No. 21-16118

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA, *et al.*,
Plaintiff-Appellants.
v.
U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*,
Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 2:21-cv-00186-SRB

PLAINTIFF STATES' OPENING BRIEF

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INTRODUCTION

This appeal turns principally on the meaning of the word "shall" in 8 U.S.C. §1231(a)(1)(A). That provision provides in relevant part that, for aliens with final orders of removal, Federal Defendants ("Defendants" or "DHS") "*shall* remove the alien … within a period of 90 days." *Id.* (emphasis added). Plaintiffs (the "States") allege that the challenged regulation, the Interim Guidance, (1) violates this provision, and that its issuance (2) was arbitrary and capricious and (3) violated notice-and-comment requirements.

If Section 1231's "shall" means "must"—*i.e.*, not "may," and hence "may refuse to"—then the district court's order must be vacated or reversed, and this Court should remand for entry of a preliminary injunction. Fortunately, while this case was pending, the Supreme Court answered this dispositive question: holding that, under that section, "[o]nce an alien is ordered removed, DHS *must* physically remove him from the United States within a 90-day 'removal period.'" *Johnson v. Guzman Chavez*, 141 S.Ct. 2271, 2281 (2021) (emphasis added).

Similarly, on no less than *three* occasions, this Court has also held that the "shall" in Section 1231(a)(1)(A) imposes a non-discretionary

obligation. It has, for example, explained that Defendants "*must* remove an alien in its custody *within ninety days* from the issuance of a final removal order." *Lema v. INS*, 341 F.3d 853, 855 (9th Cir. 2003) (emphasis added); *see also infra* at 48049. So too have the Second, Fifth, Sixth, Tenth, and Eleventh Circuits, all of which have squarely held or directly suggested that Section 1231's "shall" imposes a non-discretionary duty. *Infra* at 49-51. No other circuit has held otherwise.

That appellate courts have uniformly come to this conclusion is hardly surprising: the statutory text, the canons of *expressio unius* and avoiding surplusage, the legislative history, and context all *uniformly* support the States' interpretation. Indeed, DOJ itself has advanced that interpretation as its own in the Tenth Circuit—*and prevailed*. *United States v. Ailon-Ailon*, 875 F.3d 1334 (10th Cir. 2017)

Against the uniform consensus of every appellate court construing Section 1231 and every applicable indicium of statutory meaning, the district court reached the opposite conclusion. In its view, Section 1231(a)(1)(A)'s "shall" actually means merely "may," conferring discretion on Defendants to ignore it. And not just *some* discretion, but *unbridled, unlimited discretion* immune to *any and all* judicial scrutiny.

It thus held that despite Section 1231's seemingly mandatory language, the postulated discretion on whether to remove meant that the subject was "committed to agency discretion" and thus completely beyond judicial review under the Administrative Procedure Act ("APA").

This was patent error. *Every* relevant tool of statutory construction and mountains of precedent compels the conclusion that Section 1231(a)(1)(A)'s "shall" means "must"—*i.e.*, leaves no discretion. And a decision cannot be committed to agency "discretion" if no such discretion exists in the first place.

But even if the statute somehow left some interstitial discretion for DHS, there is no indication that it is so unbounded as to be "committed to agency discretion." 5 U.S.C. §701(a)(2). There is, for example, a "meaningful standard" readily available by which to judge DHS's exercise of putative discretion—*i.e.*, the 90-day benchmark (*i.e.*, mandate). *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993). Moreover, the nature of the challenged actions is unlike those found unreviewable: this is not akin to prosecutors initiating an investigation or bringing criminal charges; this case involves ministerial execution of a final judgment for which all prosecutorial discretion has already been exercised and all due process

exhausted. An essential element of the rule of law is that once a matter has been fully litigated to judgment, the execution of that judgment is not left to the mere whim of the Executive. The Interim Guidance's corrosive eroding of this bedrock principle merits decisive condemnation.

The district court's holding that the subject matter here was categorically unreviewable should thus be reversed. And for the same reasons, the Interim Guidance violates Section 1231(a)(1)(A) by transforming its "shall" into merely "may—and usually won't." Indeed, effects of the Interim Guidance are as stark as they are alarming: the district court found that of 325 unauthorized aliens with criminal convictions who would have been deported from Arizona before the Interim Guidance, only 7 were—roughly a 98% decrease in relevant removals of criminal aliens. 2-ER-88. The effects of the Interim Guidance are thus nearly indistinguishable from a blanket refusal to enforce the law.

DHS also violated the APA by issuing the Interim Guidance without complying with notice-and-comment requirements (and without invoking the good cause exception). The Interim Guidance plainly functions as a legislative/substantive rule. It has obvious substantive

bite: causing more than a *95% decrease* in relevant removals. By adopting new substantive criteria that are outcome-dispositive in more than 95% of cases to which it applies, the Interim Guidance cannot squeeze within the APA's narrow exceptions for mere statements of policy or interpretive rules.

The Interim Guidance is also arbitrary and capricious. Its principal rationale—purported resource shortages—has virtually no support in the administrative record and is affirmatively contradicted by the available evidence. It is undisputed that DHS has sufficient resources to return to "normal operations" (*i.e.*, pre-Interim-Guidance levels of removal) and its own witness, ICE Acting Field Office Director Albert Carter, admitted as much. And there certainly is no evidence that the precipitous—*i.e.*, greater than 95%—drop in relevant removals was necessitated by any resource shortages.

Indeed, DHS's putative resource-based rationale relies on little more than the observation that it does not have unlimited resources to do everything it wants—a ubiquitous truism that frequently defines the human condition (and the entire field of economics). But the relevant scarcity here is not *resources* to carry out normal removal operations—it

is the lack of political *will* to do so. In other words, the fact that DHS may lack the resources to deport *all* aliens with final orders of removal is not a justification for removing *nearly none*.

Defendants' rationale also violates the APA because it is demonstrably pretextual. The administrative record makes abundantly clear that purported resource shortages were *not* Defendants' actual reasons for adopting the Interim Guidance. Instead, Defendants' own record makes amply clear that their motivation was to appease outside interest groups—to whose pressure Defendants folded almost immediately, in the dead of night.

In addition, all of the requirements for a preliminary injunction are met here: the States will suffer irreparable harm (including irrecoverable economic harms), and the balance of harms and public interest favor a preliminary injunction. This Court should accordingly reverse the district court's denial of a preliminary injunction and direct entry of one on remand.

STATEMENT OF JURISDICTION

The district court denied a preliminary injunction and dismissed the States' complaint on June 30, 2021. 1-ER-11. The States filed a notice

of appeal the same day. 4-ER-615. This Court has jurisdiction under 28 U.S.C. §1292(a).

After the notice of appeal was filed, the States filed a motion for reconsideration based on intervening Supreme Court precedent on 2-ER-56-61. The parties agree that this does not affect this Court's jurisdiction, and, in any event, that motion was denied on August 12, 2021. 1-ER-2.

The States anticipate that this appeal may be consolidated with a final-judgment appeal, and will seek to use consolidated briefing for both.

ISSUES PRESENTED FOR REVIEW

(1) Whether the "shall remove … within a period of 90 days" language of 28 U.S.C. §1231(a)(1)(A) imposes a non-discretionary duty on Defendants.

(2) Whether the district court erred in holding that removals governed by Section 1231(a)(1)(A) were "committed to agency discretion" and thus categorically unreviewable.

(3) Whether the Interim Guidance violates the APA where it:

   a. Violates Section 1231(a)(1)(A) by reading its mandatory language as a mere suggestion, which it then violates over 95% of the time where applicable;

b. Was issued without complying with notice-and-comment requirements; and

c. Is arbitrary and capricious, as its resource-based rationale is both affirmatively contradicted by the record and demonstrably pretextual.

(4) Whether the remaining requirements for a preliminary injunction are met.

STATEMENT OF THE CASE

Legal Background

The Secretary of the Department of Homeland Security ("DHS") is charged with the administration and enforcement of U.S. immigration and naturalization laws, including the arrest, processing, and—ultimately—the removal of individuals who are unlawfully present. *See* Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. §1225 *et seq.*; Homeland Security Act, 6 U.S.C. §112; 8 U.S.C. §1103.

U.S. Immigration and Customs Enforcement ("ICE"), within DHS, coordinates with federal, state, and local jails and correctional facilities to identify criminal aliens held in those facilities. 2-ER-170. When an ICE "officer encounters someone in a correctional or jail institution and

determines probable cause that the individual is … amenable to arrest" under the immigration laws, then the officer will place an ICE detainer (also known as an "immigration hold") on the individual. 2-ER-170. The detainer notifies the law enforcement agency with custody of the individual that ICE "intends to assume custody" of the alien once the he or she is no longer subject to the other agency's detention, and requests that the other agency maintain custody for up to 48 additional hours. ICE, *ICE Detainers: Frequently Asked Questions*.[1]

Regardless of how an individual comes to ICE's attention, the "Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") … created a uniform procedure for deporting aliens or denying them entry into the United States." *Texas v. United States*, __ F.Supp.3d __, 2021 WL 2096669 at *5 (S.D. Tex. 2021). This uniform process commences "when DHS files a Notice to Appear ('NTA') against an alien or noncitizen … in immigration court." *Id.*; 8 C.F.R. §1003.14. The NTA must satisfy specific, statutory procedural requirements for both content and means of service. 8 U.S.C. §1229a. Under 8 U.S.C. §1229a(a)(1),

[1] Available at https://www.ice.gov/identify-and-arrest/detainers/ice-detainers-frequently-asked-questions (accessed 8/5/2021).

"proceedings for deciding the inadmissibility or deportability of an alien" are presided over by immigration judges in which the respondent alien is afforded due process, including the right to present evidence, cross-examine witnesses, and apply for relief from removal, if available. 8 U.S.C. §1229a(b)(4).

After service of the notice to appear, the respondent alien has his or her "first appearance before an immigration judge" at the Master Calendar Hearing, which is held for "pleadings, scheduling, and other similar matters." U.S. DOJ, Office of the Chief Immigration Judge, Immigration Court Practice Manual, §4.15 (2018). While this next step in the immigration enforcement process may resolve uncontested cases, if an evidentiary hearing is required, the case will "typically also require one or more master calendar hearings in preparation for that individual hearing." *De Ren Zhang v. Barr*, 767 F.App'x 101, 103 (2d Cir. 2019). For cases that cannot be resolved at the Master Calendar Hearing, an "individual hearing" is held in which DHS and the respondent alien both argue the merits of the case. *Zhang v. Gonzales*, 432 F.3d 339, 346 n.5 (5th Cir. 2005). It is after this individual hearing that the immigration court renders a decision in a contested case, and if the immigration judge

(1) finds that the respondent alien is removable and (2) does not grant relief from removal, the judge will issue an order of removal. 8 C.F.R §1240.12.

But this immigration court determination does not immediately end the matter as both DHS and the respondent alien have the right to appeal the court's decision to the Board of Immigration Appeals ("BIA"). DOJ, Office of the Chief Immigration Judge, Immigration Court Practice Manual, §4.16(h). An appeal is initiated when a party files a timely notice of appeal with the BIA, or the immigration judge may certify a case to the BIA. 8 C.F.R. §§1003.7, 1003.38.

In general, an order providing for removal becomes a "final" order of removal after (1) the BIA dismisses an appeal, (2) the respondent alien waives the right to appeal or allows the notice-of-appeal time limit to elapse, or (3) upon resolution or rejection of a certified case for review favorable to the government. 8 C.F.R. §§1003.7, 1241.1. Once a removal order becomes final, it becomes judicially reviewable, and the respondent alien may request a stay of the removal order pending review from a federal circuit court. 8 U.S.C. §1252(b). A respondent alien may also seek

an administrative stay of removal, move to reopen removal proceedings, or apply for deferred action or forbearance. 8 C.F.R. §241.6.

Once an order of removal becomes final, 8 U.S.C. §1231 governs the removal process:

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

8 U.S.C. §1231(a)(1)(A).

Section 1231 provides for the removal period to be "extended … if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal." 8 U.S.C. §1231(a)(1)(C). Additionally, the removal period does not begin to run for detained or confined aliens until "the date the alien is released from detention or confinement." 8 U.S.C. §1231(a)(1)(B)(iii). But "[p]arole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal." 8 U.S.C. §1231(a)(4)(A).

Where these statutory exceptions either do not apply or have been resolved, such as the completion of a criminal alien's imprisonment, "once an alien is ordered removed, DHS must physically remove him from the

United States within a 90-day 'removal period.'" *Guzman Chavez*, 141 S. Ct. at 2281.

While ICE must wait to remove incarcerated criminal aliens until they have completed their prison sentences and are set to be released, the detainer system gives ICE the ability to go into correctional facilities, evaluate and discover alien inmates "they know or can know with ease are in detention or incarceration," and conduct necessary enforcement operations on these individuals in the appropriate time; as the district court observed, this does "not call[] on a lot of ICE resources." 2-ER-83-84.

Once a detainer is placed on an inmate, upon completion of the inmate's sentence "[a]ll ICE has to do is go pick them up and put them in detention and then work on their removal." 2-ER-87. This is a significant savings of resources compared with enforcement operations against individuals "who are actually in the community." 2-ER-87. And, in addition to assisting ICE in completing the removal of criminal aliens within the statutory removal period, lodging and acting upon detainers has the added benefit of improving public safety in communities in which criminal aliens might otherwise be released. 2-ER-170.

Factual And Procedural Background

Initial Issuance of Ghostwritten Memorandum Imposing Moratorium On Removals, Brief Return to Normal Removal Operations, and Midnight Email Reinstating the Moratorium

On the Biden Administration's first day in office, the Acting Secretary of Homeland Security issued a Memorandum on "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities," which in Section B imposed "Interim Civil Enforcement Guidelines" and in Section C imposed an "Immediate 100-Day Pause on Removals" outside of narrow categories. 3-ER-460-63. A stated rationale for suspending removals was prioritizing "limited resources." 3-ER-462.

Despite this stated rationale, there was no evidence or analysis by DHS supporting it. The Memorandum's entire administrative record is only 7 pages, and the Memorandum was "author[ed]" entirely by an incoming White House staffer—which was discovered only because DHS briefly posted a version with revealing metadata. 3-ER-440. DHS was forced to admit it did not know who (if anyone) in the agency was its putative author. 3-ER-440, n.2; *Texas v. United States*, Case 6:21-cv-00003, ECF no. 84-1 at 6.

