No. 21-11715

In the United States Court of Appeals for the Eleventh Circuit

STATE OF FLORIDA,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees.

REPLY BRIEF OF APPELLANT STATE OF FLORIDA

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

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INTRODUCTION

Dissatisfied with the Executive Branch's administration of the immigration laws, Congress in 1996 amended the Immigration and Nationality Act to provide that the Executive Branch "*shall*"—not may—"take into custody *any alien*" who has committed certain crimes, including crimes of moral turpitude, crimes involving controlled substances, human trafficking, and money laundering, as well as aliens suspected of terrorist activity. 8 U.S.C. § 1226(c)(1) (emphases added); *see* Fla. Br. 33 & n.20.

Dissatisfied with the statute, the Executive Branch earlier this year issued two (non)enforcement memos that disregard the immigration-enforcement priorities set forth in Section 1226(c) in favor of different, conflicting priorities more to the current Administration's taste. The memos assert discretion to decide, based on the government's own, amorphous "public safety" determination, whether to detain even those aliens who have committed the crimes Congress expressly directed must result in mandatory detention of criminal aliens. *See* Fla. Br. 9–10. That unlawful shift in policy has resulted in the release of numerous dangerous criminal aliens into Florida and will continue to do so unless the injunction Florida seeks is granted.

The government's view is that the priorities set forth in Section 1226(c) are optional, requiring detention of only those aliens whom the government decides, in its discretion, to remove. Gov. Br. 31–36. But the statutory language is mandatory

and contains no such precondition. The government's interpretation inverts the operation of the statute: the statute "*subtract[s]*" from the government's "discretion," *Nielsen v. Preap*, 139 S. Ct. 954, 966 (2019) (emphasis in original), rather than enables it.

The government also seeks to avoid judicial review of its unlawful memos by contending that Florida lacks standing to sue. But as even the district court—which ruled for the government on other grounds—concluded, the government's new priorities have resulted in the release of criminal aliens who would have been detained and removed under a lawful policy (and under the policies of both of the prior two Administrations). That will continue to happen unless and until the new priorities are enjoined. Moreover, the notion that relaxing immigration enforcement against criminal aliens will predictably lead to more crime in Florida (and other attendant costs and harms) is not speculation, but rather common sense supported by record evidence.

Finally, the government asserts that the memoranda are not agency actions reviewable under the APA. But the memoranda establish a new, reticulated set of immigration-enforcement priorities and procedures and the government itself has treated them as binding. The Supreme Court held in *DHS v. Regents of the University of California*, 140 S. Ct. 1891 (2020), that the government's immigration-nonenforcement policy, in the form of the Deferred Action for Childhood Arrivals

Program, was subject to judicial review. The government's nonenforcement policy is subject to judicial review here for the same reasons. *See id.* at 1906–07.

The district court's order denying Florida's motion for a preliminary injunction should be reversed.

ARGUMENT

I. FLORIDA IS LIKELY TO SUCCEED ON THE MERITS.

A. The memos exceed Defendants' statutory authority.

As Florida has demonstrated, Section 1226(c) unambiguously requires the arrest and detention of criminal aliens who are within the categories of aliens specifically described in that statutory provision—those who have committed certain crimes or are suspected of terrorism. Fla. Br. 32–35.

1. The government's principal response is that, even if Section 1226(c) imposes a mandatory duty to arrest criminal aliens, it applies only to aliens with "pending . . . removal proceedings," Gov. Br. 44, and, it says, the decision to initiate removal proceedings is entirely "discretionary." *Id.* at 32. But the statute creates an unqualified obligation for the government to "take into custody *any alien* who . . . is released." 8 U.S.C. § 1226(c)(1) (emphasis added). As the Supreme Court recently explained, the universe of aliens who must be detained under this provision turns on *what crimes* (and related dangerous conduct) the "alien" in question has engaged in. *See Preap*, 139 S. Ct. at 965–66. And the government "*must* arrest those aliens guilty of a predicate offense." *Id.* at 966 (emphasis in original); *see id.* at 965 ("the scope

