IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STATE OF FLORIDA, **Plaintiff,**	)	
v.	)	**Case No. 8:21-cv-00541-CEH-SPF**
UNITED STATES OF AMERICA, et al., **Defendants.**	)	

MEMORANDUM OF LAW OF IMMIGRATION REFORM LAW INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTION AND STATUTES

MISCELLANEOUS

INTRODUCTION

On his first day in office, President Biden issued Executive Order 13993, 86 Fed. Reg. 7051 (Jan. 25, 2021), which the Department of Homeland Security ("DHS") implemented in a memorandum entitled "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities," dated January 20, 2021 (the "January 20 Memo"). *See* Exhibit ("Ex.") 3.[1] In section A of the January 20 Memo, the acting Secretary ordered a Department-wide review of policies and practices concerning immigration enforcement. *Id.* at 2. In section B, the acting Secretary established interim enforcement priorities focused on National Security, Border Security, and Public Health.[2] *Id.* In section C, the acting Secretary announced an immediate 100-day pause of all removals, subject to narrow exceptions. *Id.* at 3. On January 26, 2021, a district court in the Southern District of Texas entered a nationwide temporary restraining order against the 100-day stay of removals,

[1] Citations to exhibits herein refer to the exhibits attached to Florida's Motion for a Preliminary Injunction.

[2] The Department's enforcement priorities were limited to three classes of aliens: 1. aliens who are terrorists, who engage in espionage, or are otherwise a danger to national security; 2. aliens apprehended at the border while attempting to unlawfully enter the United States on or after November 1, 2020, or who were not physically present in the United States before November 1, 2020; and 3. incarcerated aliens who are released on or after the issuance of this memorandum, who have been convicted of an "aggravated felony," and are determined to pose a threat to public safety. The January 20 Memo further stated that "nothing in this memorandum prohibits the apprehension or detention of individuals unlawfully in the United States who are not identified as priorities herein." *Id.* at 3.

and on February 23, the court converted the TRO into a preliminary injunction. *Texas v. United States*, 2021 U.S. Dist. LEXIS 33890, *9, *147-48, 2021 WL 723856 (S.D. Tex. 2021).

On February 18, 2021, the Acting Director of Immigration and Customs Enforcement ("ICE") issued a memorandum establishing interim enforcement guidance in support of the January 20 Memo. Ex. 4 ("February 18 Memo"). This memorandum largely reiterated the enforcement priorities set forth in the January 20 Memo.[3] Ex. 4 at 4-5. Although the February 18 Memo stressed that "the interim priorities do not require or prohibit the arrest, detention, or removal of any noncitizen," *id.* at 3, it requires any non-priority enforcement action to be preapproved by a Field Office Director or Special Agent in Charge.[4] *Id.* at 6.

On March 8, 2021, the State of Florida initiated this action by filing a Complaint alleging that the DHS's enforcement guidelines: (1) are not in accordance with law and in excess of authority; (2) are arbitrary and capricious; (3) were improperly issued without notice and comment; (4) violate 8 U.S.C. § 1226(c); (5) violate 8 U.S.C. § 1231(a)(1)(A); (6) violate the take

[3] The February 18 Memo added criminal gang members to the Public Safety priority category. Ex. 4 at 5.

[4] The memorandum defines enforcement and removal actions to include deciding whether: to issue a detainer; to issue, serve, file or cancel a Notice to Appear; to stop, question, or arrest a noncitizen for an immigration violation; to detain or release an alien from custody, to grant deferred action; or to execute a removal order. Ex. 4 at 3.

care clause; and (7) violate the separation of powers. The next day, Florida filed a motion for a preliminary injunction.

ARGUMENT

I. Florida Has Standing

To establish standing, a plaintiff must show that: (1) the challenged action constitutes an "injury in fact," (2) the injury is "arguably within the zone of interests to be protected or regulated" by the relevant statutory or constitutional provision, and (3) nothing otherwise precludes judicial review. *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970). An "injury in fact" is (1) an actual or imminent invasion of a constitutionally cognizable interest, (2) which is causally connected to the challenged conduct, and (3) which likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992). The standing analysis assumes the plaintiff's merits views. *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *Southern Cal. Edison Co. v. F.E.R.C.*, 502 F.3d 176, 180 (D.C. Cir. 2007) ("in reviewing the standing question, the court… must therefore assume that on the merits the [plaintiffs] would be successful in [their] claims").