Six days after the Memorandum's issuance, a federal court issued a temporary restraining order against Section C's removal moratorium. *Texas v. United States*, __ F. Supp. 3d __, 2021 WL 247877, at *1 (S.D. Tex. 2021). That night, ICE notified its employees that "until further notice, in order to comply with the TRO, employees should return to *normal removal operations* as prior to the issuance of the" Memorandum. 2-ER-250 (emphasis added). The "pause" on removals was thus itself briefly paused.

On January 27, the acting head of ICE Enforcement and Removal Operations ("ERO") emailed data to inform "potential impacts of the interim guidance." 2-ER-289. There was no reference to removals in the email. Instead, it estimates "book-ins," defined as "an individual entering [ICE] custody from a single event (arrest by CBP or ICE)," to "be reduced by 50% of historical numbers and the vast majority of book-ins would come from CBP transfers." *Id.*; *see also* 2-ER-292 (chart).

On Sunday January 31, the Acting DHS Secretary issued guidance for compliance with the *Texas* TRO. 3-ER-298-99. That guidance never suggests that Section B applied to removals. Instead it says, "[a]bsent further notice, ICE should continue to conduct removal operations

without implementing, and without taking into consideration, the pause on removals set forth in Section C." 3-ER-298-99.

Activist groups, however, quickly became incensed by this compliance with the *Texas* TRO. On February 1, they wrote to the White House and DHS Secretary, stating: "Just this morning, on the first day of Black History month, there was another deportation flight from San Antonio to Haiti.... In a continued attempt to thwart the new administration's priorities, we believe ICE has scheduled yet another deportation flight for this Wednesday to Angola, Cameroon, and the Democratic Republic of Congo." 3-ER-300. They added that they "believe[d] some or all of the individuals scheduled to be deported on this flight fall outside of the interim enforcement guidelines which take effect today.... The administration must step in now to stop this injustice before it is too late." 3-ER-300-01. Defendants themselves included this email as one of the relatively few documents in their administrative record.

This pressure campaign quickly paid off. Shortly before midnight on February 4, Acting ICE Director Tae Johnson emailed senior staff regarding "ICE's Removal Priorities." 3-ER-320. Despite being sent in the dead of night, it was "[e]ffective immediately." 3-ER-320. It contained no

discussion whatsoever of limited resources, but instead simply engrafted the enforcement priorities in Section B onto removals, even though it was well-understood Section B had not applied to removals. 3-ER-320. In doing so, it effectively circumvented the *Texas* TRO, which only applied to Section C (presumably because it was the only section actually governing removals).

Director Johnson's late-night email further made clear that the Section B priorities were no mere guidance, but instead imposed a near-absolute prohibition on removal: "Over the next few days until formal guidance is issued, removal flights will continue and should be prioritized so that *only those who meet the [Section B] priorities will be removed*." 3-ER-321 (emphasis added). The email then adds a disclaimer that ICE is "not foreclosed" from taking other actions, including removal. 3-ER-321.

On February 7, the *Washington Post* published an article revealing the request for cancellation of the deportation flight to "majority Black countries … during Black History Month" and stating "[w]ithin hours, the acting director of ICE wrote to senior staff, stopping the deportations." 3-ER-322-24. The article states the *Post* had a copy of a "draft memo circulating the agency" and even quoted from that draft

memo as referring to "limited resources," 3-ER-322, but no such draft or related communications was produced in the administrative record (or otherwise). The *Washington Post* article is one of the few documents that Defendants produced in the administrative record, however.

On February 9, the *Texas* court extended its TRO through February 23, 2021. 3-ER-326-31. On February 10, the Acting ICE Deputy Director notified ICE employees of the TRO's extension. 3-ER-332. He admitted in this communication that when the TRO first issued ICE "employees were advised to return to normal removal operations as prior to the issuance of the" Memorandum, and it was only later that they were instructed that "removals should be conducted according to the priorities set forth in Section B" of the Memorandum. 3-ER-332.

The Acting ICE Director then issued the Interim Guidance on February 18, which is the rule challenged here. 2-ER-206. As to removals, the Interim Guidance largely continued the policy, previously made by Director Johnson's midnight email, of applying the priorities in Section

B of the Memorandum to removals. 3-ER-320-21. The putative basis for the Interim Guidance was "limited resources." 3-ER-500.[2]

The Interim Guidance Dramatically Decreased Removals, and the Phoenix ICE Director Testified the "Limited Resources" Rationale Was Pretextual

ICE publishes data and has provided discovery responses in this case showing that the Memorandum Section B enforcement guidelines—expanded to removals on February 4 and carried forward in the Interim Guidance—have resulted in a dramatic overall decrease in ICE enforcement. This decrease is on top of the prior substantial coronavirus-related decreases in 2020. ICE's book-ins by preceding month through 4/24/21 (the latest data provided by ICE in discovery) are as follows:

10/20	**11/20**	**12/20**	**01/21**		**02/21**	**03/21**	**04/21**		**Total**
6,804	5,978	6,071	5,118		1,985	2,343	2,156		30,455

3-ER-392.

ICE also provided the number of Removals through 4/16/21 showing a dramatic drop in removals:

10/20	**11/20**	**12/20**	**01/21**		**02/21**	**03/21**	**04/21**		**Total**

[2] The *Texas* court subsequently issued a preliminary injunction against Section C of the Memorandum. *See* 3-ER-524. Defendants never appealed that decision.

10,367	5,840	5,886	5,732	[redacted]	3,180	3,687	1,448	36,140

3-ER-404-05.

The *Washington Post* similarly reported that the number of removals carried out by ICE in April "fell to the lowest monthly level on record": 2,962 according to preliminary data, and this is "the first time the monthly figure has dipped below 3,000 … a 20 percent decline from March." 3-ER-414. It further reported that "ICE has recorded about 37,000 [removals] during the past seven months, putting the agency on pace for fewer than 55,000 deportations for the 2021 fiscal year. It would be the first time that figure has fallen below 100,000." 3-ER-414.

Because ICE has approximately 6,000 ERO officers, they are now averaging 1 interior arrest per 2.5 months per officer, on pace for 4-5 arrests per year. *See* 3-ER-418. "In private, ICE officials say their work is being essentially abolished through restrictions on their ability to make arrests and deportations." 3-ER-414.

Testimony from Acting Phoenix ICE Director Albert Carter addressed the purported resource constraints and the effect of the Interim Guidance as follows.

Purported Resource Constraints: Although the Interim Guidance cited "limited resources" as its rationale, Director Carter expressly confirmed he has sufficient monetary and other resources to effect his mission and carry out normal removal operations. 2-ER-169. The administrative record is also completely bereft of any documents discussing the purported resource limitation rationale as it relates to the specific types of removals at issue, and Defendants did not point to a single document below that could substantiate the Interim Guidance's asserted rationale. 2-ER-103.

ICE Arrests: Director Carter agreed there was a "big drop-off in ICE arrests from before" to after the Memorandum and Interim Guidance. 2-ER-168. He agreed with data showing 86% and 92% of ICE arrests in recent years were for aliens with criminal convictions or charges. 2-ER-167, 175. Importantly, he testified that, other than the Interim Guidance priorities, he could not think of any new factor that was in effect in February 2021 that could account for the sudden drop-off, including COVID-19. 2-ER-169.

ICE Removal of Criminal Aliens: Director Carter further testified that although removals decreased substantially due to

coronavirus, there was a further "big drop off in removals from before" February as compared to subsequent months. 1-ER-172.

Following the Interim Guidance, ICE's Phoenix Field Office conducted roughly 325 fewer removals per month than it had in the months immediately prior to the Interim Guidance. 2-ER-88-89. In discovery, DHS was unable to produce records showing more than 10 "other-priority" removals—that is, removals of individuals not one of the three priority categories—in the roughly 50 days covered by their document production. 2-ER-88-89, 152. Indeed, Director Carter testified that the Interim Guidance left officers with feelings of "hesitancy" and "confusion" where they "didn't want to bring any undue attention upon the field office for, you know, going outside the priorities." 2-ER-127-28.

Even after becoming more accustomed to the Interim Guidance, the volume of *requests* for preapproval to remove an alien who already had final orders of removal may have reached an estimated maximum of three per day, a slim fraction of the over 300 fewer actual removals the Phoenix office has been conducting each month. 2-ER-124.

There is no other apparent cause of this decrease in removals: Director Carter testified the "only factor" he could think of for the drop-

off in February 2021 was the Interim Guidance's new enforcement "priorities" and he did not observe any other contributing factor. 2-ER-172.

Proceedings Below

This action was filed on February 3, 2021. Due to the nationwide injunction against the Memorandum already issued in *Texas v. United States*, Plaintiffs did not seek an injunction at that time.

Following issuance of the Interim Guidance, however, Plaintiffs filed an Amended Complaint on March 8 and moved for a preliminary injunction on March 12. Plaintiffs' Motion for Preliminary Injunction was briefed and set for oral argument on April 8, 2021.

The district court denied the motion without prejudice, and ordered discovery and additional briefing. 1-ER-52, 4-ER-607-10. The expedited discovery included production of the administrative record, limited exchange of interrogatories and document production, and one deposition.

Plaintiffs then renewed their motion for a preliminary injunction, while Defendants simultaneously filed a motion to dismiss. After both motions were briefed, the district court heard argument on May 27. On

June 30, it denied Plaintiffs' motion and granted Defendants' motion to dismiss. 1-ER-11-31. After concluding that Plaintiffs had Article III standing, it nonetheless held that "the Interim Guidance is unreviewable as agency action committed to agency discretion by law." 1-ER-25, 30.

Plaintiffs filed their notice of appeal the same day and sought an emergency injunction pending appeal in the district court the next day. 1-ER-7-8, 4-ER-615. The district court denied Plaintiffs' emergency motion for injunction pending appeal on July 15.

On July 2, the States filed with the district court a motion for reconsideration of the court's denial of their complaint (but not the denial of the preliminary injunction, which had been appealed), based on the Supreme Court's decision three days before in *Guzman-Chavez*. 2-ER-56-61. On August 12, 2021, the court denied that motion for reconsideration. 1-ER-2-6.

Proceedings In This Court

On the same day the district court denied the States' motion for injunction pending appeal, the States moved for an emergency injunction pending appeal in this Court. Doc. 10. On July 30, this Court denied without prejudice Plaintiffs' emergency motion for injunction pending

appeal pending the district court's decision on Plaintiffs' motion for reconsideration of the district court's order granting Defendants' motion to dismiss. Doc. 22.

On August 13, following the district court's denial of the States' motion for reconsideration the day before, the States filed with this Court a motion for reconsideration of the court's denial of the States' emergency motion for injunction pending appeal. Doc. 23. On August 19, this Court denied reconsideration of the July 30 order and instead construed the States' motion for reconsideration as a renewed motion for an injunction pending appeal. Doc. 24. That renewed motion was fully briefed on September 1, when the States filed their reply in support of the renewed motion concurrently with this Opening Brief.

SUMMARY OF THE ARGUMENT

The predominant issue in this appeal is the meaning of the word "shall" in 8 U.S.C. §1231(a)(1)(A). If "shall" means "must," it necessarily follows that: (1) the district court's unreviewability holding must be reversed, since a decision cannot be "committed to agency discretion" if the agency enjoys no relevant discretion at all, and (2) the Interim Guidance violates Section 1231, since it plainly is premised on "shall"

meaning only "may," and repeatedly blessing actions that are patently unlawful if it actually means "must."

The resolution of this overriding issue is remarkably straightforward. Indeed, the statutory construction factors supporting the States' interpretation is nothing short of overwhelming. Those are: (1) the text itself, (2) the canons of (a) avoiding surplusage and (b) *expressio unius*, (3) the legislative history and context, (4) seemingly *every* appellate decision every interpreting Section 1231(a)(1)(A), and (5) Defendants' own recent advancement of the States' position.

Starting with the text, it is well-established both in ordinary and legal parlance that that "'shall' generally means 'must.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 n.9 (1995). But DHS's arguments all proceed from the premise that "shall" generally means "may" and some "stronger indication" is necessary for it to impose a mandate rather than supply a mere suggestion. 3-ER-347. That is precisely backwards as a textual matter. It is also unavailing since multiple "stronger indications" are present here.

One such indication comes from the canon of avoiding surplusage. Here, Section 1231(a)(1)(A)'s requirement of removal within 90 days is

completely superfluous if that section's "shall" means only "may." Under DHS's interpretation, that section is effectively rewritten as providing that it "may remove within 90 days, or after 90 days, or never." The 90-day language is thus surplusage under DHS's reading.

Similarly, the canon of *expressio unius* supports the State's interpretation. Section 1231(a)(1)(A) explicitly begins with an "[e]xcept as otherwise provided in this section" exception. Under the canon of *expression unius*, that explicit exception is presumably the *only* exception that Congress intended. And DHS does not argue that the Interim Guidance's exclusions from removals can be squeezed within that exception.

The legislative history and context of the provision, which derives from the 1996 Amendments, also provide enormous support. Not only do the relevant legislative reports make clear Congress's clear intent to eliminate prior discretion enjoyed by the Executive Branch, but that intent is made abundantly clear by Congress's elimination of *all thirteen* prior instances where the text had provided discretion to the Executive Branch. Congress's hostility to discretionary (under-)enforcement by Defendants is overwhelmingly apparent.

Given this evidence, federal courts have been virtually unanimous in construing Section 1231(a)(1)(A)'s "shall" to impose a mandate on Defendants. Indeed, the Supreme Court has done so *twice* (in *Johnson-Guzman* and *Jennings*), this Court has done so *thrice* (in *Lema*, *Xi*, and *Coyt*), and five other circuits have done so as well (the the Second, Fifth, Sixth, Tenth, and Eleventh Circuits). Nor have Defendants cited *even one* precedential decision interpreting Section 1231(a)(1)(A) as they do. Indeed, to the States' knowledge, the only court to have do so is the district court below, making its error all the plainer.

Notably, Defendants themselves *used* to read Section 1231 in the same manner as the States—expressly advancing a "shall means must" interpretation to the Tenth Circuit and *prevailing* as recently as 2017.

But even if Defendants were correct that "shall" actually meant "may," thus conferring some discretionary authority on them, the district court's decision should still be reversed. It would not follow if such discretion existed, that it was so unbounded as to be "committed to agency discretion" under the APA, and thus categorically unreviewable. The legislative history and context strongly weigh against any such conclusion. And the statutory text itself readily provides "meaningful

standard against which to judge the agency's exercise of discretion'" *Lincoln*, 508 U.S. at 191—*i.e.*, the 90-day timeframe for removals. That is quite unlike the open-ended "do justice" standard for ordinary prosecutorial decisions that are committed to their discretion. Moreover, the district court's analogy to prosecutorial discretion was inapt: this case involves only ministerial execution of a final judgment with no prosecutorial discretion remaining to be exercised.

