No. 21-40618

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

State of Texas; State of Louisiana,

Plaintiffs - Appellees,

v.

United States of America; Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security; United States Department of Homeland Security; Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, In his official capacity; United States Customs and Border Protection; Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, In his official capacity; United States Immigration and Customs Enforcement; Tracy Renaud, Senior Official Performing the Duties of the Director of the U.S. Citizenship and Immigration Services, in her official capacity; United States Citizenship and Immigration Services,

Defendants - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APELLEES

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1 and Fed. R. App. P. 26.1, *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

3) The following entity has an interest in the outcome of this case: Immigration Reform Law Institute.

DATED: December 20, 2021

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens, and also to assisting courts in understanding and accurately applying federal immigration law. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C.2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 942 F.3d 504 (D.C. Cir. 2019); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

[1] Pursuant to Fed. R. App. P. 29(a)(2), counsel for both Plaintiffs-Appellees and Defendant-Appellants have consented to the filing of this *amicus* brief. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

To the extent that the Court finds that this case is not moot,[2] the Court should affirm the district court's preliminary injunction. It has long been recognized that the power "to forbid the entrance of foreigners … or to admit them only in such cases and upon such conditions as it may see fit to prescribe" is an inherent sovereign prerogative entrusted exclusively in Congress. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *see also Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress . . . ."). But the Executive branch of the federal government has refused to enforce the laws passed by Congress requiring that certain enforcement actions be taken.

The enforcement guidelines set forth in the Memoranda of the Department of Homeland Security's ("DHS") violate the Administrative Procedure Act ("APA") because they are contrary to law and are procedurally infirm. Although Congress has permitted DHS to exercise broad discretion in enforcing some aspects of the immigration system, it has constrained that discretion by mandating

[2] On December 6, 2021, the government filed a "Consent Motion to Voluntarily Dismiss Appeal" in which it suggests that this case is moot in light of the Department of Homeland Security's ("DHS's") September 30, 2021, memorandum setting forth new immigration enforcement guidelines and rescinding the memoranda under review. The Court has not yet ruled on that motion.

certain enforcement actions with respect to certain classes of aliens, including the detention and removal of criminal aliens and aliens who have already been ordered removed. Nevertheless, in the face of such congressional directives, DHS has issued rules that preclude immigration officers from taking any enforcement actions against the vast majority of illegal aliens absent pre-approval by a high-ranking official. The rules, which are prospective and of general applicability, are reviewable and contradict clear statutory commands. The rules also greatly constrain officers' discretion and are therefore substantive rules that are procedurally invalid because they were issued without the required notice and opportunity for comment.

Because the Memoranda are contrary to law and procedurally invalid , this Court should affirm the district court's preliminary injunction.

ARGUMENT

I. Rules Establishing Immigration Enforcement Priorities Are Reviewable

The Immigration and Nationality Act ("INA") establishes a comprehensive and uniform immigration system governing who may enter and remain in the United States. Congress has specified numerous classes of aliens who are removable from the United States, such as aliens who enter illegally, commit certain crimes, violate the terms of their status (visa overstays), obtain admission through fraud or misrepresentation, vote unlawfully, become a public charge, and

whose work would undermine wages or working conditions of American workers. *See generally* 8 U.S.C. §§ 1182(a), 1227(a). By simply defining the various classes of removable aliens and merely establishing a procedure to decide whether aliens are removable, *see* 8 U.S.C. § 1229a (establishing removal proceedings), Congress generally left the determination of whether to seek removal of specific aliens in the discretion of DHS. It further provided for various forms of discretionary relief from removal, such as asylum, cancellation of removal, and adjustment of status. Thus, it is fair to say, "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona v. United States*, 567 U.S. 387, 396 (2012).