As Florida argues, the interim enforcement guidelines will cause an increase in the number of aliens in the state, including criminal aliens, which will result in an increase in criminal activity and economic injury, and require

the state to expend additional resources. Florida's Motion for a Preliminary Injunction ("PI Motion"). at 9-12. Under Circuit precedent, those injuries suffice for an Article III case or controversy. *Chiles v. Thornburgh*, 865 F.2d 1197, 1208 (11th Cir. 1989).

In addition, the Supreme Court has acknowledged such financial injuries in the immigration context, where States have "an interest in mitigating the potentially harsh economic effects of sudden shifts in population." *Plyler v. Doe*, 457 U.S. 202, 228, (1982); *see id.* at n.23 (explaining that, because the Constitution deprives States of any "direct interest in controlling entry into this country, . . . unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service"); *see also Arizona v. United States*, 567 U.S. 387, 397 (2012) (acknowledging that States "bear[] many of the consequences of unlawful immigration"); *DHS v. Regents of the U. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (finding a sudden shift in the government's immigration policy was arbitrary and capricious in part because the government "failed to address whether there was legitimate reliance" on the former immigration policy) (internal quotation marks omitted). The financial harm to States from "sudden shifts" in their population due to

immigration policies are "serious and well recognized." *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007).[5]

As the district court in *Texas* observed, the various States are "all but required to provide free public education to any unlawfully present noncitizens pursuant to the Equal Protection Clause." 2021 U.S. Dist. LEXIS 33890 at *33 (citing *Plyler*, 457 U.S. at 230). Florida has demonstrated that the interim enforcement guidance has directly resulted in the nonenforcement of immigration laws against numerous criminal aliens. *See* PI Motion at 9; Ex. 1.

Finally, insofar as Florida alleges procedural violations the bar for Article III standing is lowered. "The history of liberty has largely been the history of observance of procedural safeguards," *Corley v. United States*, 556 U.S. 303, 321 (2009) (internal quotation marks omitted), and "procedural rights are special," *Lujan*, 504 U.S. at 572 n.7 (internal quotation marks omitted). For procedural injuries, Article III's redressability and immediacy requirements apply to the present procedural violation (which may someday injure a concrete interest) rather than to a concrete future injury. *Lujan*, 504

[5] "States are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts*, 549 U.S. at 518. Rather, a State is afforded "special solicitude" in satisfying its burden to demonstrate the traceability and redressability elements of the traditional standing inquiry whenever the federal government violates a congressionally accorded procedural right which affected the State's "quasi-sovereign" interests in its physical territory or lawmaking function. *Id.* at 520-21.

U.S. at 571-72 & n.7. Florida's allegations of procedural-rights violations thus undercut the potential claim that it lacks a sufficiently immediate injury. Importantly, when it comes to redressability, Florida need not show that notice-and-comment rulemaking would result in a rule more to its liking: "If a party claiming the deprivation of a right to notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency's rule, section 553 would be a dead letter." *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 95 (D.C. Cir. 2002). Instead, vacatur would put the parties back in the position they should have been in all along, and thus provide enough redress, even if defendants potentially could take the same action on remand, leaving Florida no better off in the end.

II. The Interim Guidelines are Reviewable

As Florida argues, the interim guidelines are not committed to agency discretion by law. PI Motion at 13-15. Further, no statute bars review of DHS's interim enforcement guidelines. *Cf.* 5 U.S.C. § 701(a)(1). Although the INA contains several provisions that preclude judicial review, none of those provisions precludes review of DHS's interim guidelines by this court. *See Texas*, 2021 U.S. Dist. LEXIS 33890 at *79-84 (discussing various jurisdiction-stripping provisions of the INA and finding none applicable to DHS's January 20 Memo). Although it is permissible for federal agencies to exercise discretion

in marshalling their resources and prioritizing how those resources are expended, agencies may not, as DHS has done here, develop substantive enforcement guidelines that are contrary to congressional directives, arbitrary and capricious, and adopted without complying with the required notice-and-comment procedure. *See Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) ("[A]n agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes.").

Further, although both Memos describe the guidelines as "interim," they are final for purposes of APA review. The standard used to determine whether an agency action is final requires that two conditions to be satisfied. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S.Ct. 1807, 1813 (2016). "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. Second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (citation omitted).