of 'the alien' is fixed by the predicate offenses identified" in Section 1226(c)). This Court, too, has rightly described Section 1226(c) as "requir[ing] the pre-removal-order detention of *all* criminal aliens," explaining that it applies "during the period following the expiration of their original sentences but prior to a decision regarding their removal." *De La Teja v. United States*, 321 F.3d 1357, 1362 (11th Cir. 2003) (emphasis added). The en banc Board of Immigration Appeals, after reviewing the statute's text and history, likewise has recognized that Section 1226(c) requires the government to "remov[e] *all* criminal aliens." *In re Rojas*, 23 I. & N. Dec. 117, 122 (BIA 2001) (en banc) (emphasis in original). The statute, in other words, obliges the government to arrest and detain *criminal aliens*—not just those the government decides to remove. *See* Br. of DHS at 23, *Nielsen v. Preap*, 139 S. Ct. 954 (2019) ("Section 1226(c) embodies Congress's categorical judgment that" immigration officials "should no longer be in the business of trying to predict which criminal aliens will actually flee or reoffend.").[1]

In arguing otherwise, the government reads the phrase "pending a decision on whether the alien is to be removed" in Section 1226(a) as somehow implicitly limiting its obligation to arrest and detain criminal aliens under Section 1226(c) to aliens with "pending removal proceedings." Gov. Br. 31. That turns the statute on

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

its head: It is "subsection (c)(1) [that] limits subsection (a)'s first sentence by curbing the discretion to arrest," *Preap*, 139 S. Ct. at 966, not the other way around. Section 1226(a)—in deference to the government's "deep-rooted enforcement discretion," Gov. Br. 33—does provide the government discretion and mentions removal proceedings: It says that an alien "may be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). But subsection (c), conspicuously, does not: It limits discretion and mentions nothing about pending removal proceedings. It is true, of course, that detention under Section 1226(c) lasts only until the conclusion of removal proceedings. *See Demore v. Kim*, 538 U.S. 510, 527–28 (2003). But that has nothing to do with what triggers the government's obligation to arrest and detain an alien in the first place. And the government has itself historically read Section 1226 as being independent of pending removal proceedings. For example, ICE's standard warrant form contemplates five distinct bases for issuing a warrant pursuant to Section 1226, only one of which involves the existence of removal proceedings against the alien. *See* ICE I-200 Sample Warrant.[2]

The government's interpretation fails to respect the policy judgment Congress made in the statute. Until 1996, Congress only required mandatory detention of

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[2] *Available at* https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF.

aliens who were "aggravated felon[s]." *See* 8 U.S.C. § 1252(a)(2)(A) (1994). The 1996 amendments to the statute expanded the categories of aliens subject to mandatory detention to include aliens who commit many other crimes. 8 U.S.C. § 1226(c); *see* Fla. Br. 33 & n.20. Yet the only criminal aliens the government's new enforcement policy explicitly prioritizes are aggravated felons (as well as gang members)—the aliens that were included *before* Congress amended the statute. *See* 8 U.S.C. § 1252(a)(2)(A) (1994). As the Supreme Court has noted, Congress in 1996 amended the statute "against a backdrop of wholesale failure by [the Immigration and Naturalization Service] to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518. And "as Congress explained, '[a]liens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others." *Id.* (citation omitted). Moreover, "deportable criminal aliens who remained in the United States often committed more crimes before being removed." *Id.* The government's new policy disregards these aims and conflicts with the judgment Congress expressly made in amending the statute to realign the enforcement priorities of the Executive Branch.[3]

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[3] The government gestures at constitutional restrictions on Congress's authority to limit its enforcement discretion. Gov Br. 34 (claiming "inherent, unreviewable authority" over immigration enforcement). But "Congress may limit an agency's exercise of enforcement power if it wishes," *Heckler v. Chaney*, 470 U.S. 821, 833 (1985), especially in the field of immigration enforcement, *Fiallo v. Bell*, 430 U.S.

2. The government next argues that the memos "do not forbid the detention of any particular noncitizen." Gov. Br. 44. Regardless of what they "forbid," the evidence shows that the memos are drastically reducing enforcement, Fla. Br. 14–15, and that the government knew from the outset that they would have that effect, DE 34-2, at 2. The evident design and effect of the policy is to de-prioritize immigration enforcement against even criminal aliens who are subject to Section 1226(c), in defiance of the statute. The government cannot seriously contend that its new, relaxed immigration-enforcement policy is actually consistent with a policy of arresting and detaining all criminal aliens subject to mandatory arrest and detention under Section 1226(c). The government does point to a declaration saying that exceptions from the memos have been granted in a handful of cases. Gov. Br. 45. But that only highlights that the priorities in the memos establish the general rule—that immigration-enforcement presumptively will not proceed against criminal aliens subject to 1226(c).