Congress did not, however, leave such discretion unbounded, and Congress has primacy in setting immigration policy. *See Galvan*, 347 U.S. at 531 ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress . . . ."); *Ng Fung Ho v. White*, 259 U.S. 276, 280 (1922) (describing the Court's task as "merely to ascertain the intention of Congress."). Congress singled out at least two classes of aliens against whom mandatory detention is specified—criminal aliens under section 1226(c) and every alien who has been ordered removed under section 1231(a)(2).[3] *See Jennings v. Rodriguez*,

[3] There is another class of alien whose detention is mandated under the INA: illegal aliens apprehended at the border. *See* 8 U.S.C. § 1225(b); *Texas v. Biden (Texas MPP)*, __ F.4th __, 2021 U.S. App. LEXIS 36689, *140 (5th Cir.

138 S. Ct. 830, 837 (2018) (holding that section 1226(c) "carves out a statutory category of aliens who may *not* be released under § 1226(a)") (emphasis in original); *Nielsen v. Preap*, 139 S. Ct. 954, 959-60 (2019) (same); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2281 (2021) (holding that under 8 U.S.C. § 1231(a)(2), "detention is mandatory").

Despite these clear statutory directives, the government argues that it can avoid these mandates because the "INA vests the antecedent decision whether to initiate or continue to pursue removal proceedings against a particular noncitizen in the sole, unreviewable discretion of the Executive Branch." Brief for Appellants ("App. Br.") at 35 (citing *Arizona*, 567 U.S. at 396 (recognizing the Executive's discretion to decide "whether it makes sense to pursue removal at all")). The government's argument fails for at least two reasons.

First, the government overlooks two provisions in the INA that mandate the initiation of removal proceedings against criminal aliens, belying the government's claim of "sole, unreviewable discretion." Section 1228(a)(3)(A) requires the initiation of removal proceedings against aliens who have been convicted of an aggravated felony. 8 U.S.C. § 1228(a)(3)(A) (stating that the DHS "shall provide for the initiation and, to the extent possible, the completion of removal

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Dec. 13, 2021) (holding that 8 U.S.C. § 1225(b)(2)(A) "sets forth a general, plainly obligatory rule: detention for aliens seeking admission").

proceedings, and any administrative appeals thereof, in the case of any alien convicted of an aggravated felony before the alien's release from incarceration for the underlying aggravated felony."). Although there is no Supreme Court precedent analyzing this provision in depth, the Court has observed that any alien who has been convicted of an aggravated felony "faces expedited removal proceedings." *Torres v. Lynch*, 136 S. Ct. 1619, 1623 (2016) (citing 8 U.S.C. § 1228(a)(3)(A)).

The government also overlooks section 1229(d)(1), which states: "In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General *shall* begin any removal proceeding as expeditiously as possible after the date of the conviction." 8 U.S.C. § 1229(d)(1) (emphasis added). Section 1227(a)(2) both defines all deportable offenses and designates a class of criminal aliens who must be detained under section 1226(c). Thus, far from vesting the decision whether to initiate removal proceedings in the unreviewable discretion of the Executive Branch, the INA requires the Executive to initiate removal proceedings against criminal aliens.

Second, the government erroneously conflates the discretion to decline to take an enforcement action in a particular instance with the establishment of a prospective rule of general applicability precluding enforcement actions against certain classes of aliens. The government avers that the "choice to refrain from

pursuing particular enforcement actions is 'generally committed to an agency's absolute discretion.'" App. Br. at 30 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)). But as this Court recently held, *Heckler*'s non-reviewability presumption with respect to nonenforcement decisions does not apply to rules of general applicability and is instead limited only to the government's "discretion to do nothing in a particular case." *Texas MPP*, 2021 U.S. App. LEXIS 36689, at *105-06. In *Texas MPP*, this Court distinguished between a "rule," which is prospective and of general applicability, and an "order," which is a final disposition of a particular matter at a particular moment in time, and held that *Heckler*'s presumption is inapplicable to "rules" and only applied to "orders." *See id.* at **105-09. There is no question that the enforcement guidelines at issue here are rules as described in *Texas MPP*. *See id.* at *112 (describing the memos at issue here as "undisputedly rules"); ROA.1412.