Florida sufficiently demonstrates that the interim guidelines satisfy both conditions. PI Motion at 16-17. The immediacy of the implementation of the February 18 Memo demonstrates that DHS's decision is final and has been put into effect. In addition, the interim guidance determines certain rights and

obligations, and legal consequences have already begun to flow therefrom. *See Hawkes Co.*, 136 S.Ct. at 1813. As Florida has demonstrated, DHS has already declined to take enforcement actions against criminal aliens due to the interim guidance by refusing to issue immigration detainers or to take criminal aliens into custody as required by 8 U.S.C. § 1226(c). Ex. 1.

III. The Interim Guidelines are Contrary to Law

As Florida argues, DHS's interim guidance violates the statutory command in 8 U.S.C. § 1226(c) requiring the detention of criminal aliens pending removal because the statute requires the detention of a broader class of aliens than the interim guidelines cover. PI Motion at 18-21. For instance, as Florida points out, *id.* at 20, 8 U.S.C. § 1226(c) requires the detention of a broad range of criminal aliens, whereas the interim guidelines only prioritize enforcement actions against aliens who have been convicted of an aggravated felony or have engaged in terrorist activities.[6]

But the illegality of the interim guidance goes well beyond DHS's failure to detain criminal aliens under 8 U.S.C. § 1226(c). Although the district court in *Texas* enjoined the implementation of the blanket 100-day pause in removals

[6] Specifically, detention is required for aliens who have committed many crimes other than aggravated felonies, including crimes of moral turpitude, crimes involving controlled substances, human trafficking, money laundering, and certain firearms offenses. *See generally* 8 U.S.C. §§ 1182(a)(2), 1227(a)(2). Aliens who have engaged in terrorist activities must be detained under both 8 U.S.C. § 1226(c)(1)(D) and the interim guidelines. *See* Ex. 4 at 4.

under Section C of the January 20 Memo, that court did not enjoin the continued implementation of the interim guidance relating to enforcement priorities. *See* 2021 U.S. Dist. LEXIS 33890 at *147-48. As the February 18 Memo makes clear, the interim guidance covers a broad range of enforcement actions and DHS's refusal to take those enforcement actions with respect to aliens who do not fall within the narrowly-drawn priority categories runs afoul of several provisions of the INA.[7]

For instance, just as the blanket 100-day pause on removals ran afoul of 8 U.S.C. § 1231(a)(1)(A), so does DHS's determination not to execute removal orders for aliens who do not fall within one of its three enforcement priority categories. 8 U.S.C. § 1231(a)(1)(A) states: "[W]hen an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days." By its terms, it applies to every alien who is issued a removal order, and section 1231(a)(1)(A) commands the removal of all such aliens. The interim guidance ignores the statutory command to remove such aliens. *See Texas*, 2021 U.S. Dist. LEXIS 33890 at *92-106 (determining that "shall" in section 1231(a)(1)(A) means "must").

[7] The narrowness of the enforcement priorities set forth in the February 18 Memo is remarkable. The interim enforcement priorities include only terrorists, spies, national security threats, those not present in the United States prior to November 1, 2020, aggravated felons, and gang members.

In addition to sections 1226(c) and 1231(a)(1)(A), Congress has restricted DHS's discretion regarding certain enforcement actions in other areas of the INA. 8 U.S.C. § 1225(a)(1) provides: "An alien present in the United States who has not been admitted or who arrives in the United States … *shall* be deemed for purposes of this chapter an 'applicant for admission.'"(emphasis added). 8 U.S.C. § 1225(b)(2)(A), in turn, specifies that, subject to subparagraphs (B) and (C),[8] if the examining immigration officer determines that an "applicant for admission" is not clearly and beyond a doubt entitled to be admitted, the alien *shall* be detained for a proceeding under section 1229a of this title.[9] Thus, Congress has commanded immigration officers to initiate removal proceedings against any alien who is present in the United States without being admitted unless the alien can show that he or she is "clearly and beyond doubt entitled to be admitted."