Because Section 1231(a)(1)(A)'s "shall" imposes a mandate on DHS to remove aliens with final removal orders within 90 days, it necessarily follows that the Interim Guidance violates that provision since it purports not only (1) to confer discretion not to do so, (2) but an outright presumption that such removals are inappropriate for "other priority" cases. Defendants have never seriously suggested that the Interim Guidance is lawful if "shall" means "must."

DHS also violated the APA's notice-and-comment requirement in issuing the Interim Guidance. The Interim Guidance is plainly substantive and functions as a legislative rule, rather than a mere statement of policy or interpretive/procedural rule. Indeed, by imposing new substantive criteria that are controlling the vast majority of cases

(*i.e.*, over 95% of cases where applicable), the Interim Guidance could only have been validly promulgated by complying with notice-and-comment procedures. It was not.

The Interim Guidance is also arbitrary and capricious, in violation of the APA. Its purported rationale is resource shortages. But not only does the administrative record lack any genuine evidence of shortages that could support the Interim Guidance's issuance, but it affirmatively demonstrates that Defendants had sufficient resources to carry out "normal removal operations"—*i.e.*, pre-January 20/Interim Guidance levels of removals. And that much is further confirmed by the testimony of ICE's own Acting Field Office Director, Albert Carter. In addition, the administrative record further reveals that Defendants' rationales are simply pretextual: imagined resources shortages were not Defendants' actual rationale, and instead appeasing outside interest groups was.

Because the Interim Guidance is unlawful, and because the remaining requirements for injunctive relief are satisfied, this Court should reverse the district court's denial of a preliminary injunction. And if, as expected, this appeal is consolidated with a final-judgment appeal, this Court should reverse and remand with instructions to vacate the

Interim Guidance and/or issue a permanent injunction against its enforcement.

STANDARDS OF REVIEW

This Court "review[s] [a] district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (*en banc*). "The district court's interpretation of the underlying legal principles, however, is subject to de novo review[.]" *Id.*

This Court reviews "a district court's interpretation and construction of a federal statute" de novo. *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 938 (9th Cir. 2006).

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE INTERIM GUIDANCE WAS CATEGORICALLY UNREVIEWABLE

The district court's decision below rests on a single ground: that the "the Interim Guidance is unreviewable as agency action committed to agency discretion by law" under 5 U.S.C. §701(a)(2). 1-ER-30. But that decision was erroneous.

Congress has affirmatively prohibited Defendants' actions here by enacting an explicit command in 8 U.S.C. §1231(a)(1)(A) that imposes an unequivocal, non-discretionary mandate after entry of a final order of removal to carry out the removal within 90 days, except as otherwise provided in §1231.

Given this command, Congress has either deprived Defendants of any discretion to adopt the Interim Guidance or, at a minimum, provided sufficient statutory guidelines for this Court to exercise judicial review of the Interim Guidance. The district court's holding that the Interim Guidance regulated matters that are categorically unreviewable was thus erroneous.

A. Section 1231 Creates A Mandatory Duty To Remove Aliens With Final Orders Of Removal

By arrogating to DHS unreviewable discretion not to deport aliens with final orders of removal, the district court grievously misread 8 U.S.C. §1231(a)(1)(A). Indeed, not only did Congress *not* commit to Defendants unreviewable discretion the decision to remove aliens with final removal orders, Congress did the exact opposite: almost entirely curtailing agency discretion by enacting an unambiguous command. Specifically, Congress mandated: "[e]xcept as otherwise provided in this

section, when an alien is ordered removed, the [government] *shall* remove the alien from the United States within a period of 90 days." 8 U.S.C. §1231(a)(1)(A) (emphasis added)).

This language is unequivocal and expressly specifies that the only exceptions are those "otherwise provided" in §1231—none of which relate to the Interim Guidance in the slightest (nor does DHS contend otherwise). *Guzman Chavez*, 141 S.Ct. at 2288.

Here the States' interpretation of Section 1231(a)(1)(A) is supported by (1) the plain text, (2) the canons of avoiding surplusage and *expressio unius*, (3) the legislative history, intent, and context (4) Defendants' own statements to another court, and (5) *all* relevant authority interpreting that provision, including binding precedents of the Supreme Court and this Court.

The district court was thus simply wrong that "'shall' in §1231(a)(1)(A)" was "naked." 1-ER-27. Rather, its mandate comes clad in the support of *virtually every* conceivable tool of statutory interpretation.

1. Plain Text

The plain text of Section 1231(a)(1)(A) establishes that DHS has a non-discretionary duty to undertake removals that the Interim Guidance

disavows. That section's "shall" means just that: an actual mandate and not just a readily-ignorable suggestion.

"[A]ny question of statutory interpretation … begins with the plain language of the statute. It is well established that, when the statutory language is plain, [courts] must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (citations omitted). Thus, this Court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc v. United States*, 541 U.S. 176, 184 (2004). That is just so here.

It is well-established that "'shall' generally means 'must.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 n. 9 (1995). That accords with the definitions of dictionaries, both legal and non-legal. The "mandatory sense" of the word "shall" is the one "that drafters typically intend and that courts typically uphold." *Shall*, *Black's Law Dictionary* (11th ed. 2019). Similarly, American Heritage Dictionary defines "shall" as an "order, premise, requirement, or obligation." *Shall*, *American Heritage Dictionary* (5th ed. 2012).

The Supreme Court has thus repeatedly made clear that "Congress' use of the term 'shall' indicates an intent to 'impose discretionless

obligations.'" *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) (citation omitted)). Indeed, "the mandatory 'shall' ... normally creates an obligation impervious to judicial discretion." *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). It is equally impervious to administrative discretion.

The plain text of Section 1231(a)(1)(A) therefore creates an unequivocal obligation to remove aliens with final orders of removal within 90 days unless its explicit exception is satisfied (and DHS does not even attempt to claim it is). Defendants thus lack *any* discretion not to undertake such removals—let alone so unbounded discretion as to be completely unreviewable by courts.

2. Canons Of Construction

The canons of construction confirm what Section 1231's text already makes plain. Two are critical here: the avoidance of surplusage and *expressio unius*.

a. Canon Against Surplusage

"It is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"

TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (citation omitted). DHS's interpretation of Section 1231(a)(1)(A) violates this cardinal principle.

Section 1231(a)(1)(A) provides a specific time for removals: "within a period of 90 days," and makes "removal period" a defined term that is used another *six* times. 8 U.S.C. §1231(a)(1)(A). But if DHS were correct that "shall" means only "may," then the "90 days" language is simply superfluous: in essence the provision would effectively be rewritten "DHS may remove the alien within 90 days, or after 90 days, or never." The time limitation simply has no meaning if removals are committed to DHS's sole and unreviewable discretion.

For that reason, the Supreme Court has recognized elsewhere that the use of the word "shall" with a defined time period creates a command: "'Shall' makes the act of filing a charge within the specified time period mandatory." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002) (alteration omitted). Removal within 90 days is similarly mandatory here.

b. *Expressio Unius*

Under the venerable *expressio unius* canon, "[t]he expression of one thing implies the exclusion of others." *Jennings v. Rodriguez*, 138 S.Ct.

830, 844 (2018). Thus, "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v. Harris Cty.*, 529 U.S. 576, 583 (2000) (cleaned up)); *accord Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (en banc).

Under *expressio unius*, the enumeration of only a single exception to Section 1231's 90-day mandate means, quite simply, that only one such exception exists. Specifically, Section 1231 allows an extension of the removal period only "if the alien fails or refuses" to obtain travel documents or otherwise "acts to prevent ... removal," §1231(a)(1)(C). But DHS has never claimed that the Interim Guidance (or its predecessor 100-day Moratorium) can squeeze within that exception. The *expressio unius* canon thus strongly militates against reading in a second, unwritten exception allowing for a longer removal period, let alone complete and indefinite non-removal.

Application of the e*xpressio unius* canon is particularly appropriate here, as "[a]n implied exception to an express statute is justifiable only when it comports with the basic purpose of the statute." *Syed v. M-I, LLC*, 853 F.3d 492, 501. But DHS's conjured second exception does no such thing: instead it swallows the rest of the subsection and renders it a

nullity. Moreover, as discussed next, it is directly contrary to the purposes of the 1996 amendments that enacted it.[3]

3. Legislative History/Amendments And Context

The legislative history, including the specific amendments to section 1231(a)(1)(A) to make it more stringent as well as later laws adopted by Congress requiring DHS to achieve and maintain operational control of the border, strongly support the States' interpretation as well.

a. 1996 Amendments To Statutory Text

Congress adopted the current version of §1231(a)(1)(A) as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). *Coyt v. Holder*, 593 F.3d 902, 906 (9th Cir. 2010). The changes made to the text of §1231 in IIRIRA make plain Congress's intent to constrain *sharply* the discretion of the Attorney General (and now DHS) in effecting removals.

[3] Section 1231 also contains two other exceptions requiring removal *faster* than 90 days, for aliens with removal orders who are: 1) imprisoned and convicted of nonviolent offenses and (2) arriving at a port of entry. *See* 8 U.S.C. §1231(a)(4)(B), (c)(1).

In enacting the current version of §1231, Congress made substantial changes. The old §1252 became §1231(a), and Table 1 shows the changes in language:

Table 1: Comparison Of Language Pre- and Post-IIRIRA	
Prior §1252	**Current §1231(a)**
"[T]he Attorney General shall have a period of six months ... to effect the alien's departure from the United States." 8 U.S.C. §1252 (1996).	"[T]he Attorney General *shall remove* the alien from the United States within a period of 90 days." 8 U.S.C. §1231(a)(1)(A) (emphasis added).

Congress thus replaced language that only called for a general outcome to take place within a long period of time (6 months) with an *unequivocal* command for the federal government to remove the alien within a time period less than half as long (90 days). The new language also articulates a much more direct command: *i.e.*, "shall remove" rather than merely indicating a time period "to effect" an outcome.

Congress's intent to accelerate removals and decrease the Executive Branch's discretion to forego deportations is confirmed by other statutory changes. In particular, three predecessor sections that

were consolidated into §1231 contained specific grants of discretion to the Attorney General (now DHS)—all of which Congress tellingly abolished. As the House Conference Report explains, IIRIRA "inserts a new section 241 [8 U.S.C. §1231]" that "restates and revises provisions in current sections 237, 242, and 243 [8 U.S.C. §§1227, 1252, and 1253] regarding the detention and removal of aliens." H.R. Conf. Rep. 104-828, at 215.

For example, the old §1252 provided that during the prior six-month removal period "at the Attorney General's *discretion*, the alien *may* be detained." 8 U.S.C. §1252(c)(1) (1996) (emphasis added). But IIRIRA amended Section 1231 to order affirmatively that "[d]uring the removal period, the Attorney General *shall* detain the alien." *Id. at* §1231(a)(2) (emphasis added). Similarly, the prior §1227 stated that arriving aliens who are excluded "shall be immediately deported ... unless the Attorney General, in an individual case, *in his discretion*, concludes that immediate deportation is not practicable or proper." 8 U.S.C. §1227(a)(1) (1996) (emphasis added). But discretion too was expressly eliminated, and the current §1231(c) has no such "in his discretion" language.

Nor are these eradications of discretion isolated or subtle. While the word "discretion" appeared *thirteen times* in the prior versions of §§1227, 1252, and 1253, it no longer appears *even once* in the amended (and current) Section 1231. In essence, Congress through IIRIRA engaged in a search-and-destroy mission regarding the Executive Branch's discretion. That is hardly the action of a Congress that intended to confer unbounded and unreviewable discretion.

b. Legislative History, Intent, And Context

The legislative history and cases examining it confirms the intent already evident from IIRIRA's text. In IIRIRA, "Congress amended the INA aggressively to expedite removal of aliens lacking a legal basis to remain in the United States." *Kucana v. Holder*, 558 U.S. 233, 249 (2010). Congress's purpose in adopting IIRIRA was "to expedite the physical removal of those aliens not entitled to admission to the United States" and "[t]o that end, IIRIRA 'inverted' certain provisions of the INA, encouraging prompt voluntary departure and *speedy government action*." *Coyt* 593 F.3d at 906. (emphasis added).

The House Conference Report on IIRIRA similarly made plain that the bill's purpose was "to improve deterrence of illegal immigration to the

United States by ... reforming exclusion and deportation law and procedures." H.R. Rep. No. 104-828, at 1 and 199 (1996) (Conf. Rep.). President Clinton's signing statement likewise described IIRIRA as "landmark immigration reform legislation that ... strengthens the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system." 32 Weekly Comp. Pres. Doc. 1935, 1996 U.S.C.C.A.N. 3388, 3391 (Sep. 30, 1996).

DHS's interpretation thwarts this intent: while IIRIRA was intended to *expedite* removals, DHS invokes its provisions to assert unlimited and unreviewable discretion to *thwart and slow* them. That is neither what Congress intended nor what Congress's text can bear.

c. The Secure Fence Act of 2006

In 2006, Congress passed the Secure Fence Act of 2006, which requires the DHS Secretary to "take all actions the Secretary determines necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders of the United States." Secure Fence Act of 2006, PL 109-367, October 26, 2006, 120 Stat 2638. The bill specifically defines "operational control" to mean "the prevention of *all unlawful entries* into the United States, including

entries by terrorists, *other unlawful aliens*, instruments of terrorism, narcotics, and other contraband." *Id*. (emphasis added).

The Secure Fence Act remains in force. It enjoyed bipartisan support in both houses of Congress, and passed in the Senate by a 80-19 vote, including with then-Senator Biden's support.[4]

Congress made its intent plain in the Secure Fence Act: DHS must "take all actions ... [to] prevent[] ... all unlawful entries into the United States."

Given this clear statutory language and legislative history, DHS's contention that Congress intended to preclude all judicial review of its policies specifically intended to *defy* the Secure Fence Act's mandate blinks reality. Congress has made clear, again and again, that in this context, DHS has no discretion. As such, DHS cannot satisfy its "heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision." *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975).

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[4] https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00262#top

4. Defendants' Own Statements

Defendants *used* to understand all of this, and *explicitly argued* as much. The Department of Justice notably told the Tenth Circuit that Section 1231(a)(1)(A) creates a mandatory duty for ICE to remove. In *Ailon-Ailon*, 875 F.3d at 1334, ICE had arrested an alien who had illegally reentered the U.S. after removal. ICE referred the case to DOJ for criminal prosecution of illegal reentry. At the bail hearing, the United States requested that bail be denied, arguing that the defendant was a flight risk because, under §1231(a)(1)(A), "ICE would be obligated to remove him within ninety days." *Id.* at 1335-36.

