violate that directive. Instead, Florida asserts (Br. 32-35) that the presumed priority categories do not align exactly with the groups identified in § 1226(c) and that there are various supposed practical barriers to pursuing enforcement action against groups outside the presumed priorities. But the memoranda do not implicate the statute's limitations on the release of noncitizens detained pursuant to § 1226(c) while those noncitizens' removal proceedings are ongoing, which is the most that § 1226(c) might be read to prohibit.

Finally, Florida cannot prevail even if the Court were to assume that § 1226(c) requires the government to pursue enforcement action against all "criminal aliens." The memoranda do not forbid the 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). Dkt. No. 4-4, at 7. Florida contends (Br. 34)—based on the opinion of a single former agency official who has no experience implementing the priorities framework—that the approval process is "meaningless." But the record demonstrates that, in fact, requests for approval have "regularly" been granted. Dkt. No. 23-3, ¶ 9. The memoranda thus do not violate even Florida's (incorrect) interpretation of § 1226(c) because they do not prohibit, in theory or in practice, any official from taking any of the actions that Florida thinks § 1226(c) requires.

2. The Memoranda Are Not Arbitrary And Capricious

Florida next claims (Br. 36-38) that the priority scheme outlined in the memoranda is arbitrary and capricious. But the memoranda embody rational decisionmaking.

To determine whether agency action is arbitrary and capricious, this Court "examine[s] whether the agency came to a rational conclusion"; the Court "do[es] not substitute [its] own judgment for that of the agency." *Mendoza v. Secretary, Dep't of Homeland Sec.*, 851 F.3d 1348, 1353 (11th Cir. 2017). That review is "exceedingly deferential." *Id.* at 1352-53 (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. Dai*, 141 S. Ct. 1669, 1679 (2021) (quotation omitted).

The agencies provided a rational explanation for the policy. 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." Dkt. No. 4-3, at 3. 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. *Id.* 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. Dkt. No. 4-4, at 7. 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." *Miami-Dade County v. U.S. EPA*, 529 F.3d 1049, 1065 (11th Cir. 2008) (per curiam) (quotation omitted).

Florida responds (Br. 36-37) that the memoranda fail to discuss § 1226(c) or its ostensible purposes. But Florida has failed to explain why that single subsection—which exists within a sprawling and highly reticulated statutory scheme—warrants special discussion. Indeed, when Congress authorized the Secretary to set "national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), it did so without directing the Secretary to give special consideration to any of the myriad provisions of the INA—much less to § 1226(c) specifically. *Cf. Oregon Nat. Res. Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996) ("Whether an agency has overlooked 'an important aspect of the problem,' however, turns on what a relevant substantive statute makes

'important.'"). And nothing about § 1226(c) undermines the rational link between the agencies' justification—their demonstrated need to allocate limited resources among their various critical missions—and their decision to adopt the interim priorities.

Florida also contends (Br. 37) that the memoranda do not contain empirical evidence explaining the full extent of the resource constraints or the effects of the COVID-19 pandemic on the agencies' enforcement efforts. But DHS and ICE are not required to make any detailed evidentiary showing; instead, they need only provide a "rationale" that is "clearly explained." *Conservation All. of St. Lucie Cty., Inc. v. U.S. Dep't of Transp.*, 847 F.3d 1309, 1326 (11th Cir. 2017); *cf. FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021) ("The APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies."). And, in any event, in this particular context, it is self-evident that the agencies suffer from severe resource limitations. *Cf., e.g.*, Dkt. No. 23-3, ¶¶ 13-14 (explaining that DHS and ICE are managing the cases of over 3.2 million noncitizens who are in removal proceedings or subject to final orders of removal and who are therefore within the scope of the INA's detention provisions, but that the agencies have been appropriated sufficient funds to detain only 34,000 noncitizens).The government has—across multiple Administrations over many decades—repeatedly discussed those limitations in justifying its policies. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 218 n.17 (1982); *Arpaio*, 797 F.3d at 16.