8 U.S.C. § 1229(d) similarly requires immigration officers to initiate removal proceedings against certain aliens. Section 1229(d)(1) states: "In the

[8] Subparagraph (B) specifies that subparagraph (A) does not apply to crewmen, aliens subject to expedited removal under 8 U.S.C. § 1225(b)(1), or stowaways. Subparagraph (C) states: "In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

[9] "[S]ection 1229a of this title" refers to removal proceedings before an immigration judge. *See* 8 U.S.C. § 1229a. So long as the alien is not removable as a criminal alien, he may be released from custody on bond or conditional parole pending a decision on whether the alien is to be removed. 8 U.S.C. § 1226(a)(2).

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." (emphasis added).[10] Courts routinely interpret "shall" as creating a mandatory duty. *See*, *e.g.*, *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion."); *United States v. Chinchilla*, 987 F.3d 1303,___, 2021 U.S. App. LEXIS 3791 at *12 (11th Cir. Feb. 11, 2021) ("Generally, an alien must be physically removed from the United States within ninety days of a final removal order.") (citing 8 U.S.C. § 1231(a)(1)(A)). Because the interim enforcement guidelines run afoul of the INA, they should be enjoined. *See* 5 U.S.C. §706(2)(B)-(C); *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134 (1936) (holding that a "regulation [that] … operates to create

[10] 8 U.S.C. § 1229(d)(2) states: "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." Although 8 U.S.C. § 1229(d)(2) seems to preclude judicial review of subsection (d), this language merely bars aliens from raising a claim to compel DHS to initiate removal proceedings at a particular time. *Cf. Texas*, 2021 U.S. Dist. LEXIS 33890 at *69-77 (holding that the term "party" in nearly identical section 1231(h) does not include states such as Texas, but instead is limited to "aliens who have been ordered removed from the U.S." and who are seeking to "be removed at a particular time or to a particular place" under section 1231).

a rule out of harmony with the statute, is a mere nullity" because an agency's "power … to prescribe rules and regulations … is not the power to make law" but rather "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute").

IV. The Interim Guidelines are Arbitrary and Capricious

The APA prohibits agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The interim enforcement guidance as set forth in the February 18 Memo is arbitrary and capricious because it not only fails to consider potential policies more limited in scope and time, but it also fails to provide any concrete, reasonable justification for such a drastic change in policy. According to the two Memos, DHS needed time to reevaluate immigration policies and procedures and implemented a drastic reduction in immigration enforcement pending the outcome of that review and evaluation.[11] Nowhere in either Memo did DHS explain why the Department-wide review of policies and practices could not occur while it proceeded with the then-current enforcement guidelines. Under the prior enforcement guidance memorandum from 2017, removal of certain aliens (including all criminal aliens) were prioritized, but it

[11] The January 20 Memo also mentioned the need to maintain custody consistent with applicable COVID-19 protocols, but did not expound on how the change in guidance furthered that goal. Ex. 3 at 3.

also directed agency personnel to "faithfully execute the immigration laws of the United States against all removable aliens." Ex. 5 at 3. Under the February 18 Memo, in contrast, agency personnel are required to seek preapproval before taking any proposed enforcement action against a non-priority target. Ex. 4 at 6. And as explained above, failure to take such enforcement actions against certain aliens runs afoul of the mandatory actions under the INA.

As explained by Florida, Congress mandated the detention of criminal aliens in an effort to protect the American people from recidivist crime committed by criminal aliens. PI Motion at 12-13 (citing *Demore v. Kim*, 538 U.S. 510, 518-19 (2003)). But DHS failed to acknowledge that its interim enforcement guidelines would result in the release (or non-detention) of every criminal alien other than those who have been convicted of an aggravated felony or gang-related offenses. Failing to consider important costs of a new policy renders that policy arbitrary and capricious. "[A]gency action is lawful only if it rests 'on a consideration of the relevant factors.'" *Michigan v. EPA*, 576 U.S. 743, 750 (2015). Considering such policy concerns "was the agency's job, but the agency failed to do it." *Regents of the Univ. of Cal.*, 140 S. Ct. at 1914.[12]

[12] In *Regents of the Univ. of Cal.*, the Supreme Court held that a DHS immigration action was arbitrary and capricious because it was issued "without any consideration whatsoever of a