On appeal to the Tenth Circuit, the United States again argued that if the U.S. Marshals Service returned the alien "to ICE custody," then ICE would be "*statutorily obligated* to effect his removal to Guatemala." *Memorandum Brief for Plaintiff-Appellee*, *Ailon-Ailon*, 2017 WL 4174867 (Sept. 14, 2017) at *2 (emphasis added). The United States also admitted that once an alien "is released to ICE custody who is the subject of a removal order, ICE has a *statutory duty* to effect that alien's departure. *See* 8 U.S.C. §1231." *Id.* at *7 (emphasis added). It further contrasted ICE's discretion to "investigate crimes committed ... by aliens" and "to

refer those cases ... for prosecution," with its complete absence of discretion regarding removals of aliens with final orders of removal: "its duty [to] remove aliens in its custody who are subject to finalized removal orders is *non-discretionary, i.e., Congress has ordered ICE to attempt to carry out those removals*." *Id.* at *8 (emphasis added). Moreover, the United States acknowledged (1) "ICE's *statutory duty* to effect the alien's timely in-custody removal," (2) "ICE's *duty to remove* those aliens who have been ordered removed" and (3) that ICE has been "*directed by Congress*" to "remov[e] aliens from the United States who have been ordered removed." *Id.* at *8-10. (emphasis added)).

Those arguments notably prevailed at the Tenth Circuit, which accepted that Section 1231 created a "statutory duty to promptly remove individuals who are subject to reinstated removal orders." *Ailon-Ailon*, 875 F.3d at 1339 (citing 8 U.S.C. §1231(a)(1)(A)). Nor has DHS even acknowledged—let alone explained—its apparent change in position, which "departs from agency precedent without explanation" and thus violates the APA. *Dillmon v. NTSB*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009) (citation omitted).

5. Case Law Interpreting Section 1231

Given that the text, canons of interpretation, legislative history, intent, and prior Executive Branch construction all point in a single direction, it is perhaps unsurprising that seemingly *all* judicial opinions construing Section 1231(a)(1)(A) have *uniformly* come to the same conclusion as the States. Indeed, because those decisions include *binding precedents* of the Supreme Court and this Court, this Court could resolve this central interpretive question simply by reference to precedent alone.

a. Supreme Court: *Guzman-Johnson* and *Jennings v. Rodriguez*

In *Guzman Chavez*, 141 S. Ct. at 2271, the Supreme Court directly construed Section 1231(a)(1)(A). And its construction is dispositive here, explaining that Section 1231's "shall remove" directive means that "[o]nce an alien is ordered removed, DHS *must* physically remove him from the United States within a 90-day 'removal period.'" *Guzman Chavez*, 141 S.Ct. at 2281 (emphasis added). Put simply, Section 1231's "shall" indeed means "must."

The Supreme Court further explained that "the most natural reading of the 'except as otherwise provided' clause is that DHS *must* remove an alien within 90 days *unless* another subsection of §1231

specifically contemplates that the removal period can exceed 90 days." *Id.* at 2288 (first emphasis added). That reading "aligns with the rest of §1231, which contains specific provisions mandating or authorizing DHS to extend detention beyond 90 days." *Id.*

Similarly, in 2018, the Supreme Court explained that §1231(a)(1)(A) means that "when an alien is ordered removed, the Attorney General is *directed* to complete removal within a period of 90 days." *Jennings*, 138 S.Ct. at 843 (2018) (emphasis added). In *Jennings*, in interpreting another section of the INA, the Supreme Court specifically contrasted one section that used "may" language, which created ambiguity in the meaning of that section, with another section using "shall," which the Supreme Court held created an "*unequivocal[] mandate*" because "[u]nlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Id.* at 844 (citation omitted). So too here.

b. This Court: *Lema*, *Xi*, and *Coyt*

This Court similarly—and repeatedly—has construed Section 1231(a)(1)(A)'s "shall" as creating a *mandate* on DHS, rather than a mere suggestion conferring unlimited discretion. The question first came

before this Court in 2002, when it explained that section 1231(a)(1)(A) creates a "*statutory duty* to effect the physical removal ... within the statutorily specified 90-day 'removal period.'" *Xi v. INS*, 298 F.3d 832, 840 n.6 (9th Cir. 2002) (emphasis added). Again, in 2003, this Court held that "[o]rdinarily, the INS *must* remove an alien in its custody within ninety days from the issuance of a final removal order." *Lema,* 341 F.3d at 855 (emphasis added).

In 2010, this Court confirmed what it said in *Lema* and *Xi*, again holding that §1231(a)(1)(A) "*requires* the Attorney General to effectuate physical removal of petitioners subject to a final order of removal within ninety days of the order." *Coyt*, 593 F.3d at 907 (emphasis added).

At issue in *Coyt* was a DHS regulation that deemed a motion to reopen a removal proceeding as being automatically withdrawn upon an alien's removal, even if the motion had been timely filed within the statutory deadline for filing the motion, which was also 90 days. This Court was thus faced with the task of "harmoniz[ing] the provisions simultaneously affording the petitioner a ninety day right to file a motion to reopen [under 8 U.S.C. §1229a(c)(7)] and *requiring* the alien's removal within ninety days" under §1231(a)(1)(A). *Id.* (emphasis added).

This Court's resolution was instructive. It did not reconcile these two statutory requirements by holding that the 90-day removal period in §1231(a)(1)(A) is merely discretionary, as Defendants now contend, which would have defused the potential conflict by allowing DHS to simply exercise its putative discretion not to remove while the motion to reopen was pending. Instead, this Court held that, when Congress enacted IIRIRA, it "wished to expedite the physical removal of those aliens not entitled to admission to the United States" and that, therefore, the 90-day right to file a motion to reopen persisted after the alien's mandatory removal. *Id.* at 906.

c. Other Circuits

This Court is hardly alone in concluding that Section 1231's "shall" means "must." Indeed, *every* other circuit reaching the issue—*i.e.*, the Second, Fifth, Sixth, Tenth, and Eleventh Circuits—has likewise held or suggested as much:

- *Hechavarria v. Sessions*, 891 F.3d 49, 55 (2d Cir. 2018) ("Section 1231 assumes that the immigrant's removal is *both imminent and certain*" (emphasis added)).

- *Tran v. Mukasey*, 515 F.3d 478, 481 (5th Cir. 2008) ("[W]hen a final order of removal has been entered…, the government *must* facilitate that alien's removal … within ninety days[.]" (emphasis added)).
- *Martinez v. Larose*, 968 F.3d 555, 561 (6th Cir. 2020) ("§1231(a)(1)(A) *mandates* that … Attorney General shall remove the alien … within [the removal period].'" (emphasis added)).
- *United States v. Barrera-Landa*, 964 F.3d 912, 922 (10th Cir. 2020) (noting that an alien with a final order of removal is, under §1231(a)(1)(A), "subject to *mandatory* ... removal within 90 days under §1231(a)" (emphasis added)); *accord Ailon-Ailon*, 875 F.3d at 1339; *supra* at 44-45.
- *United States v. Chinchilla*, 987 F.3d 1303, 1309 (11th Cir. 2021) ("Generally, an alien *must* be physically removed from the United States within ninety days of a final removal order...." (emphasis added)).

Given this unbroken line of authority, this Court would have to create a square, distinctly lopsided split to affirm—as well as violating its own precedents and that of the Supreme Court.

d. *Texas v. United States*

The Southern District of Texas has also addressed these precise questions in considering a challenge to the Interim Guidance's predecessor, the 100-Day Moratorium. *See generally Texas*, 2021 WL 2096669. While the district court here reasoned that no "stronger indication is present" that "shall" actually means "shall," 1-ER-26, the *Texas* court persuasively found that "the text, context, statutory history, and precedent" all "demonstrat[e] that 'shall' means must in section 1231(a)(1)(A)." *Texas*, 2021 WL 2096669, at *35. But the district court below simply ignored virtually all of these considerations.

The *Texas* court correctly concluded that IIRIRA's added "shall" language "clearly demonstrate[d] a purpose" that led "inexorably to a single conclusion: the word 'shall' … means *must*—even as against the Government here." *Id.* at *34. And it further recognized that "numerous federal courts have recognized that *other* parts of section 1231 ... use[] 'shall' as a mandatory command" as well. *Id.* at *35 (collecting cases).

6. Defendants' Cases

To avoid reading "shall" as "must," as Congress intended, the district court and Defendants relied heavily upon *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). 1-ER-26-27. But that reliance is unavailing.

As an initial matter, it is notable what *Castle Rock* is *not*: it is neither a statutory construction nor APA decision, but rather a *due process* case. There, the critical issue was not the correct construction of statutory text, but rather whether a judicially entered restraining order had such unambiguous text as to confer "a right to police enforcement of the restraining order" that created a property interest under the Due Process Clause. *Town of Castle Rock,* 545 U.S. at 757. To put a sharper point on it, the issue was whether a restraining order issued by a *state* court under *state* law had created a *federal constitutional right* enforceable by a cause of action *for damages* under Section 1983.

The issue in *Castle Rock* was thus not what the best reading of Colorado law was or whether state law was violated, but rather whether that law was so absolute and extraordinary that it could be enforced as a matter of federal constitutional law. The Court concluded that "a true

mandate of police action would require some stronger indication from the Colorado Legislature than 'shall use every reasonable means to enforce a restraining order.'" *Id.* at 751 (quoting Colo.Rev.Stat. §18-6-803.5(3)(a)). That was particularly true as the "language [at issue] [wa]s not perceptibly more mandatory than" similar Colorado law enforcement statutes. *Id.*

Unsurprisingly, given its demonstrably inapposite nature, courts have had little trouble dispensing with DHS's repeated arguments that *Castle Rock* applies when interpreting IIRIRA's "shalls." *See*, *e.g.*, *Texas*, 2021 WL 2096669, at *34-35 (distinguishing *Castle Rock* in part on this Court's *Lema* decision); *see also Crane v. Napolitano*, No. 3:12-CV-03247-O, 2013 WL 1744422, at *8-11 (N.D. Tex. Apr. 23, 2013) (distinguishing *Castle Rock* in the context of INA section, 8 U.S.C. §1225, because the statute imposes a mandatory duty).

In any event, many of the "stronger indication[s]" lacking in *Castle Rock* are present here, as discussed above, including clear intent to remove DHS's discretion by removing *all thirteen instances* of such discretion in section 1231 and its predecessor statutes. *Supra* at 27-28. Also, unlike *Castle Rock,* the relevant individuals' "whereabouts are

[]known," 545 U.S. at 762—many are literally locked up in state prison with known release dates and cell locations. If DHS cannot find them it is only because it does not want to.

The district court also relied in part on *Arizona v. United States*, 567 U.S. 387 (2012) and *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) to support its shall-doesn't-mean-must holding. 1-ER-26-27. But neither case supports that proposition.

Arizona involved preemption of a state law empowering state and local enforcement of immigration laws. *Arizona*, 567 U.S. at 398-400. And while it discussed the generally "broad discretion exercised by immigration officials," *id.* at 396, it did not discuss—whatsoever—the specific context of aliens with final orders of removal where Congress provided neither "broad" nor even limited discretion, and instead abolished it entirely. Moreover, *Arizona*'s recognition that state law is preempted in this context underscores the heightened need for the federal government to comply with federal law—*i.e.*, the only law at issue

here—which in turn *intensifies* the need for judicial review to ensure compliance with the *only* law protecting the States.[5]

Similarly, this Court has construed the language in *Reno* about Executive Branch discretion to defer action in immigration as applying only to "*individual* 'no deferred action' decisions," and not to "programmatic shift[s]" in decisions about enforcement, such as those DHS is trying to impose in the Interim Guidance. *Regents of Univ. of Cal. v. DHS*, 908 F.3d 476, 503 (9th Cir. 2018), *rev'd and vac't in part*, 140 S.Ct. 1891 (2020).

B. The Interim Guidance Is Not Categorically Unreviewable Under 5 U.S.C. §701(a)(2)

Because Section 1231 leaves DHS with no discretion to avoid removal, the subject matter of this action cannot be "committed to agency discretion"—since no discretion exists. But even if some discretion remained under Section 1231, that provision nonetheless provides a

[5] *See* Note, *An Abdication Approach to State Standing*, 132 Harv. L. Rev. 1301, 1312-13 & nn.108-09 (2019) (explaining that "'federal abdication'" as a basis for state standing is particularly strong where the executive adopts "a sweeping policy against enforcement" in the face of "federal statutes … providing for enforcement" and in an area where the States are preempted from acting (quoting *Texas v. United States*, 86 F. Supp. 3d 591, 639 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015)).

"meaningful standard" to guide judicial review, which precludes Section 701(a)(2) from foreclosing review.

The district court reached a contrary conclusion only by applying a presumption for unreviewability for challenges to individual decisions not to institute enforcement actions. But that presumption does not apply here and, even if it did, is squarely rebutted.

1. Because Section 1231 Eliminates All Relevant DHS Discretion, The Field Covered By The Interim Guidance Is Not "Committed To Agency Discretion"

The proper construction of Section 1231(a)(1)(A) effectively resolves the question of reviewability. As set forth above, Section 1231(a)(1)(A) places an unequivocal mandate on Defendants to remove aliens with final orders of removal within 90 days. That command necessarily precludes the existence of agency discretion to do otherwise, which in turn precludes these matters being "committed to agency discretion." 5 U.S.C. §701(a)(2). Actions cannot be "committed to agency discretion" if no such discretion exists.

The D.C. Circuit has thus held that where "enforcement provisions leave no discretion to determine which cases to pursue, the [agency's]

enforcement decisions are not committed to agency discretion by law." *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991).

The same result should obtain here.

2. In Any Event, Section 1231(a)(1)(A) Provides a "Meaningful Standard" To Apply For Judicial Review

Even if Section 1231(a)(1)(A)'s text did not actually displace all discretion, whatever discretion remains is not so boundless as to be completely unreviewable under the APA. As the Supreme Court has made clear, the committed-to-agency-discretion exception only applies in the "*rare circumstances* where the relevant statute 'is drawn so that a court would have *no meaningful standard* against which to judge the agency's exercise of discretion.'" *Lincoln*, 508 U.S. at 191 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)(emphasis added)). The Supreme Court thus "applies a 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486, (2015).

