No. 21-40618

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

State of Texas; State of Louisiana,
Plaintiffs-Appellees;

v.

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

On Appeal from the United States District Court for the Southern District of Texas
Victoria Division
Case No. 6:21-cv-00016

BRIEF OF AMICI CURIAE FIEL HOUSTON AND RAICES IN SUPPORT OF EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION

Omar C. Jadwat
Michael K.T. Tan
Anand Balakrishnan
Noor Zafar
David Chen
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2660
ojadwat@aclu.org
mtan@aclu.org
abalakrishnan@aclu.org
nzafar@aclu.org
dchen@aclu.org

Spencer E. Amdur
Cody Wofsy
AMERICAN CIVIL LIBERTIES UNION
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-1198
samdur@aclu.org
cwofsy@aclu.org

Kathryn Huddleston
Andre Segura
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF TEXAS, INC.
5225 Katy Fwy., Suite 350
Houston, Texas 77007
(713) 942-8146
khuddleston@aclutx.org
asegura@aclutx.org

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 29.2 and 28.2.1, the undersigned counsel of record for *amici* certifies that the following persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. FIEL Houston

2. Refugee and Immigrant Center for Education and Legal Services

Pursuant to Fed. R. App. P. 26.1, *amici* state that they do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in either of the *amici*.

Dated: August 23, 2021

/s/ Spencer E. Amdur
Spencer E. Amdur

STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

No party's counsel authored this brief in whole or in part. No party contributed money that was intended to fund preparation or submission of the brief. No person other than amici or their members contributed money that was intended to fund preparation for or submission of the brief.

Dated: August 23, 2021

/s/ Spencer E. Amdur
Spencer E. Amdur

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

State Statues

Regulations

Other Authorities

INTEREST OF AMICI CURIAE

Prospective Amicus FIEL Houston is a non-profit, immigrant-led civil rights organization based in Houston, Texas. FIEL Houston's mission includes empowering immigrant youth and their families through civic engagement, access to higher education, and advocacy for more just immigration policies. FIEL has approximately 11,000 members, all based in the greater Houston area.

Prospective Amicus RAICES is a non-profit, nonpartisan organization, and its mission is to defend the rights of immigrants and refugees; empower individuals, families, and communities; and advocate for liberty and justice. RAICES provides free and low-cost immigration legal services to underserved immigrant children, families, and individuals, as well as bond assistance and advocacy work. It is the largest immigration legal services provider in Texas and has offices in Austin, Corpus Christi, Dallas, Fort Worth, Houston, and San Antonio.

INTRODUCTION

As the federal government has explained, the district court's injunction deprives DHS of the basic ability to set its own priorities, something that every administration has done for decades. Amici write to highlight three critical problems with the injunction.

First, the opinion's core analysis is contrary to directly-applicable Supreme Court precedent. Almost every facet of the opinion relies on the court's conclusion

that by using the word "shall," 8 U.S.C. § 1226(c) and § 1231(a)(2) impose absolute mandates, enforceable by third parties, to arrest and detain every single person described in the statutes. But in *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 760-61 (2005), the Supreme Court held that "shall arrest" provisions generally do *not* eliminate law-enforcement discretion—just the opposite of the district court. The court effectively nullified this rule, holding that *Castle Rock* does not apply whenever a statute's purpose is "to protect public or private interests." Op. 75. But that is true of *every* statute, including the statute in *Castle Rock* itself. The district court's analysis would eliminate DHS's "broad discretion . . . in the deportation context," *Reno v. Am.-Arab Anti-Disc. Comm.*, 525 U.S. 471, 489 (1999), and threatens to dramatically expand the reach of agency enforcement far beyond immigration.

Second, even if the statutes imposed mandatory duties, the district court did not find any pattern of DHS violating either one. This is an important gap, because the entire opinion depends on the assumption that even though the priorities do not prohibit any enforcement action, in practice they will cause DHS to violate both duties. It was incumbent on the district court to verify that the priorities in fact *have*, in the last six months, caused these violations. But the court did not find any actual violations, much less a widespread pattern.

Third, even if DHS were violating these statutes, the injunction is dramatically overbroad. The statutes would, at most, require DHS to arrest and detain two discrete sets of people: those convicted of certain crimes, 8 U.S.C § 1226(c)(1), and those with removal orders in the 90-day removal period, *id.* § 1231(a)(2). Yet the district court enjoined the priorities as to *everyone*, including millions of noncitizens with no convictions and no removal orders.