Addressing the reviewability of agency rules, the Court recounted how the "take care" clause of the Constitution, Art. II, sec. 3, derived from the prohibition in the English Bill of Rights against the English kings' prerogatives to suspend or dispense with the laws, *see id.* at *95-105, and concluded that:

> Congress *can* rebut the common-law presumption that nonenforcement discretion is unreviewable. Specifically, "the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." [*Heckler*, 470 U.S.] at 832-33. In other words, the executive *cannot* look at a statute, recognize that the statute is telling it to enforce the law in a particular

> way or against a particular entity, and tell Congress to pound sand. So *Heckler* expressly embraces the common law's condemnation of the dispensing power. ... Moreover, the Court emphasized that nothing in the *Heckler* opinion should be construed to let an agency "consciously and expressly adopt[] a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler*, 470 U.S. at 833 n.4 (quotation omitted). This, of course, is a condemnation of the suspending power.

Texas MPP, 2021 U.S. App. LEXIS 36689, *106-107 (emphases in original).

Here, Congress directed DHS to enforce the immigration laws in specific ways (mandatory detention) against specific classes of individuals (criminal aliens and aliens with a final removal order). *See* 8 U.S.C. §§ 1226(c), 1231(a)(2). Insofar as DHS's Memoranda preclude immigration officials from enforcing the detention mandates as specified by Congress against criminal aliens, they violate the prohibition against dispensing with the law. And to the extent that the Memoranda simply announce DHS's intention not to enforce a specific aspect of the law against anyone prospectively, the Memoranda violate the prohibition against suspending the law. Either way, the enforcement guidelines are unlawful.

The government also argues that word "shall" in 8 U.S.C. §§ 1226(c) and 1231(a)(2) "do not require DHS to arrest and detain every covered noncitizen." App. Br. at 32. The government relies on the Supreme Court's decision in *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005), for the proposition that the mere use of the word "shall" cannot overcome the deep-rooted nature of law-

enforcement discretion and is not a "true" mandate. App. Br. at 33. The government's reliance on *Castle Rock* is misplaced.

First, in *Castle Rock*, the Court merely concluded that the "respondent did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband." 545 U.S. at 768. In other words, the Court rejected the respondent's novel claim that she had a personal entitlement to specific enforcement of her restraining order such that it constituted a protected property interest under the Fourteenth Amendment to the Constitution. *Id.* at 766. Here, in contrast, the district court did not grant such an individualized entitlement, but instead issued an injunction preventing DHS from adopting an enforcement rule that conflicts with the policies set forth by Congress and constrains the discretion that enforcement officers were granted by law.

Second, *Castle Rock* is consistent with the *Texas MPP* "rule"/"order" dichotomy. In *Castle Rock*, the Court was called upon to review the nonenforcement of a law with respect to a specific individual at a specific moment in time (an unreviewable "order" in *Texas MPP*'s parlance). But as the *Texas MPP* Court recognized, "a litigant may not waltz into court, point his finger, and demand an agency investigate (or sue, or otherwise enforce against) 'that person over there.'" 2021 U.S. App. LEXIS 36689, *105. The *Castle Rock* and *Heckler* Courts both recognized and carried forward the executive's longstanding, common-law-

based discretion to do nothing in a particular case. But here, unlike in *Castle Rock* or *Heckler*, the Plaintiffs-Appellees do not challenge a nonenforcement decision with respect to a specific person under concrete circumstances, but instead challenge the adoption of a nonenforcement rule that will be applied generally and prospectively. *Castle Rock* does not purport to preclude review of such a nonenforcement rule.[4]

II. The Interim Guidelines Constitute Substantive Rules That Require Notice-and-Comment Rulemaking

The government cannot show that the district court erred in determining that the Memoranda constitute substantive or legislative rules subject to the APA's notice-and-comment procedure (which was not followed here). ROA.1411-28; 5 U.S.C. § 553. The government argues that the prioritization scheme established by the Memoranda constitutes "a general statement of policy" because "it does not 'impose any rights and obligations' and [] it leaves 'the agency and its decisionmakers free to exercise discretion' in individual cases." App. Br. at 46 (quoting *Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592,