Finally, Florida briefly argues (Br. 38) that the memoranda fail to sufficiently justify departing from the agencies' previous policy, both because (in Florida's telling) they fail to adequately acknowledge that the agencies are changing policy and because they fail to consider lesser alternatives (like the priority schemes adopted by previous Administrations) and to consider Florida's reliance interests. None of those arguments makes sense.

As an initial matter, the fact that the memoranda represent revisions to an old policy does not require the agencies "to provide detailed justifications" beyond those ordinarily required by the APA or to "show that the reasons for the new policy are better than the reasons for the old one." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 250 (2012). And the memoranda clearly indicate an awareness that they are changing policy: not only is the DHS Memorandum titled a "[r]evision" to policy, it includes a list of all previous guidance that it intends to "rescind[] and supersede[]." Dkt. No. 4-3, at 2-3, 6.

Moreover, although Florida contends that the agencies improperly failed to consider as alternatives previous Administrations' enforcement schemes, the Supreme Court has made clear that an agency is required to consider only those "alternatives that are within the ambit of the existing policy." *Department of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (alterations and quotation omitted); *cf. id.* (faulting agency for not considering an alternative that was the "centerpiece" of the rescinded policy). And here, not only have DHS and ICE retained the "centerpiece"

of many previous priority schemes—prioritizing enforcement actions against those noncitizens who pose the greatest risks to border security, national security, and public safety—but Florida also fails to demonstrate how any specific "centerpiece" of the preexisting policy was not properly considered.

Finally, Florida faults (Br. 38) the agencies for not considering two purported "reliance interests": its decisions to enact a statutory scheme that encourages cooperation with the federal government and to enter into various agreements with the federal government. But Florida nowhere explains how those actions represent legitimate reliance interests engendered by the previous policy. The federal government has for decades employed various priority schemes to determine how best to prioritize its limited immigration enforcement resources, and Florida has not demonstrated that any particular action the State previously took was induced by any feature of the priority scheme in place at that point in time (much less a feature that has changed with this policy). And Florida has nowhere even attempted to show how it could have reasonably relied on any specific feature of a given priority scheme in light of the Executive's history of altering or refining priority schemes over time or how any of those statutes or agreements has materially changed Florida's position for the worse in some irrevocable way—showings that would be required to demonstrate legitimate, detrimental reliance on previous schemes. Thus, Florida has not come close to identifying any legitimate reliance interests, much less any substantial interests that the agencies were required to take account of in promulgating the memoranda.

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

Florida suggests (Br. 38-39) that, even if the interim priorities are not arbitrary and capricious, the agencies should have issued them using notice-and-comment procedures. But notice-and-comment procedures are not required when an agency issues "general statements of policy," 5 U.S.C. § 553(b)(3)(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). The determination of whether agency action is a general statement of policy turns on the extent to which the agency is able "to exercise its discretion to follow or not to follow that general policy in an individual case." *National Mining Ass'n v. Secretary of Labor*, 589 F.3d 1368, 1371 (11th Cir. 2009) (quotation omitted). As part of that inquiry, a court must examine "the agency's expressed intentions"; "whether the statement was published in the Federal Register or the Code of Federal Regulations"; and "whether the action has binding effects on private parties." *Id.*

Here, each of those factors indicates that the memoranda are general statements of policy. As noted, *see supra* pp. 37-42, the memoranda do not establish any binding norms—both because they permit substantial discretion in their implementation and because the agencies may amend or revoke them at any time. The agencies have expressly stated that the memoranda do not create any rights or obligations. *See* Dkt. No. 4-3, at 5; Dkt. No. 4-4, at 8. The memoranda were not

published in the Federal Register or the Code of Federal Regulations. And the memoranda do not have any binding effects on third parties; they neither require nor forbid any action from any private actor.