ARGUMENT

I. The District Court Wrongly Disregarded *Castle Rock*.

The opinion's core legal premise is that "the word 'shall'" in § 1226(c) and § 1231(a)(2) imposes an absolute mandate. Op. 73. Almost every part of the opinion depends on this premise, including the court's analysis of final agency action, Op. 57-59, reviewability, Op. 63-81, the statutory merits, Op. 105, and notice and comment, Op. 133, 143-44. Without it, the whole opinion falls apart.

The Supreme Court addressed the same question in *Castle Rock*. It reviewed a claim that a "shall arrest" provision imposed an absolute mandate. The Court rejected the claim. It explained that in light of "[t]he deep-rooted nature of law-enforcement discretion," even "seemingly mandatory legislative commands" do not eliminate discretion absent "some stronger indication" than the word "shall." 545 U.S. at 761-62.

The district court recognized *Castle Rock*'s application here, but rather than apply its clear holding, invented a brand new doctrine from whole cloth. It held that a "shall" in a law enforcement statute *is* mandatory if "the statute's manifest purpose is to protect the public or private interests of innocent third parties." Op. 73. And it concluded that both INA statutes imposed mandatory duties, because they were "enacted to protect public and private interests." Op. 76.

That reasoning would eliminate the *Castle Rock* principle. It is hard to imagine a law enforcement directive whose purpose is not "to protect public or private interests." Op. 75. Indeed, if *Texas*'s rule had applied, *Castle Rock* would have come out the other way. *Castle Rock* involved a statute enacted to protect "beneficiaries of domestic restraining orders." 545 U.S. at 779 (Stevens, J., dissenting); *see id.* at 781 (describing purpose to "reduce batterer recidivism"); *id*. at 759 n.6, 760, 762-63 (noting this legislative history). Yet despite its obvious purpose to protect "innocent third parties," Op. 73—domestic violence survivors—the Court held there was no enforceable mandate.

The district court created its rule-swallowing exception based on stray phrases in two cases that long predated and were not mentioned in *Castle Rock*. Op. 73. Critically, neither case involved any attempt to force an agency to take an enforcement action, in fact just the opposite: Both decisions enforced *limits* on enforcement activity. *Escoe v. Zerbst* enforced a duty to present already-arrested

probationers to a court, with no mandate of any enforcement activity. 294 U.S. 490, 492-93 (1935); *accord* Op. 74. And *Richbourg Motor Co. v. United States* enforced a provision requiring the government to pay "innocent lienors" from the proceeds of forfeiture sales, relying on the use of "shall" simply to reconcile two forfeiture schemes by concluding the government could only proceed under the scheme that protected lienors. 281 U.S. 528, 533-35 (1930). Neither case can be used to undermine the *Castle Rock* principle.

The district court briefly tried to distinguish *Castle Rock* in several other ways, but none of them hold water.

First, the court noted a "specific legislative intent" in the INA to increase enforcement, Op. 80, but the exact same was true in *Castle Rock*. *See* 545 U.S. at 779-81 (describing widespread failures to enforce restraining orders); *Burella v. City of Philadelphia*, 501 F.3d 134, 152-53 (3d Cir. 2007) (Ambro, J., concurring in part) (rejecting similar attempt to overcome *Castle Rock*'s "substantial roadblocks").

Second, the district court noted the tradition of "police discretion" in *Castle Rock*, but the exact same is true in the immigration context, Op. 79, where the Supreme Court has repeatedly emphasized that "[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). In fact, as Justice Scalia put it, the need for "broad

discretion" is "greatly *magnified* in the deportation context." *Reno*, 525 U.S. at 483-84, 489-90 (emphasis added).

Finally, the district court contrasted the "shall" provisions with "may" provisions in other INA sections, Op. 80-81, but again, the exact same contrast existed in *Castle Rock*. *See* Colo. Rev. Stat. § 18-6-803.5(3)(d), (6)(a)-(b), (7), (9) (eight "may" provisions). There is simply no way to square the opinion below with *Castle Rock*.[1]

The district court's rejection of *Castle Rock* would have profound consequences for the immigration system. No administration has ever recognized the mandatory arrest duties that Texas posits, which are absent from the enforcement policies of the Trump, Obama, Bush, and Clinton Administrations. And for good reason. Well over a hundred thousand removal orders are entered each year, and Congress has only funded 34,000 detention beds.[2] If ICE suddenly had to arrest

[1] The opinion also cites *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021), and other cases describing various INA provisions as "mandatory." Op. 64-69. But *Guzman Chavez*, like all of Texas's cases, did not involve any effort to force ICE to arrest or detain anyone, did not mention *Castle Rock*, and did not discuss whether ICE retains discretion to decline enforcement. The cases all concern bond, and describe the statutes as "mandatory" only in the sense that detainees were not entitled to seek bond. None of them can seriously be taken to have resolved the distinct and weighty question of whether the statutes impose an absolute mandate on ICE enforceable by third parties—a question that was not presented, briefed, or addressed.