[4] The government raised *Castle Rock* in the *Texas MPP* case, but only to suggest that the "deep-rooted nature of law-enforcement discretion" precluded review of its power to parole aliens into the United States. *See* 2021 U.S. App. LEXIS 36689, *144-45. Although the Court acknowledged that *Castle Rock* is relevant in the nonenforcement context, it did not suggest that *Castle Rock* would preclude review of a prospective "rule" of general applicability and found the government's argument to the contrary to be "as dangerous as it is limitless." *Id.*

595 (5th Cir. 1995)). According to the government, the preapproval process "does not meaningfully constrict line agents' discretion" and requests to pursue nonpriority targets have 'regularly' been granted through that process." App. Br. at 47 (citing ROA.679). But the district court correctly rejected these contentions on the ground that the memos affect the rights and obligations of certain aliens, DHS, and the States, ROA.1417-18, and because the memos constrain individual officers' authority to exercise their discretion to take enforcement actions against non-priority aliens. ROA.1419-23.

As noted above, Congress specified many classes of aliens who are removable from the United States, including aliens who enter illegally, commit certain crimes, violate the terms of their status (visa overstays), obtain admission through fraud or misrepresentation, vote unlawfully, become a public charge, and whose work would undermine wages or working conditions of American workers. *See generally* 8 U.S.C. §§ 1182(a), 1227(a). Under the interim guidelines, immigration officers are restricted from taking any enforcement action[5] against the vast majority of these classes of inadmissible or deportable aliens because

[5] These restricted actions include: issuing a detainer; issuing, serving, filing, or cancelling a Notice to Appear; stopping, questioning, or arresting a noncitizen for an immigration violation; deciding whether to detain or release an alien from custody; deciding whether to grant deferred action; and executing a removal order. ROA.56.

enforcement is largely limited to aggravated felons, who constitute only a small fraction of the population of removable aliens.

The DHS has long prioritized the removal of criminal aliens over other immigration violators. For example, in fiscal year 2020, "90 percent of ICE ERO's administrative arrests were for aliens with criminal convictions or pending criminal charges while the remaining 10 percent were other immigration violators." U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations, Fiscal Year 2020 Enforcement and Removal Operations Report ("2020 ICE Report") at 13, available at: https://www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf, (last visited December 20, 2021). In fiscal year 2018, criminal aliens constituted 87 percent of all ICE interior removals. *See id.* at 14 (Figure 9). Yet even though 87-90 percent of all ICE interior removals are criminal aliens, only a fraction of those criminal aliens are aggravated felons and would therefore be subject to removal under the interim guidelines. "[O]nly about 15 percent of the criminal aliens removed from the interior in 2018" were aggravated felons. *See Center for Immigration Studies, Biden Freezes ICE; Suspends 85% of Criminal Alien Deportations,* available at: https://cis.org/Vaughan/Biden-Freezes-ICE-Suspends-85-Criminal-Alien-Deportations (last visited December 20, 2021). In other words, although the vast

majority of aliens arrested and removed by ICE are criminal aliens, aggravated felons make up only about 15 percent of those criminal aliens.[6]

The number of gang-related or terrorist aliens removed are even a smaller fraction of those removed. According to the 2020 ICE Report, aliens removed who are known or suspected gang members make up approximately two percent of total removals. *See* 2020 ICE Report at 19, 21 (compare Figures 19 and 21, depicting total ICE removals and ICE removals of gang members, respectively). The number of terrorist removals is statistically small. *See id.* at 23 (Figure 22, showing that between 31 and 58 terrorists were removed during the past three years). Thus, it is remarkable how narrowly the enforcement priorities are defined, a narrowness that reflects the government's conscious decision not to enforce these immigration laws in the vast majority of cases.