To contend otherwise, Florida relies primarily on the memoranda's supposed cabining of the agencies' prosecutorial discretion (Br. 39 (citing *Community Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987)), as well as on the fact that agency officials have relied on the memoranda to guide their decisions to lift detainers and on the memoranda's creation of a case-review process (Br. 39). But none of those arguments is persuasive. The relevant question is whether the guidance here in fact *binds* the agencies, and general principles issued to guide enforcement decisions do not. That agency officials have consulted those principles to guide their independent decisions—or have adjudicated requests by noncitizens for favorable exercises of discretion—does not demonstrate that the memoranda compel any particular enforcement decision.

The sole case cited by Florida is inapplicable. In that case, the court concluded that the agency had "bound itself" to the particular exercise of discretion in the rule by repeatedly using—including in formal publications in the Federal Register—"mandatory, definitive language" in describing the effect of the rule. *Community Nutrition Inst.*, 818 F.2d at 947-48. Here, by contrast, DHS and ICE have made clear that they are not bound to any particular exercise of discretion. To reiterate, agency officials may continue to pursue enforcement action against any noncitizen in the

United States. No noncitizen may raise the memoranda as a defense in any enforcement proceeding. And the Secretary can revoke or amend the priorities at any time.

Finally, Florida suggests (Br. 39) that this Court has previously required notice-and-comment procedures in a case involving a policy to detain additional noncitizens. In that case—which was later reheard en banc, at which point the APA claims were dismissed as moot, *see Jean v. Nelson*, 727 F.2d 957, 984 (11th Cir. 1984) (en banc)—this Court simply asked whether the policy left the agency "free to exercise discretion to follow, or not follow, the general policy in an individual case" (or, in other words, whether "the policy establishe[d] a binding norm"), *Jean v. Nelson*, 711 F.2d 1455, 1481-82 (11th Cir. 1983) (quotation omitted). And in the "peculiar" circumstances of that case, the Court concluded that the policy in question had been understood by implementing officials to "uniformly" require detaining Haitian immigrants. *Id.* at 1482. Nothing in that decision establishes a categorical rule that all policies pertaining to immigration enforcement must go through notice-and-comment procedures.

B. Florida's Additional Claims Provide No Basis For Relief

Finally, Florida briefly suggests (Br. 39-41) that even if its claims are unreviewable under the APA, it is nevertheless entitled to relief because courts have long enjoined illegal agency action and, here, the memoranda are illegal because they "violate § 1226(c), the separation-of-powers doctrine, and the take care clause." Br. 40.

These claims fail for many reasons. First, they all depend on the premise that the memoranda exceeded the agencies' statutory authority. But the memoranda are fully supported by the text and structure of the INA, particularly when read in light of foundational principles concerning the exercise of enforcement discretion. *See supra* pp. 28-36, 43-45. Second, Florida has failed to identify any statutory cause of action that would allow it to bring these claims. And to the extent that Florida gestures at some implied equitable cause of action to challenge agency action, it fails both to explain how that cause of action has survived displacement by the APA, which sets out clear limits on which agency actions are reviewable by the courts, and to demonstrate that its claims come within the narrow set of claims against agencies potentially reviewable outside the APA. *Cf. DCH Reg'l Med. Ctr. v. Azar*, 925 F.3d 503, 509 (D.C. Cir. 2019) (explaining that a nonstatutory equitable cause of action might possibly provide a remedy only where an agency has "plainly act[ed] in excess of its delegated powers," a standard that "covers only extreme agency error, not merely garden-variety errors of law or fact" (alteration and quotations omitted)). Lastly, neither the Take Care Clause nor generic separation-of-powers principles furnish any basis for the injunctive relief Florida seeks here. Any such injunction would express a "lack of the respect due" to the political branches, *Baker v. Carr*, 369 U.S. 186, 217 (1962), by assuming judicial superintendence over the exercise of Executive power that the Take Care Clause commits to the President and the delicate relationship

between the Executive and Legislative coordinate branches. *Cf. Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1867).

CONCLUSION

For these reasons, this Court should affirm the district court's denial of a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the portions of the brief referenced in 11th Cir. R. 32-4, it contains 12,998 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.