[2] *See* U.S. Dep't of Justice, Exec. Office for Imm. Review, Statistical Yearbook 2018, at 12-13 (116,508 removal orders just from immigration judges),

everyone in these categories, along with all other "shall" provisions in the INA, it would no longer have any discretion at all, because all resources would have to be devoted to mandatory enforcement. This "principal feature of the removal system" would disappear. *Arizona*, 567 U.S. at 396.

Departing from *Castle Rock* would have far-reaching consequences across the administrative state. Dozens of statutes spell out agencies' law enforcement duties using "shall." For instance, Congress has provided that the IRS "shall investigate" the failure to pay certain taxes on firearms and other goods, and "shall" file collection actions for any unpaid estate taxes. 26 U.S.C. §§ 5557(a), 6021, 7404. Likewise, the EPA "shall issue an [enforcement] order" or "file a civil action" when "any person" violates certain clean-water regulations. 42 U.S.C. §§ 300h-2(a)(1), (2). Other examples are legion.[3] Under the district court's approach, all of these could become mandatory and enforceable, severely eroding agency discretion and expanding administrative enforcement across the board.

---

https://bit.ly/3eQUmgd; ICE Operations and Support, FY 2022 Congressional Justification, 17, https://bit.ly/2VUYSEX.

[3] *See, e.g.*, 31 U.S.C. §§ 3541(b), 3542(a), 3542(b)(2), 3545 (Treasury); 42 U.S.C. § 1987 (U.S. attorneys); 42 U.S.C. §§ 9152(b)(1), (2), 18 U.S.C. § 2322, 49 U.S.C. § 80502(d), 33 U.S.C. § 1514, 45 U.S.C. § 823(j), 12 U.S.C. § 1731b(h) (DOJ), 80b-11(i) (SEC); 15 U.S.C. § 9074(c)(2) (DOT); 14 U.S.C. § 522 (Coast Guard).

II. The Court Did Not Identify Any Statutory Violations in Practice.

Even if the statutes did impose enforceable mandates, there was no factual basis for the injunction, because the district court did not find any pattern of ICE violating either supposed mandate. With no record of actual statutory violations in the six months the priorities have been in effect, it was inappropriate to enjoin ICE's main enforcement policy. The Supreme Court has made clear that even a handful of individual violations are "a patently inadequate basis for . . . imposition of systemwide relief." *Lewis v. Casey*, 518 U.S. 343, 359 (1996); *see id.* 349 (agreeing that a "District Court [must] find enough instances of actual injury to warrant systemwide relief").

Systemwide violations are critical to Texas's case, *id.*, because on its face, the priorities memo does not "prohibit the arrest, detention, or removal of *any* noncitizen," it simply assigns some decisions to line officers and other decisions to supervisors. Memo at 3. If the priorities do not prohibit officers from detaining people described in § 1226(c) and § 1231(a)(2), and if in practice the priorities are not preventing ICE from detaining those people, then there would obviously be no basis for any injunction.

Yet the district court barely engaged with the record, and failed to make any relevant factual findings about violations of either statute.

Section 1226(c), for instance, can only require ICE to arrest and detain people with predicate offenses *if* ICE chooses to place them in removal proceedings. And nothing in the statute requires ICE to initiate those proceedings in the first place. Thus, without removal proceedings, § 1226(c) cannot impose any duty. Yet neither the court nor Texas identified *a single person* in removal proceedings whom ICE has declined to arrest.

The district court did not dispute this clear limit on the scope of § 1226(c). Section 1226(a) authorizes arrest and detention only "pending a decision on whether the alien is to be removed from the United States"—*i.e.* "pending removal proceedings." *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018). And when a person is detained under § 1226(c), detention authority continues to "spring[] from subsection (a)," *Nielsen v. Preap*, 139 S. Ct. 954, 966 (2019), which means § 1226(c) can only require detention "during removal proceedings." *Demore v. Kim*, 538 U.S. 510, 517-18 (2003). Nor does § 1226(c) require ICE to initiate removal proceedings in the first place. The text says nothing about any duty to initiate proceedings, and courts do not invent statutory "requirements" that "Congress has omitted from its adopted text." *Jama v. ICE*, 543 U.S. 335, 341 (2005). No court or agency has ever recognized such a duty.