Here there is just such a "meaningful standard" for courts to apply. Section 1231(a)(1)(A) affirmatively provides a specific timetable against which DHS's actions can be judged: requiring removal "within a period of

90 days." 8 U.S.C. §1231(a)(1)(A). Thus, while Defendants retain general discretion over routine matters such as what removal flights, buses, or trains to place individuals on and what schedules to run such removal transportation operations, there is a readily available, "meaningful standard" against which to judge the results: *i.e.*, whether they effectuate removal within 90 days of entry of the final removal orders. Defendants have never explained why Section 1231(a)(1)(A)'s explicit timeline does not provide a "meaningful standard" under *Heckler*.

The Supreme Court's unanimous decision in *Mach Mining* effectively compels reversal here. There, Congress had provided that EEOC "*shall* endeavor to eliminate an alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 575 U.S. at 486 (quoting 42 U.S.C. §2000e-5(b) (alteration omitted) (emphasis added). The Court recognized that the "shall" language was "mandatory, not precatory." *Id.* And while "the statute provides the EEOC with wide latitude over the conciliation process," that did *not* preclude judicial review. *Id.* at 488. Instead, the "shall" mandate provided "a perfectly serviceable standard for judicial review: Without any

'endeavor' at all, the EEOC would have failed to satisfy a necessary condition of litigation." *Id.*

So too here. Section 1231(a)(1)(A)'s "shall" provides a "perfectly serviceable standard for judicial review," particularly in conjunction with 1) the triggering event of entry of a final order of removal, 2) the 90-day time period and 3) the "except as otherwise provided" limitation in §1231. The Interim Guidance squarely violates that standard.

The Supreme Court's recent, also unanimous, decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S.Ct. 361 (2018) further supports the States. The Court reiterated the "strong presumption favoring judicial review" in *Mach Mining*. *Id.* at 370. The federal government relied on language providing that the Secretary of Interior "*may* exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of designation" to make a similar unreviewability argument. *Id.* at 371 (cleaned up) (emphasis in original) (quoting 16 U.S.C. §1533(b)(2)).

The Court acknowledged that "[t]he use of the word 'may' certainly confers discretion on the Secretary." *Id.* But because the statute also "require[d] the Secretary to consider economic impact and relative

benefits … [t]he statute … [was] not 'drawn so that a court would have no meaningful standard against which to judge the Secretary's exercise of his discretion." *Id.* at 371-72 (quoting *Lincoln*, 508 U.S. at 191) (cleaned up). Thus, the petitioner's claim that the government failed to adequately consider costs and benefits was "the sort of claim that federal courts routinely" review, *unanimously* reversing the Fifth Circuit's contrary committed-to-agency-discretion holding. *Id.*

The States' reviewability claim here is even stronger. The federal government has no "may" language that it can hang its unbounded-discretion defense upon, and an unequivocal mandate to remove within 90 days except as otherwise provided in §1231 provides at least as much of a "meaningful standard" for courts to review than an open-ended invitation to consider costs and benefits without any further guidance as to how to do so.

3. The District Court Wrongly Analogized This Case To Law Enforcement Actions

The district court reached a contrary unreviewability holding largely by analogizing this case to law enforcement actions and applying the *Heckler* presumption against reviewability for challenges to agency decisions "not to take enforcement action." 470 U.S. at 832; *accord* 1-ER-

25-26. But that analogy was inapt. The *Heckler* presumption does not apply, or is rebutted, because this case challenges a general policy, not individual actions, and because the statute (§1231) provides sufficient "guidelines" for judicial review. This conclusion is bolstered because the actions are not traditional enforcement actions and judicial review is thus manageable.

a. The Presumption Of *Heckler* Does Not Apply In The Context Of A Challenge To A General Policy

At a basic level, the *Heckler* presumption of unreviewability applies to challenges to *particular* decisions not to initiate enforcement actions, not outright sweeping policies of non-enforcement. *See, e.g.*, *ILWU v. Meese*, 891 F.2d 1374, 1378 n.2 (9th Cir. 1989) (describing *Heckler* as applying to "an agency's refusal to prosecute or enforce a statute in a specific case"); *Bresgal v. Brock*, 843 F.2d 1163, 1169 n.1 (9th Cir. 1987) (same); *see also OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (explaining that "an agency's adoption of a general enforcement policy is subject to review," thereby distinguishing *Heckler*'s presumption of unreviewability as applying only to individual cases of non-enforcement).

Here, the States do not challenge any particular non-removals, but rather the Interim Guidance's broad policy of flouting Section 1231. In doing so, the States "do not seek review of DHS's exercise of discretion; rather, they challenge the extent of [DHS's] authority under the [removal] statute. And the extent of that authority is not a matter of discretion." *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001).

The D.C. Circuit has specifically recognized that broad non-enforcement policies are reviewable under the APA. In *National Wildlife Federation v. EPA*, that court explained that "the presumption of unreviewability does not apply where there is 'law to apply'" or where a challenger asserts "a facial challenge to the [agency] statutory interpretation." 980 F.2d 765, 773 (D.C. Cir. 1992).

For those reasons, that court had jurisdiction to review a facial challenge to an EPA rule that gave it "discretion to refuse to initiate proceedings to withdraw a state's primary enforcement responsibility, or 'primacy,' for national drinking water standards." *Id.* at 767. The court *rejected* EPA's attempt to "create still another, third point of discretion" beyond the two provided by statute. *Id.* at 771. The D.C. Circuit further held that EPA's "attempt to carve out a third area of discretion [could

not] be squared with the language of the statute." *Id.* "Four other courts have adopted this approach." Note, *An Abdication Approach to State Standing*, 132 Harv. L. Rev. at 1317 & n.146 (citing Lanza, Note, *Agency Underenforcement as Reviewable Abdication*, 112 Nw. U.L. Rev. 1171, 1188 n.104 (2018) (collecting cases)).

National Wildlife Federation strongly supports the States here. Section 1231 similarly provides "law to apply" precluding the presumption of unreviewability. In addition, DHS's attempt to engraft an additional exception onto Section 1231(a)(1)(A) beyond the sole textual exception it actually contains is just as reviewable and unlawful as EPA's attempt in *National Wildlife Federation*. *See also* Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 Geo. L.J. 157, 162 (2014).

The States' challenge is further equivalent to that in *ILWU*, which this Court held was reviewable. In that case, the plaintiffs sued DHS's predecessor, the INS, challenging INS's enforcement practice "of allowing alien workers to perform labor in the United States without certification by the Secretary of Labor allegedly in violation of 8 U.S.C. section 1182(a)(14)" by interpreting the meaning of the term "alien

crewmen" as including the class of aliens workers at issue. *ILWU*, 891 F.2d at 1378. *ILWU* held that the INS's action was reviewable under the APA because there was "no indication that Congress sought to prohibit judicial review" and because the INS's action was not "committed to agency discretion by law." *Id.* That was so because there was "law to apply in the definitions of 'alien crewmen' and Congress' enunciated purpose" in enacting the applicable statute. *Id.*

This Court specifically distinguished between situations in cases like *Heckler*, where the dispute was over "an agency's refusal to prosecute or enforce a statute in a specific case," which was not reviewable, and a case where the court was instead reviewing an agency's general enforcement practice actions in light of the INA's statutory requirements. *Id.* at n.2. Thus, in *ILWU*, this Court held that "courts must reject an administrative construction of a statute that is inconsistent with the statutory mandate or that frustrates Congress' purpose." *Id.* at 1383. And because the INS's enforcement practices at issue in that case were contrary to the statutory mandate and to Congress's purpose, this Court exercised jurisdiction and reversed. *Id.* at 1383-84.

b. Even If *Heckler*'s Presumption Regarding Specific Law Enforcement Decisions Applied, It Is Rebutted Here

Even if the district court were correct that the *Heckler* presumption of unreviewability applied, however, that presumption is defeated here.

Indeed, *Hecker* itself makes that much plain. In that case, the Court specifically cited favorably its prior decision in *Dunlop*, 421 U.S. at 560. Immediately after explaining that decisions not to take particular enforcement actions are presumptively not reviewable, the Court then cited *Dunlop* as "an example of statutory language which supplied sufficient standards to rebut the presumption of unreviewability." *See Heckler*, 470 U.S. at 833. In *Dunlop*, the Court recognized that "the language of the [statute at issue] indicated that the Secretary was required to file suit if certain 'clearly defined' factors were present" and "[t]he decision therefore was not '"beyond the judicial capacity to supervise."' *Id.* at 834. In *Dunlop*, those "clearly defined factors were 'the filing of a complaint by a union member' and the Secretary 'finding probable cause to believe a violation … has occurred.'" *Id.* at 833 (citation omitted). The *Dunlap* Court thus concluded (and the *Heckler* Court reiterated) that "[t]he statute being administered quite clearly withdrew

discretion from the agency and provided guidelines for exercise of its enforcement power." *Id.* at 834.

Here, Section 1231(a)(1)(A) provides factors that are at least as "clearly defined" as in *Dunlop*: it provides the triggering event (entry of administratively final order of removal), conditions for non-enforcement (the "except as provided" exception of §1231, which does not apply here), and time period for execution (90-days). These clearly defined factors thus "provide guidelines for exercise of [DHS's] enforcement power" that rebuts any presumption of unreviewability. *Heckler*, 470 U.S. at 834. And that conclusion is further supported by all of the statutory construction factors discussed above, which militate against any conclusion that Section 1231's "language or structure demonstrates that Congress wanted an agency to police its own conduct." *Mach Mining*, 575 U.S. at 486.

c. Reviewability Is Bolstered By The Nature Of the "Enforcement" At Issue Here.

At a general level, this context—ministerial execution of final orders for which all appellate review has been exhausted—is not the sort of law-enforcement action that are typically unreviewable. This case has nothing to do with what crimes/violations to investigate or charge, for

which meaningful standards for courts to apply are scarce. Instead, it relates solely to whether *final* orders of removal—*i.e.*, those resulting proceedings in which all agency discretion has already been exercised—will be carried out or willfully defied.

This case is thus more akin to the Bureau of Prisons (1) deciding that it disapproves of federal securities fraud crimes on policy/political grounds and (2) asserting unreviewable discretion to refuse to carry out final securities-fraud-based sentences of imprisonment imposed by district courts. Such a claim would rightfully be met with scorn by federal courts. The Interim Guidance's equivalently audacious pretense should be too.

II. THE INTERIM GUIDANCE IS UNLAWFUL

The Interim Guidance is not only reviewable under the APA, it also squarely violates it. Specifically, the Interim Guidance (1) is "not in accordance with law" because it violates Section 1231(a)(1)(A), (2) was issued "without observance of procedure required by law" because DHS flouted the APA's notice-and-comment requirements, and (3) is "arbitrary [and] capricious" because it lacks supporting record evidence and because

the rationale given for its issuance is demonstrably pretextual. 5 U.S.C. §706(2).

A. The Interim Guidance Violates Section 1231(a)(1)(A)

As set forth above, Section 1231(a)(1)(A) actually imposes a non-discretionary mandate on Defendants to remove aliens with final orders of removal absent an exception not relevant here. *Supra* Section I.

The Interim Guidance flouts Section 1231's mandate by exempting large swaths of aliens with final orders of removal from being removed. As the district court recognized, these numbers were substantial: of 325 aliens with final removals that would have otherwise been removed, only 7 were actually removed. 2-ER-88-89. The Interim Guidance thus violates Section 1231(a)(1)(A)'s unequivocal command in roughly 98% of cases in which it applies. Statutory violations rarely come much plainer.

B. DHS Violated The APA By Promulgating The Interim Guidance With Complying With Notice-And-Comment Requirements

Plaintiffs are also likely to prevail on their procedural/notice-and-comment challenge. The Interim Guidance promulgates a legislative rule requiring such procedures, since it is neither the general statement of policy nor the procedural rule exceptions apply, and Defendants did not invoke the good cause exception.

A general statement of policy must "not impose any rights and obligations" and may only "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Community Nutrition Institute v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987); and *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1012-13 (9th Cir. 1987). But the Interim Guidance does just that: it confers a new "right" to avoid removal for the vast majority of aliens falling within its scope. And, unlike mere policy statements, the Interim Guidance plainly has substantive bite. *Supra* at 67-68.

Similarly, a rule is not procedural if it "encodes a substantive value judgment" thereby "put[ting] a stamp of [agency] approval or disapproval on a given type of behavior." *Chamber of Commerce of the U.S. v. DOL*, 174 F.3d 206, 211 (D.C. Cir. 1999) (cleaned up).

The "stamp of disapproval" on removals could hardly be clearer here. Indeed, only the hopelessly dense or the willfully obtuse could fail to appreciate the general disapproval of removals under the Interim Guidance.

The record evidence bears out this common-sense conclusion. As the district court recognized, for the first eight weeks of the Interim

Guidance, "of 325 individuals *who, before February 18th, would have been put into immigration detention and removed, only seven have*." 2-ER-88-89 (emphasis added). The Interim Guidance's disapproval is thus so resounding as to be 98% as effective as a blanket and exception-less prohibition. This substantive value judgment is evident both in the tremendous drop in removals—down 45%—and in testimony that DHS officers were afraid to "bring any undue attention upon the field office for … going outside the priorities."[6] 2-ER-128.

The Interim Guidance thus bear the hallmark of a substantive rule by imposing substantive criteria with powerful and demonstrable effects. Defendants were thus required either to comply with notice-and-comment requirements or properly invoke the good-cause exception to promulgate it. They did neither, thus violating the APA.

C. The Interim Guidance Is Arbitrary And Capricious

In addition to its procedural infirmities, the Interim Guidance is also substantively invalid because DHS's issuance of it was arbitrary and capricious. That is so for two reasons: (1) the Interim Guidance is bereft of any meaningful evidentiary support for its putative "resource

[6] *See* 2-ER-189-199.

shortages" basis and (2) DHS's proffered basis is patently pretextual and not their actual rationale (which was instead to appease interest groups who were loudly complaining about DHS's compliance with a TRO against its predecessor).

1. The Interim Guidance Lacks Even A Semblence Of Record Support

ICE's primary stated rationale was "limited resources." 2-ER-202-03. But the administrative record is utterly devoid of *any* support for this contention. As the district court aptly observed, "There's nothing in the Administrative Record that shows any resource analysis." 2-ER-103.

Indeed, far from supporting DHS's contention that it lacked resources to conduct "normal removal operations," the administrative record affirmatively demonstrates the opposite. After the *Texas* court entered a TRO, DHS resumed normal operations without the slightest indication that it lacked resources to do so. That resumption lasted from January 26 at 8:36 pm to 11:32 pm on February 4, and there is zero record evidence that it experienced any resource-based issues in doing so. 2-ER-250 and 3-ER-320-21. Nor is there any evidence that resource shortages motivated the February 4 late-night, *de facto* resumption of the 100-Day Moratorium, which the Interim Guidance largely codified. Instead, the

only evidence is that these steps were taken directly as a result of pressure from interest groups. 3-ER-300-01 and 3-ER-322-25.