ICE's own statistics are telling. They reflect that since January 2021—when the memos went into effect—the average daily population of convicted criminals in

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787, 792 (1977); *see also* U.S. Const. art. I, § 8, cl. 4. The authoritative expositor of the law in the Executive Branch, at least in the Obama Administration, agreed. *See Prioritizing and Deferring Removal of Certain Aliens Unlawfully Present in the United States,* 38 Op. O.L.C. 39, 45 (2014) (withdrawn June 30, 2020).

ICE immigration custody has dropped from an average of 8,173 in January, to 7,136 in February, to 5,910 in March, to 4,869 in April, to 4,575 in May, to 4,509 in June, and to 4,547 in July. *See* U.S. Immigration and Customs Enforcement, *Detention Statistics, Detention FY21 YTD*, line 77, *available at* https://www.ice.gov/detain/detention-management.

3. The government labors to establish that the term "shall" in Section 1226(c) is not mandatory. Gov. Br. 34; *see id.* at 28–36, 43. The Supreme Court disagrees. *See Preap*, 139 S. Ct. at 966 (explaining that Section 1226(c) provides that the government "*must* arrest those aliens guilty of a predicate offense" (emphasis in original)); *Jennings v. Rodriguez*, 138 S. Ct. 830, 847 (2018) ("We hold that § 1226(c) mandates detention of any alien falling within its scope."). In any event, the statute contains far more than a bare "shall." The history, structure, and purpose of the statute all demonstrate that the government's duty under Section 1226(c) is mandatory. *See* Fla. Br. 32–35.

B. The memos violate the APA.

1. The memos are arbitrary and capricious.

Section 1226(c), at a minimum, directs the Executive Branch to "prioritize the removal of criminal aliens." *Prioritizing and Deferring Removal of Certain Aliens Unlawfully Present in the United States*, 38 Op. O.L.C. 39, 51 (2014) (withdrawn June 30, 2020). As President Obama's Solicitor General argued in the Supreme

Court, "Congress has told DHS that it has to prioritize the removal of criminal aliens." Oral Arg. Tr. 21:9–22, *United States v. Texas*, 136 S. Ct. 2271 (2016). The government thus needed to consider Section 1226(c) and explain why compliance was impossible because "[d]isagreeing with Congress's expressly codified policy choices isn't a luxury administrative agencies enjoy." *Cent. United Life Ins. Co. v. Burwell*, 827 F.3d 70, 73 (D.C. Cir. 2016). The government cannot dismiss Section 1226(c) as merely a "single subsection" that does not "warran[t] special discussion" Gov. Br. 46.

The government stresses that ICE has only 34,000 beds available for detention. Gov. Br. 5, 24, 36, 47. But ICE's own statistics show that (at least as of the writing of this brief) ICE has a "currently detained" population of convicted criminals of just 4,439. *See* U.S. Immigration and Customs Enforcement, *Detention Statistics, Detention FY21 YTD*, line 21, *available at* https://www.ice.gov/detain/detention-management. Even at the end of the end of fiscal year 2020—before the abrupt shift in policy the memos worked in January 2021—ICE had a "detained population" of "just 19,068," of which only "63 percent" were subject to "mandatory detention." U.S. Immigration & Customs Enforcement, *U.S. Immigration and Customs Enforcement Fiscal Year 2020 Enforcement and*

Removal Operations Report, at 9 (2020).[4] In any event, ICE's detention-capacity rationale cannot save the memos from invalidation because it is "nowhere to be found," *Regents*, 140 S. Ct. at 1908–09, in them.

The government also makes vague references to problems at the Southwest border and the COVID-19 pandemic, Gov Br. 6, 46; DE 4-3, at 2; DE 4-4, at 3, but never explains how reducing interior enforcement against criminal aliens in places like Florida ameliorates those problems. "[C]onclusory statements" that the government has limited resources "are simply inadequate." *Am. Fed'n of Labor & Cong. Of Indus. Orgs. v. OSHA*, 965 F.2d 962, 976 (11th Cir. 1992).[5]

The government also dismisses Senate Bill 168, the law Florida enacted relying on the federal government's past compliance with Section 1226(c),[6] as not "legitimate" because "of the Executive's history of altering or refining priority schemes." Gov Br. 49. But the government identifies no evidence of another administration openly refusing to comply with Section 1226(c), and both President

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[4] *Available at* https://www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf.