V. The Adoption of the Interim Guidelines Violated the APA's Procedural Requirements

While the APA provides exceptions where an agency statement does not require notice and comment, neither applies to the interim enforcement guidelines. The exceptions are: (1) "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" and (2) "when the agency for good cause finds … that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest." 5 U.S.C. § 553(b)(3)(A)-(B). An interpretative rule, as opposed to a legislative rule for which notice and comment rulemaking is required, "typically reflects an agency's construction of a statute that has been entrusted to the agency to administer" and does not modify or add to a legal norm "based on the agency's own authority." *Warshauer v. Solis*, 577 F.3d 1330, 1337 (11th Cir. 2009) (internal quotation omitted). An interpretative rule states what the agency thinks a statute means, but a legislative rule creates new law, rights, or duties. *Id.*

[more limited] policy." 140 S. Ct. at 1912 (internal quotation omitted). The two Memos at issue in this case also fail this requirement. It creates a default rule against removal, despite federal immigration law requiring removal, and only permits enforcement actions that fit within the narrow priorities identified. Neither Memo explains why highly restricted enforcement is preferable to more limited restrictions.

Legislative rules are those which create law, or substantially curtails the agency's discretion going forward. *Guardian Fed. Sav. & Loan Ass'n v. FSLIC*, 589 F.2d 658, 666-67 (D.C. Cir. 1978) ("If it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is -- a binding rule of substantive law."). Here, there is little question that the interim enforcement guidelines "effect[] a change in existing law or policy" and are thus a substantive rule that cannot escape the APA's notice and comment requirements. 5 U.S.C. § 553. The interim guidance itself demonstrates how the agency severely curtailed its own discretion in taking enforcement actions. Prior to the issuance of the interim guidance memoranda, immigration officers were free to "faithfully execute the immigration laws of the United States against all removable aliens." Ex. 5 at 3. But after the issuance of the Memoranda, immigration officers must obtain preapproval from Field Office Directors or Special Agents in Charge prior to fulfilling enforcement actions mandated by the INA, for example, executing a removal order against a non-priority alien.

In addition, there is little question that rights and obligations obtain to the interim guidelines. Aliens who were present in the United States prior to November 1, 2020, but have no criminal record will not be apprehended or removed by ICE agents. Indeed, most criminal aliens (those not convicted of

an aggravated felony) who would have been a priority under prior guidance will no longer face enforcement actions.

Finally, DHS also cannot avail itself of the APA's good-cause exception. To do so, DHS would have needed to have "incorporate[d] the [good cause] finding and a brief statement of reasons therefor in the rules issued." 5 U.S.C. § 553(b)(3)(B). They did not do so here, precluding any reliance on that exception. *United States v. Picciotto*, 875 F.2d 345, 348 (D.C. Cir. 1989).

VI. The Interim Guidelines Violate the Take Care Clause

In granting review in a related enforcement-policy case, the Supreme Court ordered "the parties … to brief and argue '[w]hether [the DHS policy] violates the Take Care Clause of the Constitution.'" *United States v. Texas*, 136 S.Ct. 906 (2016). If this Court considers the Take Care Clause, it should rule against defendants either under the Clause itself or under the INA on constitutional-avoidance grounds.

The failure to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, §3, is present here because, under separation-of-powers principles, it falls to Congress to make the laws, to the Executive to enforce the laws faithfully, and to the judiciary to interpret the laws. Under that division of authority, this Court clearly must reject the Memorandum:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government

> except that the Executive be under the law, and that the law be made by parliamentary deliberations.
>
> Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952). Justice Jackson put *Youngstown* within a "judicial tradition" beginning with Chief Justice Coke's admonishing his sovereign that "[the King] is under God and the Law." *Id.* at 655 n.27 (interior quotation marks omitted). Following Coke and Jackson, this Court must reject the Memorandum's overreach here.

The restrictions on the enforcement actions immigration officers are authorized to take under the interim guidelines do not simply apply to the removal of aliens. Rather, they apply to "decision[s] to issue, serve, file, or cancel a Notice to Appear" (the charging document in removal proceedings), as well as "to a broad range of other discretionary enforcement decisions, including" immigration stops and arrests, detentions and releases, and the termination of removal proceedings against facially removable aliens. Unless the court enjoins the interim guidance, it effectively means that there will be little or no immigration enforcement, or even removal proceedings, involving a broad swath of facially removable aliens for the foreseeable future. It also means that DHS's resources will largely be consumed by not enforcing the laws codified by Congress in the INA.

CONCLUSION

This Court should grant Florida's motion for a preliminary injunction.

Respectfully submitted, this 16th day of March, 2021.

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