The district court did not find a single violation of § 1226(c). The most it cited were a handful of people with convictions for whom ICE lifted detainers. Op. 138. But Texas never claimed that any of them were in removal proceedings.

The same is true for § 1231(a)(2). At most, it requires ICE to detain people "[d]uring the [90-day] removal period." *Id.* The district court mentioned a total of six people with final removal orders for whom ICE lifted detainers. Op. 23. But the overwhelming majority of people with final orders are *outside* the removal period, because the 90 days have already expired. Hausman Decl. ¶ 18-19, *Texas v. United States*, No. 6:21-cv-3, Dkt. 82-2 (S.D. Tex. Feb. 12, 2021) (over 98% outside the removal period). And the removal period can be stayed for multiple reasons. *See, e.g.*, 8 U.S.C. § 1231(a)(1)(B)(ii); 8 C.F.R. § 241.6(a). Neither Texas nor the district court made any effort to show that *any* of the six people were entering the removal period, and thus subject to the alleged duty in § 1231(a)(2). And even if they had, six individual cases are a remarkably thin basis for a sweeping nationwide injunction.

Without any actual statutory violations, the injunction makes little sense. A policy cannot violate a statutory mandate if the policy neither prohibits the mandated action nor prevents it in practice.

III. The Injunction Is Overbroad.

Even if the priorities did violate the statutes, that could not support enjoining the priorities as applied to millions of people who have no conceivable connection to either statute. *See* Migration Policy Institute, Profile of the Unauthorized Population, https://bit.ly/3jTAk74 (estimating over 10 million undocumented people in the United States). The most the statutes could support is an injunction of the priorities as applied to the arrest and detention of (1) people with the convictions listed in § 1226(c)(1) and (2) people with final removal orders in the 90-day removal period. Yet the district court enjoined the priorities as to *everyone*, including people with no convictions, people with no removal orders, and people whose removal orders are outside the removal period.

That flouts this Court's repeated instruction that a "district court must narrowly tailor an injunction" to fit "the extent of the violation established." *John Doe #1 v. Veneman*, 380 F.3d 807, 818-19 (5th Cir. 2004) (reversing injunction that "exceed[ed] the legal basis for the lawsuit"); *see Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 478 n.39 (5th Cir. 2020) (en banc) (same); *OCA-Greater Houston v. Texas*, 867 F.3d 604, 616 (5th Cir. 2017) (same). Indeed, it is "routine" for courts to "invalidate only some applications even of indivisible [regulatory] text, so long as the valid applications can be separated from invalid

ones." *NRDC v. Wheeler*, 955 F.3d 68, 81-82 (D.C. Cir. 2020); *see Davis Cty. v. EPA*, 108 F.3d 1454, 1460 (D.C. Cir. 1997) (similar).

These principles call for a significantly narrower injunction. Even if the Court does not stay the entire injunction, it should stay as applied to people who are not described in § 1226(c) or § 1231(a)(2). For this large majority of people, there is no chance of violating either statute. As to them, the injunction is "necessarily overbroad" because it "exceeds the extent of the violation established." *John Doe #1*, 380 F.3d at 819.

CONCLUSION

The Court should grant a stay.

Dated: August 23, 2021

Respectfully Submitted,

/s/Spencer E. Amdur
Spencer E. Amdur
Cody Wofsy
AMERICAN CIVIL LIBERTIES UNION
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-1198
samdur@aclu.org
cwofsy@aclu.org

Omar C. Jadwat
Michael K.T. Tan
Anand Balakrishnan
Noor Zafar
David Chen
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2660
ojadwat@aclu.org
mtan@aclu.org
abalakrishnan@aclu.org
nzafar@aclu.org
dchen@aclu.org

Kathryn Huddleston
Andre Segura
AMERICAN CIVIL LIBERTIES UNION

FOUNDATION OF TEXAS, INC.
5225 Katy Fwy., Suite 350
Houston, Texas 77007
(713) 942-8146
khuddleston@aclutx.org
asegura@aclutx.org

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing motion and attached brief via the Court's ECF filing system.

Dated: August 23, 2021

/s/ Spencer E. Amdur
Spencer E. Amdur

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with Fed. R. App. P. 27(d)(2)(A) and 29(a)(5) because it contains 3,645 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: August 23, 2021

/s/ Spencer E. Amdur
Spencer E. Amdur