[5] Despite the government's focus on its own "limited resources," the government does not respond to Florida's argument that the memos ignored the costs imposed by their actions, including on the states—a "centrally relevant factor" to regulation. *Michigan v. EPA*, 576 U.S. 743, 752–53 (2015).

[6] Senate Bill 168 requires Florida law-enforcement officers to cooperate with ICE to ensure that ICE can take custody of removable aliens when they are released from jail or prison. *See* Fla. Br. 8.

Trump and President Obama prioritized criminal aliens as required by the statute. *See* Fla. Br. 7–8, 38. It is legitimate for Florida to expect the government to continue to follow the law.

Finally, the government agrees (Gov. Br. 48) that it needed to consider "alternatives that are within the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913 (alterations and internal quotation marks omitted). But it does not acknowledge that the congressional mandate to take certain criminal aliens into custody was "within the ambit of the existing policy"—both President Trump's and President Obama's.

2. The memos unlawfully dispensed with notice and comment.

The memos are substantive rules requiring notice and comment, not "general statements of policy." Gov. Br. 50. The government agrees that "[t]he relevant question is whether the guidance here in fact *binds* the agencies." Gov. Br. 51 (emphasis in original). Agency action is binding if it "either appears on its face to be binding" or "is applied by the agency in a way that indicates it is binding." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (citations omitted). The memos curb the agency's discretion both on their face and in practice.

The memos constrain immigration officials. *See* Fla. Br. 32–35. To take Section 1226(c) criminal aliens into custody, immigration officials must, in writing, request and receive pre-approval. DE 4-4, at 7. Even for aggravated felons, officials

must conduct a separate public-safety analysis before arresting an alien. DE 4-3, at 3; DE 4-4, at 5–6. These requirements are binding on their face.

The record also shows that ICE is applying the memos as if they are "binding," *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014):

- "Per new administration guidelines, ICE will not take any action on subject," DE 4-1, at 4;
- "A detainer will not be placed on the Subject below as this case does not meet the current interim civil immigration enforcement priorities," DE 4-1, at 6;
- "This person does not meet the new interim enforcement guidelines at this time, therefore, ICE will not place a detainer," DE 4-1, at 7;
- "Subject does not meet current enforcement guidelines due to executive order, ICE has no interest in this subject," DE 4-1, at 8;
- "Subject currently does not meet our removal criteria due to Executive Order, ICE has no more interest in this subject," DE 4-1, at 10;
- "Please see attached lifted detainer, due to new guidelines," DE 29-1, at 4.

That immigration officials "regularly" use the memos' preapproval process, Gov. Br. 41, rather than venture outside that process, also shows that the memos are binding. And despite asserting that the memos are not a "defense" to enforcement action, the government seems to admit that it has created a review process allowing criminal aliens to "request a particular exercise of enforcement discretion based on

the priorities." Gov. Br. 42. Whether looking to the face of the memos or how the agencies are applying them in practice, the memos establish a binding, reticulated immigration-enforcement framework.[7]

When, as here, agency action is "calculated to have a substantial effect on ultimate" decisions, it is a legislative rule rather than a general statement of policy. *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1112–13 (D.C. Cir. 1974). Defendants' own emails here show that they expected the memos to reduce interior immigration enforcement by "50% of historical numbers." DE 34-2, at 2. Although the memos are "decorated with words that appear to be carefully chosen to avert classification as rules," *Am. Trucking Ass'ns v. I.C.C.*, 659 F.2d 452, 463 (5th Cir. Unit A 1981)—some of which Defendants point to here—the memos nonetheless needed to go through notice and comment.[8]

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[7] In its opening brief, Florida relied on *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983) (*Jean I*), in support of the proposition that a significant new, binding government policy regarding immigration detention is subject to notice and comment. Fla. Br. 39. The government points out that the Eleventh Circuit granted rehearing en banc of that decision and did not reach the merits of the APA claims. Gov. Br. 52 (citing *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc) (*Jean II*)). But the reason the en banc court did not address the notice-and-comment argument is because the federal government conducted notice and comment in response to the panel opinion. *See Jean II*, 727 F.2d at 984.