Moreover, DHS's own official confirmed explicitly the obvious conclusion to be drawn from the absence of record evidence: DHS *has* sufficient resources to carry out the removals at issue. Specifically, Acting Phoenix ICE Director Albert Carter admitted that the resource shortages that DHS pointed to do not exist and that he had sufficient resources to carry out pre- Interim Guidance operations. 2-ER-166.

To be sure, the administrative record does contain some superficial discussion that DHS lacks resources to remove *every* alien with a final order of removal. *See*, *e.g.*, Doc 13-1 at 3-4. But that truism hardly justifies the Interim Guidance. Indeed, it is a rare field of human endeavor that is untouched by the issue of finite resources. The police cannot catch every murderer, but that would not support a policy of refusing to investigate any (or 95%-plus) of murders. Moreover, as the district court noted, many of the removals that the Interim Guidance precludes are actually the *easiest* and *least-resource-intensive* to carry out. As the district court pointed out, for aliens who "are already in custody of the State, then there's not a lot of resources that have to be

focused on finding those individuals so they can be removed. All ICE has to do is go pick them up and put them in detention and then work on their removal if it's not a simple matter." 2-ER-87.

Defendants have utterly failed to connect their invocation of trite clichés about scarce resources to the particular policy chosen here. They have not, because they cannot. Defendants' arguments in this case raise a host of questions they are apparently unable to answer: How does the obvious fact that resources are scarce justify a 98 percent reduction in relevant removals? What change necessitated such a precipitous drop? Accepting the Defendants' hollow *post-hoc* rationalizations would bless any and all blanket non-enforcement decisions.

2. The Rationale Supplied For The Interim Guidance Is Demonstrably Pretextual

Defendants also violated the APA because the resource-constraint rationale they gave is not only evidence-free, but is also demonstrably not their actual motivation. Indeed, the administrative record reveals that Defendants' sole discernable actual motivation was appeasing special interest groups.

Defendants' good-faith compliance with the *Texas* TRO/preliminary injunction proved exceptionally short-lived. Once DHS began

experiencing pressure from anti-enforcement activist groups, it folded almost immediately—and in a manner that lays bare what its actual rationale was.

Defendants received a letter dated February 1 from a coalition of activist groups complaining that "[a]ffirmative, meaningful steps need to be taken *now*." 3-ER-300-01 (emphasis in original). The Washington Post article that Defendants included in their sparse administrative record details further pressure from activists in early February asking the White House and DHS officials to intervene to stop removals. 3-ER-324. Defendants' administrative record is conspicuous not only for mostly containing evidence of political pressure from activists, but also because it contains no evidence of any actual policy analysis.

Thus, the Defendants' "sole stated reason … seems to have been contrived." *Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2575 (2019). There is no evidence that the Interim Guidance was motivated by purported resource shortages. But there is *extensive* evidence that it was motivated entirely by a desire to appease outside interest groups that were clamoring for reduced deportations at all costs. 3-ER-300-01.

Thus, as in *New York*, this Court is "presented … with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process." *New York*, 139 S. Ct. at 2575. As such, the Interim Guidance's rationale is pretextual and as such fails "reasoned explanation requirement of administrative law." *Id.*; *accord id.* at 2573 (decision resting on a "pretextual basis" "warrant[s] a remand").

D. The Interim Guidance Is Reviewable As Final Agency Action

The States anticipate that Defendants may contend (as they did below and in opposing an injunction pending appeal) that the Interim Guidance is not final agency action. Such an attempt would be unavailing.

As this Court has held, "In determining whether an agency's action is final, we look to whether the action [1] amounts to a definitive statement of the agency's position or [2] has a direct and immediate effect on the day-to-day operations of the subject party, or [3] if immediate compliance with the terms is expected." *Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (cleaned up). The test is

notably stated in the disjunctive, so satisfying any of those three criteria can suffice. *Id.* But the Interim Guidance actually satisfies all three.

As the district court observed, the Interim Guidance drastically affects Defendants' day-to-day operations: of 325 individuals who would have been deported previously, only 7 were—a 98% drop. 2-ER-88-89. Overall arrests and removals are also down considerably. *Supra* at 29-30. Similarly, there is no indication that the Interim Guidance is not the "definitive statement of the agency's position," and "*[i]mmediate compliance* with the terms [wa]s expected," *Oregon Nat. Desert Ass'n*, 465 F.3d at 982 (emphasis added). Indeed, Acting Director Johnson's midnight email makes plain his expectation of *immediate* compliance: "*Effective immediately … only* those who meet the [Section B] priorities will be removed." 3-ER-320-21 (emphasis added).

More generally, the Interim Guidance is final agency action under the Supreme Court's test in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Under the *Bennett* test, "two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights

or obligations have been determined, or from which legal consequences will flow." *Id.* 177-78 (cleaned up).

Defendants themselves admitted that the Interim Guidance, despite its name, was not "merely tentative or interlocutory in nature"—an indeed has now been in effect for over *six months*. 2-ER-95-96. And the possibility that DHS may supersede it with another final agency action down the line does not insulate it from review. *See Sackett v. EPA*, 566 U.S. 120, 127 (2012).

Nor can the fact that "legal consequences … flow" from the Interim Guidance's promulgation be reasonably contested. As discussed previously, the Interim Guidance was a significant change in policy that has plummeted removals to historic lows as a result.

Moreover, the Interim Guidance effectively disavows DHS's statutory obligation to remove aliens within 90 days, thereby conferring entirely new rights on criminal aliens to avoid removal. *See Lema*, 341 F.3d at 855. It also reverses the statutory presumption in favor of removal and forces ICE to seek approval from high-level officials to carry out its most routine statutory functions. *See id.* at 855. That too is a form of "legal consequences" that supports finality.

III. THE OTHER REQUIREMENTS FOR A PRELIMINARY INJUNCTION ARE MET HERE

In addition to showing likely success on the merits, Plaintiffs have satisfied all of the other requirements for obtaining a preliminary injunction. This Court should accordingly reverse the district court's denial of such relief.

To obtain a preliminary injunction, a plaintiff must show that (1) it "is likely to succeed on the merits," (2) it "is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [its] favor," and (4) "an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

The district court's standing analysis amply demonstrates the States' irrecoverable harms, and hence irreparable injury. 1-ER-20-24. Moreover, the balance of harms and public interest favor the States since an injunction (1) will vindicate the public interest, as set by Congress, (2) will permit the public participation through commenting, as the APA requires, (3) protect the public from dangerous felons, and (4) prevent substantial harms to the States. Nor can Defendants claim genuine harm, since the putative basis for the Interim Guidance is a concocted "resource constraints" fiction that is purely pretextual.

A. The States Face Irreparable Harm Absent Injunction

The States continue to suffer irreparable injury that is ongoing, and thus by definition "likely to occur during the period before the appeal is decided." *Doe #1 v. Trump*, 957 F.3d 1050, 1058-59 (9th Cir. 2020). The Interim Guidance directly and irreparably harms Plaintiffs by increasing the unreimbursed costs they must bear due to the decrease in removals, including the "increase in community supervision costs, both already suffered and likely to arise in the near future," which the district court found were "'causally linked' to the Interim Guidance" and thus supported standing. 1-ER-22-23. And as time passes, "unremoved noncitizens" continue to be "added to the ranks of those under community supervision, which almost certainly increase the overall cost to Arizona." *Id.* at 13.

It is well established that irrecoverable economic harms constitute irreparable injury. *See*, *e.g.*, *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021); *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018). And there is no dispute here that Plaintiffs have no avenue of recovering damages from the federal government. Moreover, this Court has specifically recognized that a state suffers irreparable harms where

it is likely to bear the "heavy financial costs" of supporting an increased number of immigrants "on state and local programs" as a consequence of a federal agency rulemaking. *City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 981 F.3d 742, 762 (9th Cir. 2020).

In addition, Plaintiffs will suffer direct law enforcement costs (including costs of reincarcerating repeat offenders) and crime-based injuries because of the Interim Guidance's non-removals and inevitable recidivism among unremoved criminal aliens. Generally, among released prisoners, 68% are re-arrested within 3 years, 79% within 6 years, and 83% within 9 years.[7] The release of convicts into the community under to the Interim Guidance makes it virtually certain that Plaintiffs will incur additional costs of recidivism.[8]

Finally, Plaintiffs have also suffered procedural harm tied to their unrecoverable monetary damages, having been deprived of the

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[7] *See*, National Institute of Justice, Measuring Recidivism (Feb. 20, 2008), https://nij.ojp.gov/topics/articles/measuring-recidivism#statistics.

[8] Additionally, Plaintiffs are required by federal law to include unauthorized aliens in their Emergency Medicaid Programs, 42 C.F.R. §440.255(c), and the Supreme Court in *Plyler v. Doe* required that States provide public education to school-age unauthorized aliens. 457 U.S. 202, 230 (1982). The Interim Guidance severe reduction in removals will thus force Plaintiffs to incur the costs of providing such services.

opportunity to provide input through notice-and-comment rulemaking. *East Bay,* 993 F.3d at 677 ("Intangible injuries may also qualify as irreparable harm, because such injuries 'generally lack an adequate legal remedy.'" (quoting *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014)).

B. The Balance of Equities and Public Interest Favor an Injunction

Since "the Government is a party" the "balance of the equities and public interest factors merge." *Doe #1 v. Trump*, 984 F.3d 848, 861-62 (9th Cir. 2020). Both factors favor an injunction pending appeal.

As set forth above, the Interim Guidance imposes considerable burdens on the States. Conversely, Defendants will not be harmed by an injunction maintaining the prior status quo. *See*, *e.g.*, *Doe #1*, 957 F.3d at 1068-69 (explaining that there is a "lack of irreparable harm to the United States" due to a delay in immigration policy implementation by injunction).

The Constitution vests Congress with the enumerated power "[t]o establish an uniform Rule of Naturalization." U.S. Const. art. I, §8. DHS has no legitimate interest in the implementation of an unlawful policy that directly contradicts a naturalization statute enacted by Congress.

See N.Y. Progress & Prot. PAC v. Walsh, 733 F.3d 483, 488 (2d Cir. 2013). In any event, the administrative record itself shows that when the January 20 Memorandum was enjoined in the *Texas* case—something DHS never appealed—there was no improper interference, but merely a "return to normal removal operations." 2-ER-250, 3-ER-332.

Additionally, if the purported interference with Executive Branch prerogatives were actually as great as DHS now contends, it would have appealed the *Texas* preliminary injunction. It did not, precisely because it could live with the return to "normal removal operations" that the Texas preliminary injunction necessarily occasioned. It can equally live with the similar return that the States now seek here.

Where Plaintiffs face irreparable harm without an injunction, while DHS faces none if the status quo is maintained, the public interest and balance of equities favor granting the preliminary injunction. *E.g.*, *Doe #1*, 957 F.3d at 1069.

Moreover, Congress itself has already balanced the public interest here in section 1231(a)(1)(A) and mandated the removals that the Interim Guidance effectively prohibits. An injunction against that unlawful near-complete prohibition thus serves the public interest as set

by Congress. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) ("[A] court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" (citation omitted)).

CONCLUSION

This Court should reverse both (1) the district court's holding that the subject matter of the Interim Guidance was "committed to agency discretion" and thus categorically unreviewable and (2) its resulting denial of the States' request for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s) 21-16118

I am the attorney or self-represented party.

This brief contains 15,280 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief:

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Signature s/ Drew C. Ensign **Date: 8/9/21**.

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2021, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

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Drew C. Ensign

STATUTORY ADDENDUM

8 U.S.C. § 1227 (1996)

8 U.S.C. § 1231

8 U.S.C. § 1252 (1996)

8 U.S.C. § 1253 (1996)

8 U.S.C. § 1227 (1996)

§ 1227. Immediate deportation of aliens excluded from admission or entering in violation of law

(a) Maintenance expenses

(1) Any alien (other than an alien crewman) arriving in the United States who is excluded under this chapter, shall be immediately deported, in accommodations of the same class in which he arrived, unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper. Deportation shall be to the country in which the alien boarded the vessel or aircraft on which he arrived in the United States, unless the alien boarded such vessel or aircraft in foreign territory contiguous to the United States or in any island adjacent thereto or adjacent to the United States and the alien is not a native, citizen, subject, or national of, or does not have a residence in, such foreign contiguous territory or adjacent island, in which case the deportation shall instead be to the country in which is located the port at which the alien embarked for such foreign contiguous territory or adjacent island. The cost of the maintenance including detention expenses and expenses incident to detention of any such alien while he is being detained shall be borne by the owner or owners of the vessel or aircraft on which he arrived, except that the cost of maintenance (including detention expenses and expenses incident to detention while the alien is being detained prior to the time he is offered for deportation to the transportation line which brought him to the United States) shall not be assessed against the owner or owners of such vessel or aircraft if (A) the alien was in possession of a valid, unexpired immigrant visa, or (B) the alien (other than an alien crewman) was in possession of a valid, unexpired nonimmigrant visa or other document authorizing such alien to apply for temporary admission to the United States or an unexpired reentry permit issued to him, and (i) such application was made within one hundred and twenty days of the date of issuance of the visa or other document, or in the case of an alien in possession of a reentry permit, within one hundred and twenty days of the date on which the alien was last examined and admitted by the Service, or (ii) in the event the

application was made later than one hundred and twenty days of the date of issuance of the visa or other document or such examination and admission, if the owner or owners of such vessel or aircraft established to the satisfaction of the Attorney General that the ground of exclusion could not have been ascertained by the exercise of due diligence prior to the alien's embarkation, or (C) the person claimed United States nationality or citizenship and was in possession of an unexpired United States passport issued to him by competent authority.
(2) If the government of the country designated in paragraph (1) will not accept the alien into its territory, the alien's deportation shall be directed by the Attorney General, in his discretion and without necessarily giving any priority or preference because of their order as herein set forth, either to--
(A) the country of which the alien is a subject, citizen, or national;
(B) the country in which he was born;
(C) the country in which he has a residence; or
(D) any country which is willing to accept the alien into its territory, if deportation to any of the foregoing countries is impracticable, inadvisable, or impossible.

