



## **EXPLAINER: FIFTH CIRCUIT STAYS LOWER COURT ORDER, INTERIM ENFORCEMENT GUIDELINES REMAIN IN EFFECT<sup>1</sup>**

September 16, 2021

Yesterday the [Fifth Circuit stayed a district court order](#) that would have halted much of the Biden Administration’s interim enforcement priorities. Though the Fifth Circuit left narrow portions of the order in place, its decision represents a significant blow to the efforts of anti-immigrant state governments to block the Biden Administration’s efforts to set guidelines on the exercise of discretion in immigration enforcement and detention.

On August 19, Judge Andrew Tipton, a Trump appointee in the Southern District of Texas, issued a nationwide preliminary injunction halting much of the Biden Administration’s January 20 and February 18 enforcement priorities memoranda (the “Priorities Memos”). This lawsuit, filed by the governments of Texas and Louisiana, mirrored similar lawsuits by the states of Florida and Arizona. With yesterday’s decision, the Fifth Circuit confirmed that [Judge Tipton’s sweeping order](#) was unlawful and unenforceable.

The Fifth Circuit reaffirmed the longstanding principle that immigration officials have the discretion to prioritize whom to select for immigration enforcement. Noting the long history of executive branch memos setting immigration enforcement priorities, it held that the states of Texas and Louisiana were unlikely to show that the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) overrode the “deep-rooted tradition of enforcement discretion when it comes to decisions that occur before detention, such as who should be subject to arrest, detainers, and removal proceedings.” Order at 10, 12. Rejecting Judge Tipton’s “novel” interpretation of IIRIRA, the Fifth Circuit noted that “in the quarter century that IIRIRA has been on the books, no court at any level previously has held that sections 1226(c)(1) or 1231(a)(2) eliminate immigration official’s discretion to decide who to arrest or remove.” *Id.* at 9.

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<sup>1</sup> Publication of the National Immigration Project of the National Lawyers Guild (NIPNLG), 2021. This explainer is released under a Creative Commons Attribution 4.0 International License (CC BY 4.0). It is current as of September 16, 2021 and does not account of any future developments. It is also not a substitute for legal advice of counsel about particular cases. The explainer was authored by Joseph Meyers; for questions, you can reach out to him at [jmeyers@nipnlg.org](mailto:jmeyers@nipnlg.org).

The Fifth Circuit did allow a narrow provision of Judge Tipton’s order to remain in place. That portion of the order “prevents the Attorney General from relying on the [priorities] memos to release those who are facing enforcement actions and fall within the mandatory detention provisions” of 8 U.S.C. §§ 1226(c)(1) and 1231(a)(2). Order at 7. This includes “prisoners with qualifying convictions against whom ICE has lodged a detainer (8 U.S.C. § 1226(c)(1)) or individuals subject to removal orders (*id.* § 1231(a)(2)).” Order at 7–8. However, this portion of Judge Tipton’s order is largely redundant with the existing statutory scheme and has little effect on the scope of the Priorities Memos. Some important clarifications are needed here:

**First**, the Fifth Circuit left Judge Tipton’s order in place only insofar as it restrained the Biden Administration from using the Priorities Memos to guide the discretion of immigration officials in deciding whether to release two specific categories of immigrants: (1) those subject to the mandatory provision under 8 U.S.C. §§ 1226(c)(1) against whom immigration officials have issued a detainer and (2) those with final removal orders and subject to mandatory detention under § 1231(a)(2). Order at 7–8. All other portions of the Priorities Memos remain in place.

**Second**, as to mandatory pre-final-order detention, Judge Tipton’s order now extends only to the decision of whether to detain individuals who are **both** subject to § 1226(c)(1) **and** against whom ICE has separately decided to lodge an immigration detainer. *See* Order at 7–8 (holding that the United States is likely to succeed on “the core foci of the interim enforcement priorities—immigration officials’ ability to prioritize who is subject to investigative and enforcement action in the first place.”). Thus, immigration officials are no longer enjoined from relying on the Priorities Memos to determine whether to initiate enforcement actions in the first place, including whether to issue a detainer.

**Third**, as to post-final-order detention, Judge Tipton’s order now extends only to those individuals who are subject to detention under § 1231(a)(1)(A) during the 90-day removal period. *See* Order at 7 (recognizing that, after the 90-day removal period, detention is no longer mandatory and is governed by “other rules allowing for release under certain conditions.”). Immigration officials may still apply the Priorities Memos in deciding whether to release an individual after the 90-day removal period.

**Fourth**, immigration officials still retain the authority to make individualized determinations of whether to detain those noncitizens falling in those narrow provisions of Judge Tipton’s order that remain in place. The effect of Judge Tipton’s order, where it still applies, is only to enjoin the specific priorities laid out in the January 20 and February 18 Priorities Memos. *See* Tipton Order at 158–59. It does not prevent immigration officials

from exercising individualized discretion to release people who are detained. It also does not prevent immigration officials from exercising their discretion in determining whether to release detained immigrants in compliance with other court orders, such as *Fraihat, et al. v. U.S. Immigration and Customs Enforcement, et al.*, Case No. 5:19-cv-01546-JGB-SHK (C.D. Cal.). And nothing in the remaining portions of Judge Tipton's order compels immigration officials to arrest or re-detain any non-citizens not currently in immigration custody.

The Fifth Circuit's stay will remain in place until the federal government's appeal of the Tipton injunction is resolved.