[8] Even if APA review were unavailable, Florida would still have a non-statutory cause of action to challenge the government's unlawful, *ultra vires* conduct, which does indeed "survive[] displacement by the APA." Gov Br. 52; *see Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690–91 (1949)).

II. FLORIDA HAS STANDING AND WILL BE IRREPARABLY HARMED.

The memos cause Florida to expend additional resources combatting criminal-alien crime and supervising criminal-aliens released under the memos. The government does not dispute that these injuries cause Florida irreparable harm, nor could they. *See Odebrecht Const., Inc., v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013). It instead argues that the district court erred in holding that Florida has standing. Gov. Br. 18–25. The government is wrong. If anything, the district court erred only in rejecting Florida's alternative standing theories.

A. The memos cause Florida to spend more money and resources on supervised release.

Contrary to the government's assertion (Gov. Br. 23), Florida has "demonstrated . . . financial impact related to the memoranda." The record includes explicit examples of aliens released because they "do[] not meet current enforcement guidelines" under the memos. DE 4-1, at 8; *see also id.* at 4–10; DE 29-1; DE 4-2, at 5. And the record shows that supervised release—also known as Community Corrections—of these criminal aliens is costly to the State. *See* DE 4-13, at 15, 68. Thus, as the district court found, "[t]he probation costs to the State for overseeing these noncitizens on supervised released are concrete and particularized injuries that are fairly traceable to the federal government's withdrawal of retainers [sic] on noncitizens that they would have otherwise taken into custody." DE 38, at 18.

The government argues that Florida must show a "specific additional cost" like "hir[ing] additional staff." Gov. Br. 24. But states need not hire more staff to show financial harm. If Florida's Governor were "forced to call out the National Guard"—even if Florida did not hire more guardsmen—"there is no doubt the state would have suffered injury in fact." *Chiles v. Thornburgh*, 865 F.2d 1197, 1208 (11th Cir. 1989).

Even still, the cost of supervised release is not confined to staff salary. Supervised release entails "field visits at offenders' residences, employment sites, treatment centers, and public service locations." DE 4-13, at 15. "Offenders on supervision also participate in substance use disorder treatment programs." DE 4-13, at 63. These acts cost the State time, money, and resources. The State spent over $220 million on supervised release in 2019–2020. DE 4-13, at 68.

Those increased costs are attributable to the memos' causing the release of criminal aliens. A significant proportion of criminals—34.3%—released on supervised release had drug offenses, DE 4-13, at 67, and the government agrees that drug offenses fall under Section 1226(c), *see* DE 23-4, at 6–7; DE 30-1. Indeed, Florida demonstrated that, under the policy reflected in the memos, ICE lifted the detainer of a specific criminal alien, DE 4-1, at 5, who was released into Florida on community supervision after serving time for drug possession (in addition to grand theft and burglary). *See* DE 4-2, at 5–6.

The government, citing *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007), argues that Florida cannot show redressability because resource constraints still will require the government "to decline to pursue enforcement actions against some noncitizens." Gov. Br. 25. But if the government is enjoined from categorically refusing to arrest and detain aliens who are subject to Section 1226(c), then that predictably will result in increased immigration enforcement against the aliens Congress singled out as deserving special priority: Section 1226(c) criminal aliens. "A favorable decision in this case could provide redress for that injury." *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1130 (11th Cir. 2005). That is all Florida need show.

B. The memos cause Florida to spend more money and resources addressing criminal-alien crime.

The memos reduce enforcement against Section 1226(c) criminal aliens. That reduction will increase crime in Florida, which costs Florida money.[9] The government's arguments against both points fail. Gov. Br. 18–22.

The government argues that the memos "do not *legally* require" an overall reduction in enforcement actions (at 18 (emphasis added)). Again, however, the government has known since at least January 27, 2021, that the memos would cause a significant reduction in interior immigration enforcement, which of course was

[9] Florida spends approximately $120 million annually on incarcerating aliens. DE 4-13, at 4.

their intent. *See* DE 34; DE 34-2; DE 4-18, at 11–14. Criminal aliens are no exception. *See* DE 4-1; DE 23-4; DE 29-1; DE 30-1.

And contrary to the government's argument (Gov. Br. 19), this reduction in enforcement will cause more crime. Congress found that Section 1226(c) criminal aliens were highly likely to recidivate. *See Demore*, 538 U.S. at 518–19. That is why Congress, through Section 1226(c), required DHS to prioritize these aliens. Florida's evidence confirms Congress's finding.