The Memoranda permit immigration officers to exercise their discretion in taking enforcement actions against aliens who fall within one of the three priority categories, but require preapproval by a Field Office Director or Special Agent in Charge before any enforcement action may be taken against an alien who falls outside those priority categories. ROA.58-59. By limiting enforcement priorities to

[6] Aliens removed by ICE "include both aliens arrested by ICE ERO in the interior of the country" (interior deportations or removals) and aliens "who are apprehended by CBP and subsequently turned over to ICE ERO for removal." 2020 ICE Report at 18.

terrorists, spies, aggravated felons, and gang members, the government is consciously refusing to enforce the law against the vast majority of aliens unlawfully present in the United States. Put another way, about 85 to 88 percent of criminal aliens will no longer be subject to any enforcement action under the Memoranda. These numbers quantify how drastically officers' discretion has been reduced. As the district court correctly concluded, "the amount of discretion [the Memoranda] afford is insufficient for them to be classified as general statements of policy." ROA.1419.

In addition, as the district court observed, the preapproval process established by the February Memorandum contradicts the INA and implementing regulations. ROA.1419 (citing 8 U.S.C. § 1357; 8 C.F.R. § 287.5). The INA establishes the powers of immigration officers, which include the authority to take certain actions without warrant, to administer oaths and take evidence, and to detain aliens in specified situations. *See* 8 U.S.C. § 1357. The applicable regulations grant certain authorized immigration officers the "[p]ower and authority to interrogate[;] [to] patrol the border[;] to arrest[;] to conduct searches[;] to execute warrants[;] [and] to carry firearms." 8 C.F.R. § 287.5. Authorized officers are those "who have successfully completed basic immigration law enforcement training" and generally include:

> border patrol agents; air and marine agents; special agents; deportation officers; CBP officers; immigration enforcement agents; supervisory

> and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and immigration officers who need the authority to arrest persons under [8 U.S.C. § 1357(a)(4)] in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP, the Assistant Secretary/Director of ICE, or the Director of the USCIS.

8 C.F.R. § 287.5(c).

The Memoranda, however, severely limit this authority by requiring immigration officers to seek pre-approval for non-priority enforcement actions, as well as instituting a new level of review for such decisions. It provides that "[a]ny civil immigration enforcement or removal actions that do not meet the . . . criteria for presumed priority cases will require preapproval." ROA.59. Furthermore, such approval, if obtained, only applies to the alien it references and does not extend to any aliens "encountered during an [approved] operation if" the aliens are not in one of the priority categories. *Id.* Thus, immigration officers who previously had the authority to interrogate and arrest aliens without a warrant have been stripped of such authority and may now only exercise it in "exigent circumstances." *Id.*

Such officers are also prevented from taking enforcement actions against aliens who are already subject to a final order of removal, but who do not meet DHS's priority criteria. *See id.* Any officer who takes an enforcement action against a non-priority alien without the preapproval required by the new DHS policy must subsequently submit paperwork for such approval. *See id.* It is unclear

what consequences will follow should such retroactive preapproval be denied. Thus, these new procedures are not supported by the INA and are in direct conflict with current regulations, which authorize immigration officers to conduct enforcement and removal operations without first obtaining preapproval. *See* 8 C.F.R. § 287.5.

In sum, the Memoranda establish substantive rules that meaningfully constrain immigration officers' discretion to take enforcement actions authorized by law. Because the district court correctly concluded that the Memoranda do not fall within an exception to the APA's notice and comment requirement, the Court should affirm the judgment of the district court.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's preliminary injunction.

DATED: December 20, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with Fed. R. App. P. 32(a)(7) and 29(a)(5) because it contains 3,683 words, as measured by Microsoft Word software. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, Roman-style typeface of 14 points or more.

DATED: December 20, 2021

Respectfully submitted,

/s/ Matt Crapo
Matt A. Crapo

CERTIFICATE OF SERVICE

I certify that on December 20, 2021, I electronically filed the foregoing *amicus* brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Matt Crapo
Matt A. Crapo