(b) Unlawful practice of transportation lines

It shall be unlawful for any master, commanding officer, purser, person in charge, agent, owner, or consignee of any vessel or aircraft (1) to refuse to receive any alien (other than an alien crewman), ordered deported under this section back on board such vessel or aircraft or another vessel or aircraft owned or operated by the same interests; (2) to fail to detain any alien (other than an alien crewman) on board any such vessel or at the airport of arrival of the aircraft when required by this chapter or if so ordered by an immigration officer, or to fail or refuse to deliver him for medical or other inspection, or for further medical or other inspection, as and when so ordered by such officer; (3) to refuse or fail to remove him from the United States to the country to which his deportation has been directed; (4) to fail to pay the cost of his maintenance while being detained as required by this section; (5) to take any fee, deposit, or consideration on a contingent basis to be kept or returned in case the alien is landed or excluded; or (6) knowingly to bring to the United States any alien (other than an alien crewman)

excluded or arrested and deported under any provision of law until such alien may be lawfully entitled to reapply for admission to the United States. If it shall appear to the satisfaction of the Attorney General that any such master, commanding officer, purser, person in charge, agent, owner, or consignee of any vessel or aircraft has violated any of the provisions of this section, such master, commanding officer, purser, person in charge, agent, owner, or consignee shall pay to the Commissioner the sum of $2,000 for each violation. No such vessel or aircraft shall have clearance from any port of the United States while any such fine is unpaid or while the question of liability to pay any such fine is being determined, nor shall any such fine be remitted or refunded, except that clearance may be granted prior to the determination of such question upon the deposit with the Commissioner of a bond or undertaking approved by the Attorney General or a sum sufficient to cover such fine.

(c) Transportation expense of deportation

An alien shall be deported on a vessel or aircraft owned by the same person who owns the vessel or aircraft on which the alien arrived in the United States, unless it is impracticable to so deport the alien within a reasonable time. The transportation expense of the alien's deportation shall be borne by the owner or owners of the vessel or aircraft on which the alien arrived. If the deportation is effected on a vessel or aircraft not owned by such owner or owners, the transportation expense of the alien's deportation may be paid from the appropriation for the enforcement of this chapter and recovered by civil suit from any owner, agent, or consignee of the vessel or aircraft on which the alien arrived.

(d) Stay of deportation; payment of maintenance expenses

The Attorney General, under such conditions as are by regulations prescribed, may stay the deportation of any alien deportable under this section, if in his judgment the testimony of such alien is necessary on behalf of the United States in the prosecution of offenders against any provision of this chapter or other laws of the United States. The cost of maintenance of any person so detained resulting from a stay of deportation under this subsection and a witness fee in the sum of $1 per

day for each day such person is so detained may be paid from the appropriation for the enforcement of this subchapter. Such alien may be released under bond in the penalty of not less than $500 with security approved by the Attorney General on condition that such alien shall be produced when required as a witness and for deportation, and on such other conditions as the Attorney General may prescribe.

(e) Deportation of alien accompanying physically disabled alien

Upon the certificate of an examining medical officer to the effect that an alien ordered to be excluded and deported under this section is helpless from sickness or mental and physical disability, or infancy, if such alien is accompanied by another alien whose protection or guardianship is required by the alien ordered excluded and deported, such accompanying alien may also be excluded and deported, and the master, commanding officer, agent, owner, or consignee of the vessel or aircraft in which such alien and accompanying alien arrived in the United States shall be reqired to return the accompanying alien in the same manner as other aliens denied admission and ordered deported under this section.

8 U.S.C. § 1231
§ 1231. Detention and removal of aliens ordered removed

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

(1) Removal period
(A) In general
Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").
(B) Beginning of period
The removal period begins on the latest of the following:
(i) The date the order of removal becomes administratively final.
(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.
(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.
(C) Suspension of period
The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.
(2) Detention
During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.
(3) Supervision after 90-day period
If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien--
(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;
(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and
(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a) of Title 42 and paragraph (2)[1], the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment--
(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title[2] and (II) the removal of the alien is appropriate and in the best interest of the United States; or
(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that such alien be so removed.

(C) Notice

Any alien removed pursuant to this paragraph shall be notified of the penalties under the laws of the United States relating to the reentry of

deported aliens, particularly the expanded penalties for aliens removed under subparagraph (B).

(D) No private right

No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that--

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.

(b) Countries to which aliens may be removed

(1) Aliens arriving at the United States

Subject to paragraph (3)--

(A) In general

Except as provided by subparagraphs (B) and (C), an alien who arrives at the United States and with respect to whom proceedings under

section 1229a of this title were initiated at the time of such alien's arrival shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States.

(B) Travel from contiguous territory

If the alien boarded the vessel or aircraft on which the alien arrived in the United States in a foreign territory contiguous to the United States, an island adjacent to the United States, or an island adjacent to a foreign territory contiguous to the United States, and the alien is not a native, citizen, subject, or national of, or does not reside in, the territory or island, removal shall be to the country in which the alien boarded the vessel that transported the alien to the territory or island.

(C) Alternative countries

If the government of the country designated in subparagraph (A) or (B) is unwilling to accept the alien into that country's territory, removal shall be to any of the following countries, as directed by the Attorney General:

(i) The country of which the alien is a citizen, subject, or national.

(ii) The country in which the alien was born.

(iii) The country in which the alien has a residence.

(iv) A country with a government that will accept the alien into the country's territory if removal to each country described in a previous clause of this subparagraph is impracticable, inadvisable, or impossible.

(2) Other aliens

Subject to paragraph (3)--

(A) Selection of country by alien

Except as otherwise provided in this paragraph--

(i) any alien not described in paragraph (1) who has been ordered removed may designate one country to which the alien wants to be removed, and

(ii) the Attorney General shall remove the alien to the country the alien so designates.

(B) Limitation on designation

An alien may designate under subparagraph (A)(i) a foreign territory contiguous to the United States, an adjacent island, or an island adjacent to a foreign territory contiguous to the United States as the place to which the alien is to be removed only if the alien is a native, citizen, subject, or national of, or has resided in, that designated territory or island.

(C) Disregarding designation
The Attorney General may disregard a designation under subparagraph (A)(i) if--
(i) the alien fails to designate a country promptly;
(ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country;
(iii) the government of the country is not willing to accept the alien into the country; or
(iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.
(D) Alternative country
If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country--
(i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or
(ii) is not willing to accept the alien into the country.
(E) Additional removal countries
If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:
(i) The country from which the alien was admitted to the United States.
(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.
(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.
(iv) The country in which the alien was born.
(v) The country that had sovereignty over the alien's birthplace when the alien was born.
(vi) The country in which the alien's birthplace is located when the alien is ordered removed.
(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph,

another country whose government will accept the alien into that country.

(F) Removal country when United States is at war

When the United States is at war and the Attorney General decides that it is impracticable, inadvisable, inconvenient, or impossible to remove an alien under this subsection because of the war, the Attorney General may remove the alien--

(i) to the country that is host to a government in exile of the country of which the alien is a citizen or subject if the government of the host country will permit the alien's entry; or

(ii) if the recognized government of the country of which the alien is a citizen or subject is not in exile, to a country, or a political or territorial subdivision of a country, that is very near the country of which the alien is a citizen or subject, or, with the consent of the government of the country of which the alien is a citizen or subject, to another country.

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that--

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

(C) Sustaining burden of proof; credibility determinations

In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 1158(b)(1)(B) of this title.

(c) Removal of aliens arriving at port of entry

(1) Vessels and aircraft

An alien arriving at a port of entry of the United States who is ordered removed either without a hearing under section 1225(b)(1) or 1225(c) of this title or pursuant to proceedings under section 1229a of this title initiated at the time of such alien's arrival shall be removed immediately on a vessel or aircraft owned by the owner of the vessel or aircraft on which the alien arrived in the United States, unless--

(A) it is impracticable to remove the alien on one of those vessels or aircraft within a reasonable time, or

(B) the alien is a stowaway--

(i) who has been ordered removed in accordance with section 1225(a)(1) of this title,

(ii) who has requested asylum, and

(iii) whose application has not been adjudicated or whose asylum application has been denied but who has not exhausted all appeal rights.

(2) Stay of removal

(A) In general
The Attorney General may stay the removal of an alien under this subsection if the Attorney General decides that--
(i) immediate removal is not practicable or proper; or
(ii) the alien is needed to testify in the prosecution of a person for a violation of a law of the United States or of any State.
(B) Payment of detention costs
During the period an alien is detained because of a stay of removal under subparagraph (A)(ii), the Attorney General may pay from the appropriation "Immigration and Naturalization Service--Salaries and Expenses"--
(i) the cost of maintenance of the alien; and
(ii) a witness fee of $1 a day.
(C) Release during stay
The Attorney General may release an alien whose removal is stayed under subparagraph (A)(ii) on--
(i) the alien's filing a bond of at least $500 with security approved by the Attorney General;
(ii) condition that the alien appear when required as a witness and for removal; and
(iii) other conditions the Attorney General may prescribe.
(3) Costs of detention and maintenance pending removal
(A) In general
Except as provided in subparagraph (B) and subsection (d)[3], an owner of a vessel or aircraft bringing an alien to the United States shall pay the costs of detaining and maintaining the alien--
(i) while the alien is detained under subsection (d)(1), and
(ii) in the case of an alien who is a stowaway, while the alien is being detained pursuant to--
(I) subsection (d)(2)(A) or (d)(2)(B)(i),
(II) subsection (d)(2)(B)(ii) or (iii) for the period of time reasonably necessary for the owner to arrange for repatriation or removal of the stowaway, including obtaining necessary travel documents, but not to extend beyond the date on which it is ascertained that such travel documents cannot be obtained from the country to which the stowaway is to be returned, or
(III) section 1225(b)(1)(B)(ii) of this title, for a period not to exceed 15 days (excluding Saturdays, Sundays, and holidays) commencing on the

first such day which begins on the earlier of 72 hours after the time of the initial presentation of the stowaway for inspection or at the time the stowaway is determined to have a credible fear of persecution.

(B) Nonapplication

Subparagraph (A) shall not apply if--

(i) the alien is a crewmember;

(ii) the alien has an immigrant visa;

(iii) the alien has a nonimmigrant visa or other documentation authorizing the alien to apply for temporary admission to the United States and applies for admission not later than 120 days after the date the visa or documentation was issued;

(iv) the alien has a reentry permit and applies for admission not later than 120 days after the date of the alien's last inspection and admission;

(v)(I) the alien has a nonimmigrant visa or other documentation authorizing the alien to apply for temporary admission to the United States or a reentry permit;

(II) the alien applies for admission more than 120 days after the date the visa or documentation was issued or after the date of the last inspection and admission under the reentry permit; and

(III) the owner of the vessel or aircraft satisfies the Attorney General that the existence of the condition relating to inadmissibility could not have been discovered by exercising reasonable care before the alien boarded the vessel or aircraft; or

(vi) the individual claims to be a national of the United States and has a United States passport.

(d) Requirements of persons providing transportation

(1) Removal at time of arrival

An owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel or aircraft bringing an alien (except an alien crewmember) to the United States shall--

(A) receive an alien back on the vessel or aircraft or another vessel or aircraft owned or operated by the same interests if the alien is ordered removed under this part; and

(B) take the alien to the foreign country to which the alien is ordered removed.

(2) Alien stowaways
An owner, agent, master, commanding officer, charterer, or consignee of a vessel or aircraft arriving in the United States with an alien stowaway--
(A) shall detain the alien on board the vessel or aircraft, or at such place as the Attorney General shall designate, until completion of the inspection of the alien by an immigration officer;
(B) may not permit the stowaway to land in the United States, except pursuant to regulations of the Attorney General temporarily--
(i) for medical treatment,
(ii) for detention of the stowaway by the Attorney General, or
(iii) for departure or removal of the stowaway; and
(C) if ordered by an immigration officer, shall remove the stowaway on the vessel or aircraft or on another vessel or aircraft.

The Attorney General shall grant a timely request to remove the stowaway under subparagraph (C) on a vessel or aircraft other than that on which the stowaway arrived if the requester has obtained any travel documents necessary for departure or repatriation of the stowaway and removal of the stowaway will not be unreasonably delayed.
(3) Removal upon order
An owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel, aircraft, or other transportation line shall comply with an order of the Attorney General to take on board, guard safely, and transport to the destination specified any alien ordered to be removed under this chapter.

(e) Payment of expenses of removal

(1) Costs of removal at time of arrival
In the case of an alien who is a stowaway or who is ordered removed either without a hearing under section 1225(a)(1)[4] or 1225(c) of this title or pursuant to proceedings under section 1229a of this title initiated at the time of such alien's arrival, the owner of the vessel or aircraft (if any) on which the alien arrived in the United States shall pay the transportation cost of removing the alien. If removal is on a vessel or

aircraft not owned by the owner of the vessel or aircraft on which the alien arrived in the United States, the Attorney General may--
(A) pay the cost from the appropriation "Immigration and Naturalization Service--Salaries and Expenses"; and
(B) recover the amount of the cost in a civil action from the owner, agent, or consignee of the vessel or aircraft (if any) on which the alien arrived in the United States.

(2) Costs of removal to port of removal for aliens admitted or permitted to land

In the case of an alien who has been admitted or permitted to land and is ordered removed, the cost (if any) of removal of the alien to the port of removal shall be at the expense of the appropriation for the enforcement of this chapter.

(3) Costs of removal from port of removal for aliens admitted or permitted to land

(A) Through appropriation

Except as provided in subparagraph (B), in the case of an alien who has been admitted or permitted to land and is ordered removed, the cost (if any) of removal of the alien from the port of removal shall be at the expense of the appropriation for the enforcement of this chapter.

(B) Through owner

(i) In general

In the case of an alien described in clause (ii), the cost of removal of the alien from the port of removal may be charged to any owner of the vessel, aircraft, or other transportation line by which the alien came to the United States.

(ii) Aliens described

An alien described in this clause is an alien who--
(I) is admitted to the United States (other than lawfully admitted for permanent residence) and is ordered removed within 5 years of the date of admission based on a ground that existed before or at the time of admission, or
(II) is an alien crewman permitted to land temporarily under section 1282 of this title and is ordered removed within 5 years of the date of landing.

(C) Costs of removal of certain aliens granted voluntary departure

In the case of an alien who has been granted voluntary departure under section 1229c of this title and who is financially unable to depart at the alien's own expense and whose removal the Attorney General deems to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this chapter.

(f) Aliens requiring personal care during removal

(1) In general
If the Attorney General believes that an alien being removed requires personal care because of the alien's mental or physical condition, the Attorney General may employ a suitable person for that purpose who shall accompany and care for the alien until the alien arrives at the final destination.
(2) Costs
The costs of providing the service described in paragraph (1) shall be defrayed in the same manner as the expense of removing the accompanied alien is defrayed under this section.