Former Acting ICE Director Homan relied on his 32 years of experience working for ICE to confirm, under penalty of perjury, that criminal aliens allowed back into Florida communities will commit more crimes. DE 4-18, at 6–9. And that itself tracks the Department of Justice's own study showing that prisoners are highly likely to commit further crimes upon their release. DE 4-11, at 2–3. The government rebutted none of this evidence with evidence of its own below and fails to point to any record evidence on appeal, too. This evidence thus must be "presumed true." 11A C. Wright & A. Miller, *Federal Practice and Procedure* § 2949 (3d ed. Supp. 2021).

The government brushes aside former Acting Director Homan's declaration as "anecdot[al]." Gov. Br. 20. Putting aside that the examples the government calls anecdotal make up but a small portion of Homan's declaration, the Department of Justice cited those exact same examples—in a declaration also by former Acting

Director Homan—to support a recent lawsuit against California. *See* United States Mot. for Prelim. Inj. at 37, *United States v. California*, 2018 WL 1473199 (E.D. Cal. Mar. 6, 2018). More is not required to confirm the commonsense proposition that Section 1226(c) criminal aliens released back into Florida under the memos—like the drug traffickers already released, DE 4-2, at 13–14; DE 29-2, at 2–3; DE 30-1—are likely to commit additional crimes.

The government notes that "courts should not lightly rely on the actions of third parties to establish that a plaintiff has standing." Gov. Br. 20. But third-party conduct creates standing if those parties are "likely [to] react in predictable ways" that cause harm. *Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). The conduct held sufficient to support standing by the Supreme Court in *Commerce* depended on third parties, who were not necessarily criminals, breaking the law. *Id.* at 2565–66. Here, it is even more evident that third parties *who have already broken the law* predictably will do so again.

And the harm from that further crime, contrary to the government's assertion (Gov. Br. 19), is "certainly impending." The Supreme Court held in *Massachusetts v. EPA* that greenhouse gases posed a certainly impending risk of harm to a sovereign State because once the greenhouse gases were emitted, they could not be put back. *See* 549 U.S. at 520–21.

The same is true here. Like greenhouses gases, the key moment for criminal aliens, as Section 1226(c) recognizes, is "when" the criminal alien is "released" from state custody. That moment—called a custodial transfer—is the most common method of immigration arrest. *See* DE 4-18, at 7 (comparing "at-large" arrests to arrests in "custodial settings"). That is because it allows an alien to be taken into custody with minimal resources "in a secure and controlled environment as opposed to the alternative of conducting at-large arrests which can pose safety concerns for the officers and the community." DE 4-7, at 3. In other words, because it is more difficult to arrest at-large criminal aliens, Defendants' failure to arrest them at that moment satisfies any imminence requirement.

The government rests its standing argument heavily on a single, out-of-circuit opinion: *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015). The plaintiff there, though, alleged that the policies he challenged would increase immigration to the United States and that more immigrants—criminal *and* noncriminal alike—within the United States would lead to more crime. *Id.* at 15. Here, the legal question concerns criminal aliens and Florida has submitted evidence that more criminal aliens lead to more crime, as well as other attendant costs.

The government's standing arguments fail to respect the special solicitude the State is entitled to when it comes to standing. Under *Massachusetts v. EPA*, "all the normal standards for redressability and immediacy" are relaxed. *Massachusetts*, 549

U.S. at 517–18. To receive that special solicitude, plaintiffs must assert a procedural right—here, APA review—and a quasi-sovereign interest. *Id.* at 517–20. A "helpful indication" of a quasi-sovereign interest is "whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Alfred L. Snapp & Son, Inc. v. P.R. ex rel. Barez*, 458 U.S. 592, 607 (1982). The interests Florida asserts here in its sovereign territory and the movement of people within it satisfy that standard, especially because Florida is "preclude[d]" from engaging in its own immigration "enforcement." *See Arizona v. United States*, 567 U.S. 387, 399 (2012).

Florida has standing to challenge the memos.

III. THIS COURT MAY REVIEW THE MEMOS.

A. The memos are final agency action.

The Supreme Court has established a two-part test for final agency action: (1) the action "mark[s] the consummation of the agency's decisionmaking process; and (2) *either* the action is "one by which rights or obligations have been determined" *or* the action is one "from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016). This Court has noted that the "core question" about finality is "'whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.'" *Canal A Media Holding, LLC v. U.S. Citizenship &*

Immigr. Servs., 964 F.3d 1250, 1255 (11th Cir. 2020) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992)). The memos are final agency action under these standards.

The government argues that "[s]o long as the agency retains the discretion to alter or revoke the guidance at will—as DHS and ICE have expressly done here—the guidance is nonfinal." Gov. Br. 40. But the fact that the agency might reconsider "is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." *Hawkes*, 136 S. Ct. at 1814 (citing *Sackett v. EPA*, 566 U.S. 120, 127 (2012)).

The memos also satisfy the second prong: they determine rights and legal consequences flow from them. They are far from "purely advisory" actions like providing reports or recommendations to the President, *see Bennett v. Spear*, 520 U.S. 154, 178 (1997), and instead directly affect ICE officers, Florida, and criminal aliens. *See* Fla. Br. 25–27.

ICE Officers. As Florida showed in its opening brief, the memos have legal consequences, first and foremost, because ICE officers have treated them as binding. Fla. Br. 25–26. The government dismisses this evidence as merely reflecting the exercise of the "discretion" of these officers "as informed by the priorities," Gov. Br. 41—but this misstates the evidence in the record, which shows that they have treated the "priorities" as conclusive. *See supra* at 12.

The memos also create legal consequences in reordering the immigration-enforcement priorities of ICE officials. Indeed, the government agrees that, as a consequence of the memos, ICE officials *will* change their enforcement priorities: "in some number of cases, officers will exercise their discretion, as informed by the priorities, to defer enforcement action against particular noncitizens who are not identified as priorities." Gov. Br. 41. In other words, there is nothing "contingent" about the memos. They went into effect immediately and directly affect ICE officers' activities. That the memos do not entirely "eliminate[]" discretion or "require" a certain decision is beside the point. Gov. Br. 40–41. They affect it—substantially—consistent with the government's intent to do so. *See* Fla. Br. 32–35.

Florida. The government argues the memos do not "require" Florida to do anything, or prohibit the State from acting. Gov. Br. 42. That is beside the point because, as a "direct" consequence of the memos, *Bennett*, 520 U.S. at 178, Florida incurs the cost of recidivist criminal-alien crime and supervising the criminal aliens released under the memos who, but for the memos, would be in federal custody. *See supra* at 14–20.

Criminal Aliens. The government argues that the "practical effects" of the memos are irrelevant. Gov. Br. 38. Rather, the government argues that "as a legal matter," any unauthorized alien before the memos remains unauthorized after the memos. *Id.* But courts may consult not only the formal legal consequences of the

policy, but also its practical consequences, including whether the agency has treated such guidance "in a way that indicates [they] are binding." *Texas v. EEOC*, 933 F.3d 441, 441 (5th Cir. 2019). Moreover, there is no question that the government has created a process of allowing criminal aliens to "request a particular exercise of enforcement discretion based on the priorities." Gov. Br. 42. An ICE officer who determines that an alien falls into the categories identified in the memos as an enforcement priority can, without more, take legal action against any such alien. That is a legal consequence. And Defendants knew that the effect of the memos would be a 50% drop in interior immigration enforcement. DE 34-2, at 2.

The memos are reviewable agency action.

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

The memos are not committed to agency discretion. As noted, Section 1226(c) creates a non-discretionary duty that the memos ignore. Moreover, agency action is not *committed* to discretion even when an agency has substantial discretion. To avoid the APA's presumption of judicial review, DHS's discretion must be "unbounded." *See Commerce*, 139 S. Ct. at 2567–68. DHS's discretion here is not, and the memos are not committed to agency discretion by law.

The Supreme Court's decision in *Regents*, 140 S. Ct. 1891, underscores that the memos are subject to judicial review. In that case, the Court rejected the government's argument that a policy of immigration-nonenforcement discretion—

in the form of the Deferred Action for Childhood Arrivals program—was committed to agency discretion by law. The Court noted that the government's nonenforcement policy was far more than "a passive non-enforcement policy"—rather, it directed DHS "to establish a clear, efficient process for identifying individuals who met the enumerated criteria." *Id.* at 1906. As a result, the Court held that DACA was subject to judicial review under the APA. *Id.* The same is true of the memos in this case.

C. Florida falls within the zone of interests of Section 1226(c).

For the first time on appeal, the government argues that Florida does not fall within the zone of interests of Section 1226(c).

Under the zone-of-interests test, courts do not "require any 'indication of congressional purpose to benefit the would-be plaintiff.'" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (citation omitted). A plaintiff falls outside the zone of interest "only when [its] 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* at 225 (citation omitted). "[I]n the APA context" in particular, "the [zone of interests] test is not 'especially demanding,'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (citation omitted).

Congress, through Section 1226(c), has required Defendants to take certain criminal aliens into custody. Florida, despite "bear[ing] many of the consequences

of unlawful immigration," *Arizona*, 567 U.S. at 397, is largely dependent on Defendants' doing so faithfully, for Florida itself is limited in what immigration enforcement of its own it can accomplish, *see generally id.*

Moreover, Congress has recognized that incarcerating criminal aliens imposes costs on states. It thus "empowered" the federal government "to implement a program called SCAAP which provides direct financial aid to State prisons to offset the costs of detaining criminal aliens." *Texas v. United States*, --- F. Supp. 3d ---, 2021 WL 2096669, at *28 (S.D. Tex. Feb. 23, 2021); *see also* DE 4-13, at 3 (discussing SCAAP). Florida thus is within the zone of interests.

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

The equities favor preliminarily enjoining the memos (and ultimately vacating them). Far from advancing the public's interest, the memos cause "safety risks," *Los Angeles v. Barr*, 929 F.3d 1163, 1178 (9th Cir. 2019) (quoting *Arizona*, 567 U.S. at 398), and create a "public safety nightmare," DE 4-18, at 9. The record reflects this reality. The criminals released back into Florida after only a few short weeks under the memos include burglars, DE 29-2, at 4–6; grand thieves, *id.*; aggravated stalkers, DE 29-2, at 7–8; possessors, sellers, and traffickers of cocaine and amphetamine, DE 4-2, at 5–7, 13–14, 18–19; DE 29-2, at 2–3; and aliens arrested for domestic violence and sexual assault of a minor, DE 4-16, at 3–4, 9, 15, 20–21, 24–25. It is a virtual certainty that at least some of these criminals will offend again, as Congress

found before enacting Section 1226(c), *Demore*, 538 U.S. at 518–19, and as DOJ research confirms, *see* DE 4-11, at 2–3.

In analyzing the equities, the government focuses only on Florida's financial harm. Gov. Br. 25–27. Although that harm is substantial, far more is at stake. In considering the equities, the Court should also give great weight to the harms Florida's communities and citizens are likely to suffer as a result of crimes committed by recidivist criminal aliens.

Those harms are not outweighed by any harms to Defendants. The government argues that an injunction would "invade" the Executive Branch's discretion over immigration and "undermin[e]" its "expert" decision on safety. Gov. Br. 26. But if Florida is right that the government's policies violate Section 1226(c), then Congress has already done that, quite deliberately and legitimately. The government cannot prevail on the equities by recycling their incorrect statutory argument on the merits.

The government suggests that an injunction would cause confusion among ICE attorneys and officers. Gov. Br. 26–27. That seems most unlikely—ordering ICE to comply with the clear, unambiguous priorities reflected in Section 1226(c) would give ICE attorneys and officers clear marching orders and revert to policies with which they were already familiar. If anything, the memos are the cause of any confusion. Invalidating the memos would also not preclude the government from

issuing ICE attorneys additional guidance that is consistent with Section 1226(c). In any event, the interest in making the jobs of government officials easier is outweighed by the public interest in safer communities.

Defendants' claim that enjoining the memos would "affect ICE's relationship with state[s]" is perplexing. Gov. Br. 27. Florida believes that it is best for the federal government to comply with congressional commands that keep criminals off the streets.

CONCLUSION

For the reasons set forth above, this Court should reverse the district court's decision denying Florida's motion for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limits of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because, excluding the parts of the brief exempted under 11th Cir. R. 32-4, it contains 6,339 words.

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

/s/ Jason H. Hilborn

CERTIFICATE OF SERVICE

I certify that on August 2, 2021, I electronically filed this brief with the Clerk of Court by using the Court's CM/ECF system, which will send a notice of electronic filing to all parties in the case who are registered through CM/ECF.

/s/ Jason H. Hilborn