(g) Places of detention

(1) In general
The Attorney General shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal. When United States Government facilities are unavailable or facilities adapted or suitably located for detention are unavailable for rental, the Attorney General may expend from the appropriation "Immigration and Naturalization Service--Salaries and Expenses", without regard to section 6101 of Title 41, amounts necessary to acquire land and to acquire, build, remodel, repair, and operate facilities (including living quarters for immigration officers if not otherwise available) necessary for detention.
(2) Detention facilities of the Immigration and Naturalization Service
Prior to initiating any project for the construction of any new detention facility for the Service, the Commissioner shall consider the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use.

(h) Statutory construction

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

(i) Incarceration

(1) If the chief executive officer of a State (or, if appropriate, a political subdivision of the State) exercising authority with respect to the incarceration of an undocumented criminal alien submits a written request to the Attorney General, the Attorney General shall, as determined by the Attorney General--
(A) enter into a contractual arrangement which provides for compensation to the State or a political subdivision of the State, as may be appropriate, with respect to the incarceration of the undocumented criminal alien; or
(B) take the undocumented criminal alien into the custody of the Federal Government and incarcerate the alien.
(2) Compensation under paragraph (1)(A) shall be the average cost of incarceration of a prisoner in the relevant State as determined by the Attorney General.
(3) For purposes of this subsection, the term "undocumented criminal alien" means an alien who--
(A) has been convicted of a felony or two or more misdemeanors; and
(B)(i) entered the United States without inspection or at any time or place other than as designated by the Attorney General;
(ii) was the subject of exclusion or deportation proceedings at the time he or she was taken into custody by the State or a political subdivision of the State; or
(iii) was admitted as a nonimmigrant and at the time he or she was taken into custody by the State or a political subdivision of the State has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status.

(4)(A) In carrying out paragraph (1), the Attorney General shall give priority to the Federal incarceration of undocumented criminal aliens who have committed aggravated felonies.
(B) The Attorney General shall ensure that undocumented criminal aliens incarcerated in Federal facilities pursuant to this subsection are held in facilities which provide a level of security appropriate to the crimes for which they were convicted.
(5) There are authorized to be appropriated to carry out this subsection--
(A) $750,000,000 for fiscal year 2006;
(B) $850,000,000 for fiscal year 2007; and
(C) $950,000,000 for each of the fiscal years 2008 through 2011.
(6) Amounts appropriated pursuant to the authorization of appropriations in paragraph (5) that are distributed to a State or political subdivision of a State, including a municipality, may be used only for correctional purposes.

8 U.S.C. § 1252 (1996)

§ 1252. Apprehension and deportation of aliens

(a) Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congressional committees

(1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Except as provided in paragraph (2), any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.
(2) The Attorney General shall take into custody any alien convicted of any criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), upon release of the alien from incarceration, shall deport the alien as expeditiously as possible. Notwithstanding paragraph (1) or subsections (c) and (d) of this section, the Attorney General shall not release such felon from custody.
(3)(A) The Attorney General shall devise and implement a system--

(i) 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;
(ii) to designate and train officers and employees of the Service within each district 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
(iii) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony and who have been deported; such record shall be made available to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any such previously deported alien seeking to reenter the United States.
(B) The Attorney General shall submit reports to the Committees on the Judiciary of the House of Representatives and of the Senate at the end of the 6-month period and at the end of the 18-month period beginning on the effective date of this paragraph which describe in detail specific efforts made by the Attorney General to implement this paragraph.

(b) Proceedings to determine deportability; removal expenses

A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien; except that nothing in this subsection shall preclude the Attorney General from authorizing proceedings by electronic or telephonic media (with the consent of the alien) or, where waived or agreed to by the

parties, in the absence of the alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that are consistent with section 1252b of this title and that provide that--

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held,

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose,

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government, and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

Except as provided in section 1252a(d) of this title, the procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of

this chapter, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 1251 of this title if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraphs (2), (3) or (4) of section 1251(a) of this title. If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this chapter.

(c) (1) Final order of deportation; place of detention

(1) Subject to paragraph (2), when a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention

pending eventual deportation as is authorized in this section. The Attorney General is authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section. Where no Federal buildings are available or buildings adapted or suitably located for the purpose are available for rental, the Attorney General is authorized, notwithstanding section 5 of Title 41 or section 278a of Title 40 to expend, from the appropriation provided for the administration and enforcement of the immigration laws, such amounts as may be necessary for the acquisition of land and the erection, acquisition, maintenance, operation, remodeling, or repair of buildings, sheds, and office quarters (including living quarters for officers where none are otherwise available), and adjunct facilities, necessary for the detention of aliens. For the purposes of this section an order of deportation heretofore or hereafter entered against an alien in legal detention or confinement, other than under an immigration process, shall be considered as being made as of the moment he is released from such detention or confinement, and not prior thereto.
(c) (2)
(2) When a final order of deportation under administrative process is made against any alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D) or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), the Attorney General shall have 30 days from the date of the order within which to effect the alien's departure from the United States. The Attorney General shall have sole and unreviewable discretion to waive the foregoing provision for aliens who are cooperating with law enforcement authorities or for purposes of national security.

(d) Supervision of deportable alien; violation by alien

Any alien, against whom a final order of deportation as defined in subsection (c) of this section heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if

necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(e) Penalty for willful failure to depart; suspension of sentence

Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the classes described in section 1251(a) of this title, who shall willfully fail or refuse to depart from the United States within a period of six months from the date of the final order of deportation under administrative processes, or, if judicial review is had, then from the date of the final order of the court, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than four years, or shall be imprisoned not more than ten years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 1251(a) of this title: *Provided*, That this subsection shall not make it illegal for any alien to take any proper steps for the purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: *Provided further*, That the court may for good cause suspend the sentence of such alien and order his release under such conditions as the court may

prescribe. In determining whether good cause has been shown to justify releasing the alien, the court shall take into account such factors as (1) the age, health, and period of detention of the alien; (2) the effect of the alien's release upon the national security and public peace or safety; (3) the likelihood of the alien's resuming or following a course of conduct which made or would make him deportable; (4) the character of the efforts made by such alien himself and by representatives of the country or countries to which his deportation is directed to expedite the alien's departure from the United States; (5) the reason for the inability of the Government of the United States to secure passports, other travel documents, or deportation facilities from the country or countries to which the alien has been ordered deported; and (6) the eligibility of the alien for discretionary relief under the immigration laws.

(f) Unlawful reentry

Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) of this section the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.

(g) Voluntary deportation; payment of expenses

If any alien, subject to supervision or detention under subsections (c) or (d) of this section, is able to depart from the United States under the order of deportation, except that he is financially unable to pay his passage, the Attorney General may in his discretion permit such alien to depart voluntarily, and the expense of such passage to the country to which he is destined may be paid from the appropriation for the enforcement of this chapter, unless such payment is otherwise provided for under this chapter.

(1) Except as provided in paragraph (2), an alien sentenced to imprisonment may not be deported until such imprisonment has been terminated by the release of the alien from confinement. Parole, supervised release, probation, or possibility of rearrest or further confinement in respect of the same offense shall not be a ground for deferral of deportation.
(2) The Attorney General is authorized to deport an alien in accordance with applicable procedures under this Act prior to the completion of a sentence of imprisonment--
(A) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (i) the alien is confined pursuant to a final conviction for a nonviolent offense (other than alien smuggling), and (ii) such deportation of the alien is appropriate and in the best interest of the United States; or
(B) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (i) the alien is confined pursuant to a final conviction for a nonviolent offense (other than alien smuggling), (ii) such deportation is appropriate and in the best interest of the State, and (iii) submits a written request to the Attorney General that such alien be so deported.
(3) Any alien deported pursuant to this subsection shall be notified of the penalties under the laws of the United States relating to the reentry of deported aliens, particularly the expanded penalties for aliens deported under paragraph (2).

(i) Expeditious deportation of convicted aliens

In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of the conviction. Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(j) Incarceration

(1) If the chief executive officer of a State (or, if appropriate, a political subdivision of the State) exercising authority with respect to the incarceration of an undocumented criminal alien submits a written request to the Attorney General, the Attorney General shall, as determined by the Attorney General--
(A) enter into a contractual arrangement which provides for compensation to the State or a political subdivision of the State, as may be appropriate, with respect to the incarceration of the undocumented criminal alien; or
(B) take the undocumented criminal alien into the custody of the Federal Government and incarcerate the alien.
(2) Compensation under paragraph (1)(A) shall be the average cost of incarceration of a prisoner in the relevant State as determined by the Attorney General.
(3) For purposes of this subsection, the term "undocumented criminal alien" means an alien who--
(A) has been convicted of a felony and sentenced to a term of imprisonment; and
(B)(i) entered the United States without inspection or at any time or place other than as designated by the Attorney General;
(ii) was the subject of exclusion or deportation proceedings at the time he or she was taken into custody by the State or a political subdivision of the State; or
(iii) was admitted as a nonimmigrant and at the time he or she was taken into custody by the State or a political subdivision of the State has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status.
(4)(A) In carrying out paragraph (1), the Attorney General shall give priority to the Federal incarceration of undocumented criminal aliens who have committed aggravated felonies.
(B) The Attorney General shall ensure that undocumented criminal aliens incarcerated in Federal facilities pursuant to this subsection are held in facilities which provide a level of security appropriate to the crimes for which they were convicted.
(5) There are authorized to be appropriated such sums as may be necessary to carry out this subsection, of which the following amounts may be appropriated from the Violent Crime Reduction Trust Fund:

(A) $130,000,000 for fiscal year 1995;
(B) $300,000,000 for fiscal year 1996;
(C) $330,000,000 for fiscal year 1997;
(D) $350,000,000 for fiscal year 1998;
(E) $350,000,000 for fiscal year 1999; and
(F) $340,000,000 for fiscal year 2000.

8 U.S.C. § 1253 (1996)

§ 1253. Countries to which aliens shall be deported

(a) Acceptance by designated country; deportation upon nonacceptance by country

The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either--
(1) to the country from which such alien last entered the United States;
(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;
(3) to the country in which he was born;
(4) to the country in which the place of his birth is situated at the time

he is ordered deported;
(5) to any country in which he resided prior to entering the country from which he entered the United States;
(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or
(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

(b) Deportation during war

If the United States is at war and the deportation, in accordance with the provisions of subsection (a) of this section, of any alien who is deportable under any law of the United States shall be found by the Attorney General to be impracticable, inadvisable, inconvenient, or impossible because of enemy occupation of the country from which such alien came or wherein is located the foreign port at which he embarked for the United States or because of reasons connected with the war, such alien may, in the discretion of the Attorney General, be deported as follows:
(1) if such alien is a citizen or subject of a country whose recognized government is in exile, to the country in which is located that government in exile if that country will permit him to enter its territory; or
(2) if such alien is a citizen or subject of a country whose recognized government is not in exile, then to a country or any political or territorial subdivision thereof which is proximate to the country of which the alien is a citizen or subject, or, with the consent of the country of which the alien is a citizen or subject, to any other country.

(c) Payment of deportation costs; within five years

If deportation proceedings are instituted at any time within five years after the entry of the alien for causes existing prior to or at the time of entry, the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this chapter, and the deportation from such port shall be at the expense of the owner or owners of the vessels, aircraft, or other transportation lines by which

such alien came to the United States, or if in the opinion of the Attorney General that is not practicable, at the expense of the appropriation for the enforcement of this chapter: *Provided*, That the costs of the deportation of any such alien from such port shall not be assessed against the owner or owners of the vessels, aircraft, or other transportation lines in the case of any alien who arrived in possession of a valid unexpired immigrant visa and who was inspected and admitted to the United States for permanent residence. In the case of an alien crewman, if deportation proceedings are instituted at any time within five years after the granting of the last conditional permit to land temporarily under the provisions of section 1282 of this title, the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this chapter and the deportation from such port shall be at the expense of the owner or owners of the vessels or aircraft by which such alien came to the United States, or if in the opinion of the Attorney General that is not practicable, at the expense of the appropriation for the enforcement of this chapter.

(d) Cost of deportation, subsequent to five years

If deportation proceedings are instituted later than five years after the entry of the alien, or in the case of an alien crewman later than five years after the granting of the last conditional permit to land temporarily, the cost thereof shall be payable from the appropriation for the enforcement of this chapter.

(e) Refusal to transport or to pay

A failure or refusal on the part of the master, commanding officer, agent, owner, charterer, or consignee of a vessel, aircraft, or other transportation line to comply with the order of the Attorney General to take on board, guard safely, and transport to the destination specified any alien ordered to be deported under the provisions of this chapter, or a failure or refusal by any such person to comply with an order of the Attorney General to pay deportation expenses in accordance with the requirements of this section, shall be punished by the imposition of a penalty in the sum and manner prescribed in section 1227(b) of this title.

(f) Payment of expenses of physically incapable deportees

When in the opinion of the Attorney General the mental or physical condition of an alien being deported is such as to require personal care and attendance, the Attorney General shall, when necessary, employ a suitable person for that purpose who shall accompany such alien to his final destination, and the expense incident to such service shall be defrayed in the same manner as the expense of deporting the accompanied alien is defrayed, and any failure or refusal to defray such expenses shall be punished in the manner prescribed by subsection (e) of this section.

(g) Countries delaying acceptance of deportees

Upon the notification by the Attorney General that any country upon request denies or unduly delays acceptance of the return of any alien who is a national, citizen, subject, or resident thereof, the Secretary of State shall instruct consular officers performing their duties in the territory of such country to discontinue the issuance of immigrant visas to nationals, citizens, subjects, or residents of such country, until such time as the Attorney General shall inform the Secretary of State that such country has accepted such alien.

(h) Withholding of deportation or return

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.
(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that--
(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
(B) the alien, having been convicted by a final judgment of a

particularly serious crime, constitutes a danger to the community of the United States;
(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or
(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.
For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime. For purposes of subparagraph (D), an alien who is described in section 1251(a)(4)(B) of this title shall be considered to be an alien for whom there are reasonable grounds for regarding as a danger to the security of the United States.
(3) Notwithstanding any other provision of law, paragraph (1) shall apply to any alien if the Attorney General determines, in the discretion of the Attorney General, that--
(A) such alien's life or freedom would be threatened, in the country to which such alien would be deported or returned, on account of race, religion, nationality, membership in a particular social group, or political opinion; and
(B) the application of paragraph (1) to such alien is necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees.