ORAL ARGUMENT NOT YET SCHEDULED

No. 21-5275

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____

N.S., individually and on behalf of all others similarly situated,
Appellee,

v.

Robert A. Dixon, United States Marshal,
District of Columbia (Superior Court), in his official capacity,
Appellant.

_____

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), (b), appellee N.S., through undersigned counsel, certifies as follows:

A. Parties and Amici

The plaintiff in the District Court and appellee in this Court is N.S. (whom the District Court permitted to proceed by initials) in his individual capacity and on behalf of a certified class of "[a]ll indigent criminal defendants in the Superior Court for the District of Columbia: (1) who were, are, or will be detained by officers of the United States Marshals Service for suspected civil immigration violations, and (2) as to whom Immigration and Customs Enforcement has not effectuated a warrant of removal/deportation (a form I-205) and/or has not obtained an order of deportation or removal." JA 117-18. The defendant in the District Court and appellant in this Court is Robert A. Dixon in his official capacity as United States Marshal for the District of Columbia Superior Court, who was automatically substituted for his predecessor, Michael A. Hughes. *See* Fed. R. Civ. P. 25(d).

Appearing as amici curiae in the district court were the District of Columbia, the National Immigrant Justice Center, and the following law professors: Amna Akbar, Nadia Anguiano-Wehde, Carolina Antonini, Sabrineh Ardalan, David C. Baluarte, Caitlin Barry, Kaci Bishop, Benjamin Casper Sanchez, R. Linus Chan, Violeta R. Chapin, Michael J. Churgin, Holly S. Cooper, Ingrid V. Eagly, Tanya

Golash-Boza, Joseph D. Harbaugh, Dina Francesca Haynes, Laura A. Hernández, Barbara Hines, Bill Ong Hing, Laila L. Hlass, Geoffrey Hoffman, Ulysses Jaen, Anil Kalhan, Ira Kurzban, Annie Lai, Christopher N. Lasch, Jennifer J. Lee, Beth Lyon, Elizabeth McCormick, Nancy Morawetz, Howard S. (Sam) Myers, III, William Quigley, Nina Rabin, Maritza Reyes, Sarah Rogerson, Victor C. Romero, Carrie Rosenbaum, Anita Sinha, David B. Thronson, Philip L. Torrey, Enid Trucios-Haynes, Yolanda Vázquez, Shoba Sivaprasad Wadhia, Michael J. Wishnie, Stephen Wizner, and Mark E. Wojcik. Some or all of these parties may also seek to appear before this Court as amici curiae in support of appellee. The Immigration Reform Law Institute has filed a brief in this Court as amicus curiae in support of appellant.

B. Rulings under Review

The ruling under review is the final order of the District Court (Lamberth, J.), entered September 30, 2021, granting in part and denying in part the parties' cross-motions for summary judgment and entering a permanent injunction. JA 144. The accompanying Memorandum Opinion, entered October 7, 2021, JA 145, is unpublished. *See N.S. v. Dixon*, No. 1:20-cv-101-RCL, 2021 WL 4622490 (D.D.C. Oct. 7, 2021). The District Court's Memorandum Opinion certifying the class and granting a preliminary injunction, entered on May 7, 2020, JA 89, is published as *N.S. v. Hughes*, 335 F.R.D. 337 (D.D.C.), *reconsideration denied*, 2020 WL

4260739 (D.D.C. July 24, 2020), *modified*, 2020 WL 6701076 (D.D.C. Nov. 13, 2020).

C. Related Cases

There are no related cases.

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GLOSSARY OF TERMS

APA ..... Administrative Procedures Act

DHS ..... The Department of Homeland Security

Dixon Br. ..... Brief for the Appellant

DOJ ..... The Department of Justice

I-200 ..... Warrant for Arrest of Alien, issued by DHS

HSA ..... Homeland Security Act

ICE ..... Immigration and Customs Enforcement

INA ..... Immigration and Nationality Act

INS or the Service ..... Immigration and Naturalization Service

JA ..... Joint Appendix

JPATS ..... Justice Prisoner and Alien Transportation System

NSEERS ..... National Security Entry-Exit Registration System

USMS or the Marshals ..... United States Marshals Service

STATEMENT OF THE ISSUES

1. Controlling statutes and regulations delegate the power to make civil immigration arrests exclusively to designated immigration officers. Given those provisions, do unpublished orders delegating power to the U.S. Marshals Service validly authorize arrests for suspected civil immigration violations?

2. Is the injunction in this case barred by a statute prohibiting class-wide injunctions that "restrain the operation" of certain provisions of the Immigration and Nationality Act (INA), where appellant has waived this claim by failing to raise it below, and where the injunction does not prevent the government from enforcing any covered provision of the INA?

3. Did the District Court err in finding irreparable injury to the class, where class members would be unlawfully detained in the absence of the injunction?

STATUTES, REGULATIONS, AND RULES

Pertinent statutes and regulations are in a separately bound Addendum to this brief. Except for the items in the Addendum, all applicable statutes, etc., are contained in the Brief for Appellant and its Addendum.

STATEMENT OF THE CASE

I. Legal Background

Congress vested the Secretary of Homeland Security with all powers and functions of enforcing the immigration laws. 8 U.S.C. § 1103(a); *see also* 8 C.F.R.

§ 2.1. The Secretary has delegated, by regulation, the power to arrest people for civil violations of immigration law to a designated set of trained immigration officers within the Department of Homeland Security (DHS). JA 12-13; 8 C.F.R. §§ 236.1(b)(1), 287.5(c)(1), (e)(3), 287.8(c)(1).

The U.S. Marshals Service (USMS) is a component of the Department of Justice (DOJ), whose "primary role and mission [is] to provide for the security and to obey, execute, and enforce all orders of [federal courts]." 28 U.S.C. § 566(a). The Marshals are statutorily authorized to make criminal, but not civil, arrests. *See id.* § 566(d); 18 U.S.C. § 3053.

Under D.C. law, people arrested on criminal charges must be brought without unnecessary delay before a judicial officer of the D.C. Superior Court. D.C. Code § 23-562(c)(1). As the Marshals responsible for security in Superior Court, appellant Robert A. Dixon and his deputies maintain physical custody of arrestees inside the courthouse. *See* 28 U.S.C. § 566(e)(1)(A); *Johnson v. District of Columbia*, 584 F. Supp. 2d 83, 90 (D.D.C. 2008), *aff'd*, 734 F.3d 1194 (D.C. Cir. 2013). When an arrestee is presented in Superior Court, the judicial officer may order the person's release. D.C. Code § 23-1321(a)(1). When that happens, the releasee is free to leave. JA 98-99. But if there is a "detainer" for the releasee—a request from another law enforcement agency to detain that person—the Marshals will detain the person until the "close of business." JA 45-46.

II. Factual and Procedural History

A. N.S.'s detention by the Marshals

N.S. was arrested on January 13, 2020, for alleged robbery and destruction of property. JA 146. The next day, he was presented before a magistrate judge in Superior Court, who found he was neither dangerous nor a flight risk and ordered him released. JA 10, 146. But instead of unshackling N.S. and allowing him to leave, the Marshals "immediately detained him" at the request of Immigration and Customs Enforcement (ICE), and held him for several hours in the courthouse cellblock until ICE officers picked him up. JA 90.

B. The preliminary injunction and class-certification order

On January 14, 2020, the same day he was detained by the Marshals, N.S. sought a preliminary injunction and class certification. JA 2.

On May 7, 2020, the District Court granted a preliminary injunction and certified the class. JA 117-18. The court ruled that the detention of N.S. after he was ordered released was a new arrest that required legal authority. JA 97. The court then ruled that none of the claimed sources of authority—the ICE detainer, 5 U.S.C. § 566(c), and 28 C.F.R. § 0.111—authorized the Marshals to arrest individuals for suspected civil immigration violations. JA 99-108. Dixon does not challenge these rulings on appeal.

The District Court certified a class of "[a]ll indigent criminal defendants in the Superior Court for the District of Columbia" who have been or will be detained by the USMS for suspected civil immigration violations, unless they are subject to a warrant of removal or order of removal. JA 117-18.

C. The denial of Dixon's motion to reconsider

On June 4, 2020, Dixon moved to reconsider the preliminary injunction, citing (for the first time) an unpublished order issued by the Attorney General in 2002. JA 119. That order, relating to the National Security Entry-Exit Registration System (NSEERS), JA 71-73, authorized the USMS "to exercise the functions of immigration officers for the purpose of (1) determining the location of, and apprehending, any alien who is in the United States in violation of [immigration laws]; and (2) enforcing any requirements for such statutes or regulations, including, but not limited to, requirements [of NSEERS]." JA 76. Dixon was unaware of this order until after the preliminary injunction was issued. JA 122-23.

The District Court denied the motion, both on procedural grounds, JA 122-23, and because the order was not a valid delegation of authority to make civil immigration arrests, JA 123, 130-34. The District Court first ruled that the Homeland Security Act (HSA) did not nullify the 2002 order. Although the District Court agreed with N.S. that the HSA transferred all immigration-enforcement powers from the Attorney General to the Secretary of Homeland Security in 2003, the court

concluded that the Act's "savings provision" for "completed administrative action" preserved the 2002 order. JA 124-26.

The District Court ruled, however, that the 2002 order "fails to support" a valid delegation of immigration-arrest power. JA 130. The 2002 order did not cite the provision of the INA, 8 U.S.C. § 1103(a)(4) (2000), authorizing the Attorney General to delegate immigration-enforcement powers. JA 130-31. Instead, the 2002 order cited the Attorney General's general statutory authority to delegate "functions" under 28 U.S.C. § 510. JA 130-31. The District Court explained the "*Chenery* doctrine" requires agencies to clearly state the bases for their actions. JA 132 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 85 (1943); *SEC v. Chenery Corp*, 332 U.S. 194, 196-97 (1947)). The court found that an intent to delegate immigration-enforcement powers under § 1103(a) could not "reasonably be discerned" from the record. JA 133 (citation omitted).

The court also concluded that, even if the 2002 order were valid, it still would not authorize the Marshals' conduct. Even if authorized to act as "immigration officers," the Marshals have not undergone the immigration-enforcement training required by regulation before an immigration officer may make an arrest. JA 133-34 (citing 8 C.F.R. § 287.5(c)).

D. The permanent injunction

On September 30, 2021, the District Court granted in part and denied in part each party's motion for summary judgment. JA 144. The court permanently enjoined Dixon and his subordinates "from arresting and detaining criminal defendants in the Superior Court for the District of Columbia for suspected civil immigration violations." *Id.*

In a memorandum opinion explaining its ruling, the District Court reiterated its prior rulings, not challenged on appeal, that neither ICE detainers nor the cited regulatory and statutory provisions confer authority to make civil immigration arrests. JA 152-54.

The District Court also rejected Dixon's claim—made for the first time in his Cross-Motion for Summary Judgment—that the Marshals' conduct in this case was authorized by a "newly discovered" unpublished internal order issued by the Deputy Attorney General in 1996. JA 154. That order, which sought to facilitate the Marshals' participation in an interagency prisoner-transportation program called the "Justice Prisoner and Alien Transportation System" (JPATS), authorized the Marshals "to perform and exercise the powers and duties of Immigration Officers for the purpose of receiving, processing, transporting, handling property for, and maintaining custody of aliens in the custody of the Attorney General." JA 70.

The court ruled that the 1996 order authorized the Marshals to maintain custody of someone already arrested, but not to arrest someone who has been ordered released. JA 55. The court explained that when an arrestee held for presentment to a Superior Court judge is ordered released, "he [is] no longer legally in the custody of USMS as a criminal defendant in the D.C. Superior Court." JA 155-56. Thus, the Marshals' practice of detaining releasees is a new arrest, not "just maintaining custody of an alien in the custody of the Attorney General." JA 156. Dixon does not challenge this ruling on appeal. *See* Dixon Br. 29 n.10.

The District Court reiterated its prior ruling that the 2002 order relating to NSEERS was also not a valid delegation of immigration-arrest powers. The court explained that, "for the Attorney General to give the USMS authority over civil immigration arrests properly, he would have had to invoke 8 U.S.C. § 1103." JA 157. The court rejected Dixon's attempt to "rectify its *Chenery* problem by linking" the 2002 order relating to NSEERS (which did not invoke § 1103) to the 1996 order relating to JPATS (which did invoke § 1103). JA 158. The court ruled that, despite an internal memorandum describing the 2002 order as an attempt to "clarify" the 1996 order, the 2002 order itself "makes absolutely no reference to the 1996 order" and cannot be deemed "some sort of addendum" to it. *Id.* The court found no "reasonable path from the 1996 Order's invocation of 8 U.S.C. § 1103(a) that requires [the court] to incorporate it into the 2002 Order." *Id.*

SUMMARY OF ARGUMENT

The USMS lacks authority to arrest and detain individuals for suspected violations of civil immigration law. Controlling regulations limit that authority to "only" certain designated "immigration officers who have successfully completed basic immigration law enforcement training." 8 C.F.R. §§ 236.1(b)(1), 287.5(c)(1), (e)(3), 287.8(c)(1). Because the Marshals are undisputedly not among these officers, they are excluded by the regulations from making civil immigration arrests. The 1996 and 2002 orders—the only authorities on which Dixon now relies—do not authorize the Marshals' conduct in this case for four independent reasons.

First, the orders were invalid when issued because they conflicted with then-controlling regulations. In 1996 and 2002, like now, binding regulations limited the immigration-arrest power to certain designated and trained immigration officers, thus excluding the Marshals from exercising that power. While the Attorney General could amend or revoke those regulations, he did not purport to do so. Because the regulations were binding, the Attorney General lacked power to issue delegations that contradicted the regulations. Moreover, even if the orders purported to amend or revoke the regulations, they were procedurally inadequate to do so. As legislative rules—rules affecting the rights of arrestees and the duties of immigration officers—the controlling regulations could not be altered by an unpublished order, but only through additional rulemaking subject to public notice and comment.

Second, even if valid when issued, the orders were nullified by the Homeland Security Act (HSA) and subsequent DHS regulations. The HSA transferred all immigration-enforcement powers from the Attorney General and DOJ to DHS. The Attorney General's orders were not preserved by the HSA's "savings provision," which does not apply to agency actions that have been "terminated . . . by operation of law" or "superseded." 6 U.S.C. § 552(a)(1). Any delegation of the Attorney General's immigration-arrest power was "terminated . . . by operation of law" when the HSA stripped the Attorney General—and thus his delegees—of that power. Any delegation was also "superseded" by subsequent DHS regulations that delegated the immigration-arrest power exclusively to designated and trained immigration officers.

Third, even if the orders survived the HSA and subsequent DHS regulations, they could not lawfully authorize Marshals' practice of arresting and detaining people for suspected civil immigration violations without an administrative warrant. The record in this case shows that, when the Marshals detain class members, they do not have an administrative arrest warrant, and do not serve such a warrant on the arrestee, as immigration officers are required to do by regulation.

The power to arrest people for suspected *civil* infractions without even the minimal safeguard of an administrative warrant is extraordinary. Accordingly, the statute authorizing warrantless immigration arrests is narrow. It requires "reason to

believe" that the person "is likely to escape before a warrant can be obtained," and it permits delegation of the warrantless-arrest power only to employees of DHS and only by "regulation." 8 U.S.C. § 1357(a)(2). The Marshals are not DHS employees, and their only claimed sources of authority are internal orders, not regulations. Nor do they contend that class members are likely to escape before a warrant can be obtained. Therefore, the enjoined conduct is unlawful and not validly authorized by the Attorney General's orders.

Fourth, even if the orders did not conflict with controlling statutes and regulations, they do not properly delegate power to make civil immigration arrests. Dixon effectively concedes on appeal that the 1996 order does not authorize arrests. And the District Court correctly ruled that the 2002 order was invalid because it failed to cite the proper source of authority, 8 U.S.C. § 1103(a), for delegating immigration-enforcement powers. Under the *Chenery* doctrine, § 1103(a) cannot now be offered as a proper basis for the delegation.

Given the lack of lawful authority for the challenged conduct, the District Court did not err in granting class-wide injunctive relief. Dixon's claim that 8 U.S.C. § 1252(f)(1) bars that relief is waived by his failure to raise it below.

It also lacks merit. Section 1252(f)(1) bars class-wide injunctions that "restrain the operation of" certain provisions of the INA, 8 U.S.C. §§ 1221-32. *Id.* § 1252(f)(1). The injunction in this case, at most, affects only 8 U.S.C. § 1357

(authorizing immigration detainers and warrantless immigration arrests). That is not one of the INA provisions covered by § 1252(f)(1). Moreover, because the injunction restrains only the Marshals, and not the DHS officers charged with enforcing the INA, it does not "restrain the operation of" *any* provision of the INA.

The injunction is also justified under traditional equitable principles. Being unlawfully arrested and detained is an injury. And because the deprivation of liberty challenged in this case is "inherently transitory," it is immaterial whether N.S. individually faces an imminent risk of being unlawfully held by the Marshals when it is undisputed that other class members face that risk.

ARGUMENT

I. The Marshals have no authority to arrest and detain class members for suspected civil immigration violations.

As a federal agency, the USMS "literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986); *see also Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961). Congress has not authorized the Marshals to arrest and detain individuals suspected of civil immigration violations. And the officials that Congress has vested with immigration-enforcement powers—currently the Secretary of Homeland Security, and previously the Attorney General, through INS—have consistently issued regulations withholding the immigration-arrest power from

anyone but the designated and trained immigration officers listed in 8 C.F.R. § 287.5. This list undisputedly does not include the Marshals.

The only source of authority claimed by Dixon on appeal is the combination of two unpublished, internal administrative orders issued in 1996 and 2002, which even Dixon did not know about until after the preliminary injunction in this case. As explained below, these orders were not valid delegations of immigration-arrest power when issued. Or even if valid when issued, they have since been terminated or superseded. They do not authorize the Marshals' conduct in this case.

A. The claimed delegations conflicted with controlling regulations and thus were invalid when issued.

When the 1996 and 2002 orders were issued, controlling regulations explicitly limited the power to make civil immigration arrests to designated categories of trained immigration officers. As Dixon concedes, the Marshals are "plainly" not among those authorized by the regulations. Dixon Br. 35. Because the 1996 and 2002 orders conflicted with then-controlling regulations excluding anyone but designated and trained immigration officers from making civil immigration arrests, the orders were invalid when issued.

From the enactment of the INA until the establishment of DHS in 2003, all authority to enforce immigration laws was vested in the Attorney General. *See, e.g.*, 8 U.S.C. § 1103(a) (2000). The Attorney General was empowered to arrest and detain people suspected of violating civil immigration law, either on a warrant, *id.*

§ 1226(a), or without a warrant, *id.* § 1357(a)(2). The Attorney General delegated immigration-enforcement powers to INS, including the power to issue regulations. 23 Fed. Reg. 9117 (Nov. 26, 1958), *codified at* 8 C.F.R. § 2.1 (1995). Pursuant to that authority, INS promulgated detailed substantive regulations governing the arrest and detention of people suspected of immigration violations. In addition to prescribing standards and requirements for immigration arrests, the regulations specified that "[a] warrant of arrest may be served *only* by those immigration officers listed in § 287.5(e)[]" who have "completed basic immigration law enforcement training," 8 C.F.R. §§ 242.2(c)(1), 287.8(c)(1), 287.5(e)(2) (1995), *recodified at* 8 C.F.R. §§ 236.1(b)(1), 287.8(c)(1), 287.5(e)(3) (1998) (emphasis added), and "*[o]nly* designated immigration officers" "listed in § 287.5(c)(1)" "are authorized to make an arrest [without a warrant],"[1] 8 C.F.R. §§ 287.8(c)(1), 287.5(c)(1) (1995) (emphasis added). Those regulations became effective on August 17, 1995, *see* 59 Fed. Reg. 42406 (Aug. 17, 1994), and were published in materially identical form in the Code of Federal Regulations every year from 1995 to 2003.[2]

[1] Section 287.5(c)(1) refers to arrests under "section 287(a)(2) of the [INA]," which is codified at 8 U.S.C. § 1357(a)(2) and authorizes warrantless arrests for civil immigration violations.

[2] DHS promulgated similar regulations after the Homeland Security Act transferred all immigration-enforcement power to DHS in 2003. *See* p. 24 *infra*.

By specifying that "*only*" those trained immigration officers listed in § 287.5 were authorized to make immigration arrests, the regulations excluded anyone else from making such arrests. The word "only" "is a limiting and restrictive term and in this sense means 'solely' or the equivalent of the phrase 'and no[one] else.'" *Ute Indian Tribe v. Lawrence*, 22 F.4th 892, 904 (10th Cir. 2022) (alterations and citation omitted); *see also A/S Ivarans Rederi v. United States*, 895 F.2d 1441, 1449 n.10 (D.C. Cir. 1990) (interpreting "only" to establish an "exclusive test"). Although Dixon argues that "[n]othing in the language of [§ 287.5] purports to award *exclusive* authority to the listed agents and officers," Dixon Br. 35, he ignores the language in § 236.1(b)(1) and § 287.8(c)(1) stating that "*only*" those officers listed in § 287.5 are authorized to make immigration arrests.[3]

Because these regulations were in force in 1996 and 2002, the Attorney General was bound by them and could not violate them by issuing contrary orders. "It is axiomatic that an agency must adhere to its own regulations . . . ." *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986) (Scalia, J.) (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265-67 (1954)). "Although it is within the power of an agency to amend or repeal its own regulations,

[3] Even absent that express limitation, under the canon of "*expressio unius est exclusio alterius*," the specific list of officers authorized to make immigration arrests in § 287.5 would implicitly exclude anyone not listed. *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997).

an agency is not free to ignore or violate its regulations while they remain in effect." *Nat'l Envt't Dev. Ass'n Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (brackets and internal quotation marks omitted); *see also United States v. Nixon*, 418 U.S. 683, 696 (1974) ("So long as [a] regulation remains in force the Executive Branch is bound by it . . . ." (citing *Accardi*, 347 U.S. 260)); *Service v. Dulles*, 354 U.S. 363, 386-87 (1957) (cabinet official was bound by terms of regulations delegating power to subordinates); *Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959).

Here, while the regulations limiting the arrest power remained in force, the Attorney General himself was bound by them, and he could not delegate the arrest power to those excluded by the regulations—"even though without such regulations he could have [done so]," *Vitarelli*, 359 U.S. at 540, and "even though the original authority [to delegate] was his and he could reassert it by amending the regulations," *Nixon*, 418 U.S. at 696. Neither the Attorney General nor INS promulgated new regulations amending or revoking § 236.1(b)(1) and § 287.8(c)(1). And the internal orders did not even acknowledge these regulations, much less purport to amend or revoke them. To the contrary, those same regulations were republished in the Code of Federal Regulations every year from 1997 to 2003. *See* 44 U.S.C. § 1510(a), (e) (publication in the Code indicates that regulation is in "legal effect" "on and after the date of publication"); *Nolan v. United States*, 44 Fed. Cl. 49, 56-58 (1999)

(unpublished express revocation of regulation was invalid where original regulation was subsequently republished in the Code). The internal orders cited by Dixon were invalid because an agency's order cannot "violate[its] regulations without purporting to amend those regulations." *Nat'l Envt'l Dev. Ass'n*, 752 F.3d at 1009 (agency "directive" that contradicted procedural regulation was invalid); *see also VanderMolen v. Stetson*, 571 F.2d 617, 624 (D.C. Cir. 1977) ("Actions by an agency of the executive branch in violation of its own regulations are illegal and void.").

Even if the non-public orders had purported to amend the regulations, they could not have lawfully done so. The INS regulations governing immigration-arrest powers were "legislative" or "substantive" rules that, under the Administrative Procedure Act (APA), required public notice and comment to be amended. *See* 5 U.S.C. § 553. The regulations were promulgated through notice-and-comment rulemaking, 57 Fed. Reg. 47011 (Oct. 14, 1992) (proposed rule); 59 Fed. Reg. 42406 (Aug. 17, 1994) (final rule), and published in the Code of Federal Regulations, evincing that they were "legislative" rules. *See AT&T Corp. v. FCC*, 970 F.3d 344, 350-51 (D.C. Cir. 2020); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 19 (D.C. Cir. 2019).

Moreover, the regulations were legislative because they imposed binding duties on immigration officers and defined the rights of arrestees. *See Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980) (defining "legislative rules" as

those that "grant rights, impose obligations, or produce other significant effects on private interests"); *see also, e.g.*, *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6 (D.C. Cir. 2011) (change in procedures for screening air passengers was "substantive" rule because it impacted privacy interests). The regulations prescribed "standards for enforcement activities" that "must be adhered to by every immigration officer involved in enforcement activities." 8 C.F.R. § 287.8 (2002). The regulations controlled not only who was authorized to make arrests, but also how those arrests must be made, what standards must be satisfied, and what rights of arrestees must be enforced—including when and how they may be released.[4] Because these requirements were primarily directed at protecting the rights of arrestees rather than "improving the efficient and effective operations of [the] agency," they did not fall within the "narrowly construed" category of "rules of agency organization, procedure, or practice" that the APA exempts from public notice and comment. *Am. Fed'n of Labor & Congress of Indus. Orgs. v. NLRB*, 57 F.4th 1023, 1034-35 (D.C. Cir. 2023) (citations omitted); 5 U.S.C. § 553.

[4] *See* 8 C.F.R. § 236.1(c) (2002) (prescribing release procedures for arrestees); *id.* § 287.8(c)(2)(i) (prescribing "reason to believe" standard for arrest); *id.* § 287.8(c)(2)(iii)-(iv) (mandating notice to arrestee of reason for arrest and other rights, and prescribing additional procedures for arrests with or without a warrant, including release); *see also id.* § 287.10(b) (authorizing individuals to file complaints against officers who violate § 287.8).

As legislative rules, the INS regulations governing arrests were subject to the APA's notice-and-comment requirement and could not be amended by unpublished order. Because "an 'amendment to a legislative rule must itself be legislative,'" any amendment must go through the notice-and-comment process as well. *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 84 (D.C. Cir. 2020) (quoting *Sierra Club v. EPA*, 873 F.3d 946, 952 (D.C. Cir. 2017)). Unpublished internal orders like those cited by Dixon could not amend the regulations even if they had purported to do so.

This case illustrates why administrative rules governing immigration arrests must be made through published regulations and not unpublished orders. Both law enforcement officers and the public should know who is authorized to make arrests and what must happen when an arrest is made. If, instead, the authority to make arrests is granted through a conflicting mashup of published regulations and unpublished orders, members of the public do not know if their arrests are lawful, and officers do not know what their powers or duties are. Here, even the Marshals themselves were unaware of the 1996 and 2002 orders until after the preliminary injunction was issued. Indeed, they did not follow any of the requirements for immigration arrests prescribed by the regulations and claim they are not subject to those requirements. *See* pp. 29, 38-39 *infra*.

B. The claimed delegations did not survive the Homeland Security Act and subsequent regulations.

Even if the orders cited by Dixon were valid when issued, any delegation of the Attorney General's immigration-arrest power did not survive the transfer of that power to DHS in 2003, and DHS's subsequent regulations delegating that power exclusively to designated immigration officers. In the Homeland Security Act of 2002 (HSA), Congress mandated the transfer of all immigration-enforcement authority from the Attorney General to the Secretary of Homeland Security, *Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005), and directed the President to develop a "reorganization plan" to implement this transfer of power, 6 U.S.C. § 542. When the INS was then transferred to DHS pursuant to the President's reorganization plan on March 1, 2003, the Attorney General was permanently divested of all immigration-enforcement authority, including the power to make immigration arrests. *See* 6 U.S.C. § 551(d)(2).

Contrary to Dixon's claim, the Attorney General's prior orders delegating the immigration-arrest power to the Marshals were not preserved by the HSA's "savings clause." Dixon Br. 28 n.9. That provision states that "[c]ompleted administrative actions . . . shall continue in effect *until* amended, modified, *superseded*, *terminated*, set aside, or revoked . . . by an officer of the United States or a court . . . or *by operation of law*." 6 U.S.C. § 552(a)(1) (emphases added). Dixon's argument that the 1996 and 2002 delegations have "never been altered or revoked," Dixon Br. 28

n.9, accounts for only a fraction of the savings provision's text. Because the Attorney General's delegations have been "terminated" by the transfer of his power to DHS, and also "superseded" by now-controlling DHS regulations, they are not preserved by the HSA's savings clause.

1. The Attorney General's delegations were terminated by the transfer of his power to DHS.

Any delegations of the Attorney General's immigration-arrest powers to the Marshals were "terminated . . . by operation of law" when the Attorney General's powers were removed and transferred to DHS. *See AT&T Corp. v. FCC*, 369 F.3d 554, 560 (D.C. Cir. 2004) (noting that temporary legal protections could be terminated by "operation of law" without agency action). It is a "basic tenet[] of agency and corporation law" that "an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended." *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 473 (D.C. Cir. 2009) (citing *Restatement (Third) of Agency* § 3.07(4) (2006)). That rule applies here, where Congress's termination of the Attorney General's own immigration-enforcement authority necessarily terminated the authority of his delegees within DOJ.

The termination of delegated immigration-enforcement powers within DOJ was essential to the HSA's purpose. Before the HSA, control over who and what could pass through the nation's borders was widely distributed among many

executive departments. *See* DHS, Who Joined DHS, https://www.dhs.gov/who-joined-dhs (last visited Feb. 2, 2024). Congress sought to consolidate these functions in a single department with a single line of authority to fix "what many believed were overlapping and unclear chains of command with respect to the former INS's service and enforcement functions." Lisa M. Seghetti, Cong. Rsch. Serv., RL31388, *Immigration and Naturalization Service: Restructuring Proposals in the 107th Congress* 1 (2002). The HSA was envisioned to "unify authority" over the borders and immigration, "allowing a single government entity" to have control. Pres. George W. Bush, *The Department of Homeland Security* 2 (June 2002).

The HSA thus contains several provisions confirming that all powers over immigration arrests, detention, and removal were taken from DOJ and transferred to DHS. *See Enriquez-Perdomo v. Newman*, 54 F.4th 855, 862 n.3 (6th Cir. 2022); *see also Clark*, 543 U.S. at 374 n.1. The HSA directed the transfer to DHS of "all functions" of INS, including its "detention and removal program." 6 U.S.C. § 251(2).[5] The Secretary of Homeland Security was made responsible for "[c]arrying out the immigration enforcement functions [previously] vested by statute in, or performed by, [INS]." *Id.* § 202(3). Upon the transfer of INS's functions, "the

[5] The term "functions" is broadly defined to "include[] authorities, powers, rights, privileges, immunities, programs, projects, activities, duties, and responsibilities." 6 U.S.C. § 101(9).

Secretary shall have *all functions* relating to the agency that *any other official* could by law exercise in relation to the agency immediately before such transfer." *Id.* § 551(d)(2) (emphases added). All references in federal laws and regulations to transferred entities or functions are now "deemed to refer to the Secretary, other official, or component of [DHS]." *Id.* § 557; *see also id.* § 552(d).[6] And shortly after the HSA's enactment, Congress amended the INA to substitute the "Secretary of Homeland Security" for the "Attorney General" as the official charged with enforcement of the INA. 8 U.S.C. § 1103(a)(1), as amended by the Consolidated Appropriations Resolution, 2003, Pub. L. 108-7, div. L, § 105, 117 Stat. 11, 531.

Accepting Dixon's view of the savings provision would directly contravene the HSA's purpose and its power-transfer provisions. According to Dixon, despite the purposeful consolidation of immigration-enforcement authority in DHS, this authority remains diffused among the Attorney General's delegees in DOJ—including the Deputy Attorney General, to whom the Attorney General delegated all immigration-enforcement powers. 28 C.F.R. § 0.15(a). If Dixon is right, that delegation is preserved as well. The result would be that DOJ would continue to have the exact same powers over immigration enforcement as it did before the HSA,

[6] For that reason, although statutes governing immigration detention and removal continue to refer to the "Attorney General" or "the Service," these statutes are now "deemed to refer" to the Secretary of Homeland Security and components of DHS. *See Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1965 n.3 (2020).

now led by the Deputy Attorney General. Rather than consolidating enforcement powers under a single line of authority as Congress intended, Dixon's reading of the savings provision would instead leave immigration enforcement in the hands of different agencies with potentially different or even contradictory directives. Indeed, Dixon's reading of the HSA would compel the extraordinary conclusion that the HSA's wholesale transfer and consolidation of immigration-enforcement powers in DHS actually affected only a single person—the Attorney General himself. The statute should not be read to produce such an absurd result. *See Cannon v. Watermark Ret. Communities, Inc.*, 45 F.4th 137, 149 (D.C. Cir. 2022).

Whatever the HSA's savings clause preserves, it cannot be read to preserve exactly what the HSA was designed to change. *Cf. Archuleta v. Hopper*, 786 F.3d 1340, 1349 (Fed. Cir. 2015) (holding that another statute's savings clause "demonstrates that, although certain rules may have been preserved, no rules that conflict with the [statute] survive"). "A 'statute should ordinarily be read to effectuate its purposes rather than frustrate them.'" *United States v. Barnes*, 295 F.3d 1354, 1364 (D.C. Cir. 2002). The HSA's purpose of consolidating immigration-enforcement power in a single department precludes a reading that leaves power diffused throughout the federal government.

2. The delegations were superseded by now-controlling DHS regulations.

Even if the 1996 and 2002 delegations had not been "terminated" by the transfer of the Attorney General's power to DHS, they have been "superseded" by DHS's subsequent regulations. Those regulations exclude the Marshals from making civil immigration arrests. Shortly after the INS was transferred to DHS, DHS promulgated comprehensive, detailed regulations delegating the power to make immigration arrests to certain designated and trained immigration officers. *See* 68 Fed. Reg. 35273, 35277, 35279 (June 13, 2003), *codified at* 8 C.F.R. § 287.5(c)(1), (e)(3). Like the INS regulations that preceded them, the DHS regulations provide that "only" those designated and trained immigration officers listed in § 287.5 are authorized to make civil immigration arrests, with or without a warrant. 8 C.F.R. §§ 236.1(b), 287.8(c)(1). As Dixon concedes, the immigration officers listed in § 287.5 "plainly do not include USMS personnel." Dixon Br. 35. The regulations therefore exclude the Marshals from making such arrests. *See* pp. 12-14, *supra*.

These comprehensive regulations "superseded" any prior delegations of the immigration-arrest power, including the orders cited by Dixon. *See St. Francis Hosp., Inc. v. Becerra*, 28 F.4th 119, 132 (10th Cir. 2022) (citing "familiar rule[] of construction" that "a newer regulation supersedes the older version" (citation omitted)); *see also United States v. Irvine*, 511 U.S. 224, 229 n.6 (1994). "[T]he term 'supersede' ordinarily means 'to displace (and thus render ineffective) while

providing a substitute rule.'" *Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999); *see also Black's Law Dictionary* (11th ed. 2019), s.v. "supersede" ("To annul, make void, or repeal *by taking the place of* <the 1996 statute supersedes the 1989 act>." (emphasis added)). That is what happened here. DHS issued detailed, comprehensive regulations that not only delegate immigration-arrest powers to specified immigration officers, down to their job titles and training requirements, but expressly provide that "only" those officers may make civil immigration arrests. These regulations "displace (and thus render ineffective)" any prior delegations of immigration-arrest powers.[7]

[7] The savings provision specifies only two events that do not affect an administrative action, neither of which applies here. First, although the provision specifies that "[c]ompleted administrative actions . . . shall not be affected by the enactment of [the HSA]," 6 U.S.C. § 552(a)(1), it was not the "enactment" of the HSA on November 25, 2002, that terminated the Attorney General's power; rather, it was the implementation of the President's reorganization plan months later that did so. It was only when INS and its functions were transferred to DHS on March 1, 2003, that the Attorney General, and his DOJ delegees, lost their immigration-enforcement powers. *See* 6 U.S.C. § 551(d)(2). Second, although the savings clause provides that "[c]ompleted administrative actions of *an agency* shall not be affected by . . . the transfer of *such agency* to [DHS]," *id.* § 552(a)(1) (emphases added), that provision applies only to the completed administrative actions of agencies that were transferred to DHS, such as INS. *See M.M.V. v. Garland*, 1 F.4th 1100, 1107 (D.C. Cir. 2021) ("such" refers to the same thing previously mentioned). It does not mean that the completed actions of agencies that were *not* transferred to DHS, such as the Attorney General, are unaffected by the transfer of a different agency, such as INS. *See* 6 U.S.C. § 541(1) (defining "agency" in § 552(a)(1) to include "any entity").

C. The claimed delegations do not validly authorize the Marshals' practice of arresting class members without a warrant.

Even if the orders cited by Dixon did not conflict with controlling regulations and survived the HSA, they still would not validly authorize the Marshals' practice of arresting and detaining class members without a warrant. The only source of authority for warrantless civil immigration arrests is 8 U.S.C. § 1357(a)(2). Congress limited that power to "officer[s] or employee[s] of the Service [now DHS]" who are "authorized under regulations prescribed by the Attorney General [now the Secretary of Homeland Security]" to exercise that power. 8 U.S.C. § 1357(a)(2); *see also* 6 U.S.C. § 557 (provisions referring to the "Service" and "Attorney General" now deemed to refer to appropriate components of DHS). Congress further required arresting officers to have "reason to believe" that the person "is likely to escape before a warrant can be obtained for his arrest." *Id.* The Marshals are not DHS employees authorized by regulation to make warrantless immigration arrests. And Dixon has never claimed any reason to believe that class members are likely to escape before a warrant can be obtained. The warrantless arrests in this case are therefore unlawful.

1. The Marshals arrest class members without a warrant.

The strictures of § 1357(a)(2) apply to the Marshals' practice of arresting class members without a warrant. As the District Court ruled, and as Dixon no longer

disputes on appeal, an ICE detainer is not a warrant—it is merely a request to notify ICE of a person's release. JA 152-53. ICE itself has "concede[d] that being detained pursuant to an ICE immigration detainer constitutes a warrantless arrest," a power "bestowed and limited by 8 U.S.C. § 1357(a)(2)." *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1005 (N.D. Ill. 2016); *see also Gonzalez v. U.S. Immigration & Customs Enf't*, 975 F.3d 788, 815 (9th Cir. 2020) ("[I]t is undisputed that a detainer is not a warrant of any kind.").

Although Dixon asserts that the Marshals arrested N.S. pursuant to an "ICE detainer" and "an accompanying federal immigration warrant," Dixon Br. 11, he cites no evidence in the record of any such warrant. The administrative record prepared by the USMS contains no I-200 warrant for N.S.'s arrest, nor even a detainer. The complaint alleged, and Dixon did not dispute, that N.S. was never shown a copy of a detainer "or any other written information from ICE," JA 15, even though the standard detainer form itself states that "[t]he alien **must be served with a copy of this form** for the detainer to take effect." JA 22 (sample detainer form) (bold in original); *see also* JA 102 n.6 (District Court finding that "it does not appear that [USMS] ha[s] a policy of providing detainees with [the detainer] form"). Dixon cites only a copy of the Marshals' "lock-up list" with the words "HOLD" and "*ICE" next to N.S.'s name, JA 87, and the Marshals' stated policy of seeking a detainer or

warrant and including it in its file, JA 45. Dixon Br. 11. The absence of any detainer or warrant from the administrative record indicates that no such documents exist.

Although Dixon notes that, under ICE policy as of April 2, 2017, "ICE detainers must be accompanied by a signed administrative warrant of arrest," Dixon Br. 8, the record in this case demonstrates that ICE does not follow that policy. *See United States v. Valdez-Hurtado*, 638 F. Supp. 3d 879, 894-95 (N.D. Ill. 2022) (finding that ICE "did not comply" with the 2017 policy requiring that detainers be accompanied by warrants). Indeed, because ICE views its policy as "not legally required,"[8] it cannot rely on that policy to establish that warrants are routinely attached to detainers. *See Creedle v. Miami-Dade Cnty.*, 349 F. Supp. 3d 1276, 1292 (S.D. Fla. 2018). Dixon did not invoke the "presumption of regularity" in the District Court, and that presumption could not apply here to establish the existence of a warrant, *see, e.g.*, *Welch v. United States*, 678 F.3d 1371, 1379 (Fed. Cir. 2012); *United States v. Hanks*, 569 Fed. App'x 785, 788 (11th Cir. 2014), especially where, as here, "it is shown that an administrative agency deviated from its established procedures," *Cotton Petroleum Corp. v. U.S. Dep't of Interior, Bureau of Indian Affs.*, 870 F.2d 1515, 1526 (10th Cir. 1989).

[8] ICE, Policy Number 10074.2 at 2 n.2, 6 ¶ 9 (Mar. 24, 2017), *available at* https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf.

Even if this Court could assume that ICE issued an I-200 warrant for N.S.'s arrest, his arrest by the Marshals was still warrantless. When a warrant exists on file somewhere, an arrest is nonetheless warrantless if the arresting officers are unaware of it. *See Moreno v. Baca*, 431 F.3d 633, 641-42 (9th Cir. 2005) (recognizing as "clearly established" law that "[b]ecause the Deputies did not know of Moreno's . . . outstanding arrest warrant at the time they searched and seized him, th[at] circumstance[] cannot justify their conduct"); *Livingston v. Kehagias*, 803 Fed. App'x 673, 688 n.6 (4th Cir. 2020) (same); *see also* Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 5.1(h) n.398 (6th ed. 2020). Here, the absence of any warrant from the USMS's administrative record indicates that the Marshals had no warrant.

Nothing about the Marshals' detention of N.S. suggests that the Marshals arrested him pursuant to a warrant. N.S. was never served with a warrant, even though that is an important requirement for a civil immigration arrest. *See* 8 C.F.R. § 236.1(b)(1); *Valdez-Hurtado*, 638 F. Supp. 3d at 895; 59 Fed. Reg. 42406, 42407 (Aug. 17, 1994) (rejecting expansion of list of officers authorized to serve warrants because "service of the warrant entails a step-by-step process requiring training and proficiency in service of process procedures."). The I-200 itself contains a certificate of service to be completed by the immigration officer, including a certification that "the contents of this notice were read to [the arrestee]." JA 26 (sample I-200).

Because the Marshals did not have a warrant and did not serve a warrant when they arrested and detained N.S., they did so "without warrant" under 8 U.S.C. § 1357(a)(2).[9]

2. The warrantless arrests in this case are unlawful.

The statute authorizing warrantless immigration arrests provides that an "officer or employee of [*DHS*] authorized under *regulations* . . . shall have power without warrant" "to arrest any [noncitizen]" for a suspected immigration violation "if he has reason to believe" that the noncitizen "is *likely to escape* before a warrant can be obtained for his arrest." 8 U.S.C. § 1357(a)(2) (emphases added). Thus, the statute prescribes three conditions on the power to make warrantless immigration arrests, none of which are met here.

First, because § 1357(a)(2) specifically authorizes "officer[s] or employee[s] of the Service [now DHS]" to exercise the power to make warrantless immigration arrests, the Marshals could not be authorized to exercise that power under the Attorney General's more general delegation authority. In *United States v. Giordano*, 416 U.S. 505 (1974), the Supreme Court held that a nearly identically worded statute—authorizing "any Assistant Attorney General specifically designated by the Attorney General" to approve wiretaps—precluded the Attorney General from

[9] The arguments in Section I.A, B, and D of this brief apply to arrests with or without a warrant. If the Court concludes that the enjoined conduct is unlawful for any of those reasons, it need not decide whether the arrests in this case warrantless.

authorizing other DOJ employees to approve wiretaps pursuant to his general authority to delegate under 28 U.S.C. § 510. Here, as in *Giordano*, the specific statute authorizing delegation of the *warrantless*-arrest power to INS (now DHS) employees, § 1357(a)(2), trumps any general statutory authority to delegate immigration-enforcement power to DOJ employees such as the Marshals. This conclusion is further supported by the canon of "*expressio unius est exclusio alterius*," whereby a statute permitting delegation to one agency precludes a delegation to a different agency. *See Halverson*, 129 F.3d at 185 (statute authorizing delegations to Coast Guard officials implicitly "excludes delegations to non-Coast Guard officials").

This same logic applies to § 1357(a)'s second requirement: that warrantless arrests be "authorized under regulations." Because § 1357(a) provides for delegations of the warrantless-arrest power to be made by "regulations," it trumps any more general authority to delegate immigration-enforcement powers by less formal means, such as an internal order. Where a statutory grant of authority requires an agency to act through "regulations," other forms of agency action are invalid. *See MST Express v. Dep't of Transp.*, 108 F.3d 401, 406 (D.C. Cir. 1997) (agency "failed to carry out its statutory obligation to establish *by regulation*" its safety-rating procedures because it relied on methodology in a published agency manual

(emphasis added)); *accord Ethyl Corp. v. EPA*, 306 F.3d 1144, 1150 (D.C. Cir. 2002).

Finally, even if the Attorney General's orders could validly authorize the Marshals' warrantless arrests, the arrests in this case are still unlawful because the Marshals claim no "reason to believe" that class members are "likely to escape before a warrant can be obtained." 8 U.S.C. § 1357(a)(2). In this context, "it is clear that 'likely to escape' means 'likely to evade detention by immigration officers.'" *Moreno*, 213 F. Supp. 3d at 1006 (citations omitted). N.S. was released in his criminal case on a finding that he was not a flight risk. Without any "reason to believe" that N.S. was "likely to evade detention by immigration officers" if ICE sought to arrest him at his home or place of work, the Marshals lacked authority to arrest him without a warrant.

D. The claimed delegations do not authorize the enjoined conduct with sufficient clarity.

Even if the orders cited by Dixon did not conflict with governing statutes and regulations, they still would not validly authorize the Marshals' conduct in this case. The District Court correctly ruled that the 2002 order was not a valid delegation of authority to arrest individuals suspected of civil immigration violations. *See* JA 157-58; JA 130-33. Congress granted the Attorney General the specific authority to delegate his "powers, privileges, or duties" under the INA in 8 U.S.C. § 1103(a)(4). Yet the 2002 order did not invoke that specific authority. It instead invoked the

general authority to delegate the Attorney General's "function[s]" under 28 U.S.C. § 510. The District Court correctly ruled that this failure to clearly identify the applicable source of authority rendered the order invalid. Under the *Chenery* doctrine, an administrative action must state the basis for its action "with such clarity as to be understandable," so that a court will not "be compelled to guess at the theory underlying the agency's action." *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947). The requirement that an agency speak with clarity is particularly important when it comes to delegations. *See San Pedro v. United States*, 79 F.3d 1065, 1071 (11th Cir. 1996) ("In order to be effective, a delegation of statutory authority from the Attorney General to other federal officials must be both *explicit* and *affirmative*." (emphases in original)); *United States v. Touby*, 909 F.2d 759, 770 (3d Cir. 1990), *aff'd,* 500 U.S. 160 (1991).[10]

Dixon identifies four purported errors in the District Court's *Chenery* ruling, but none are persuasive. First, Dixon contends that, because the 2002 order invoked

[10] Dixon has effectively conceded that the 1996 order, permitting the Marshals to "maintain" custody of prisoners, does not itself authorize the Marshals' practice. He notes that he "does not appeal" the District Court's ruling that a person is not "in custody" after the Superior Court orders the person released "such that the USMS could not possibly 'maintain' custody of him." Dixon Br. 29 n.10. Though Dixon says he "disputes" that ruling, his decision not to challenge it on appeal is a conclusive waiver. *See Wood v. Milyard*, 566 U.S. 463, 474 (2012) (court of appeals abused its discretion by deciding issue that state refused to concede but chose not to argue).

authority "*including*" § 510, this "non-restrictive" invocation could have included "other sources" of authority, such as § 1103(a). Dixon Br. 30. Dixon notes that § 1103(a) was "hardly obscure or infrequently invoked." *Id*. But the common invocation of § 1103(a) hurts rather than helps Dixon's position: If the Attorney General meant to invoke § 1103(a), he surely would have said so. As the District Court correctly ruled, *Chenery* required the Attorney General to identify what "other sources" of authority formed the basis of his delegation; the Court may not guess at what he might have had in mind.

Second, the District Court correctly rejected Dixon's claim that the 2002 order implicitly incorporated the 1996 order's invocation of § 1103(a). *See* Dixon Br. 31. The 2002 order made no reference to the 1996 order, and did not purport to supplement or modify the 1996 order. JA 158. The memo accompanying the 2002 order said it sought to "clarify[]" the Marshals' authority to "apprehend" *despite* the limitations of the 1996 order—it did not purport to clarify the 1996 order itself. JA 72. It was a new delegation, citing different authority.

Third, Dixon's argument that the *Chenery* doctrine does not apply because the issue here is "purely legal," Dixon Br. 32, misstates the issue. It is true that the *Chenery* doctrine does not apply to legal issues, "like issue preclusion," "that *a court* usually makes." *Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 304 (D.C. Cir. 2015) (emphasis added). If a legal question is for a court to decide, then the court's

resolution of it does not intrude on an agency's discretion. But this Court has consistently held that the *Chenery* doctrine applies to legal decisions that belong to the agency, not the courts—including whether to invoke a claimed source of authority. *See, e.g.*, *Mozilla Corp. v. FCC*, 940 F.3d 1, 82 (D.C. Cir. 2019) (declining to consider newly asserted "legal basis" as a "source of preemption authority" under *Chenery*); *Clean Air Council v. Pruitt,* 862 F.3d 1, 9 (D.C. Cir. 2017) (Court could not rely on agency's inherent authority as it was not the basis asserted by the agency when it acted); *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 860 (D.C. Cir. 2012) ("[W]e have held that that [the *Chenery* doctrine] applies to statutory interpretations."); *Mitchell v. Christopher*, 996 F.2d 375, 379 (D.C. Cir. 1993) (Court could not hold that administrative board lacked jurisdiction because it was not agency's stated reason). Here, the decision to invoke § 1103(a) and delegate his power was for the Attorney General to make, not the courts.

Finally, Dixon argues that it does not matter if the order invoked § 1103(a) because § 510, which it did invoke, was adequate authority. Dixon Br. 32-34. But the failure to invoke § 1103(a) is just the tip of the *Chenery* iceberg. The problem here goes deeper than citing the wrong statute. The 2002 order fails to grapple with or even acknowledge the existing statutory and regulatory limits on civil immigration arrests, or to explain how it fits into that regulatory framework. Ultimately, the 2002 order can give a reviewing court no confidence that the

Marshals are exercising power that the Attorney General intended to delegate, or in the manner the Attorney General authorized.

As explained above, the power to make civil immigration arrests under the INA—whether with or without a warrant—is governed by a detailed, comprehensive set of statutory and regulatory provisions that prescribe who can make what types of arrests, and under what conditions. Yet the 2002 order makes no mention of these provisions and leaves the scope of the delegated authority unclear.

For example, whereas the governing regulations authorize designated immigration officers to "make an *arrest*" based on a "*reason to believe* that the person to be arrested . . . is [a noncitizen] illegally in the United States," 8 C.F.R. § 287.8(c)(2)(i) (emphases added), the 2002 order authorizes the Marshals to "exercise the functions of immigration officers" for the purpose of "determining the location of and *apprehending*" any noncitizen "who *is* in the United States *in violation of* the [INA]," JA 76 (emphases added). The order thus fails to articulate a delegation of the power to arrest someone based on probable cause—the power claimed here—as opposed to the power to apprehend someone who is subject to a final order of removal or other conclusively determined violation, and whose location is unknown.

Similarly, whereas the INA and its implementing regulations set forth different requirements and procedures for arrests made with and without a warrant,

see, e.g., 8 C.F.R. §§ 236.1(b); 287.8(c)(2)(iv), 287.3, the 2002 order makes no reference to warrants, or the statutory exception to the warrant-requirement when there is a likelihood of escape. The order does not say which type of arrest the Marshals are authorized to make, and whether they are subject to the regulatory requirements for each type of arrest. Dixon exploits that ambiguity to argue that the 2002 order authorizes the Marshals to "act as immigration officers" for the purpose of serving immigration warrants, but exempts the Marshals from the training requirement for immigration officers in 8 C.F.R § 287.5(e)(3). *See* Dixon Br. 35. The District Court correctly rejected that argument. JA 133-34; *see also* pp. 38-39 *infra*. But even if the Attorney General had lawful authority to selectively exempt the Marshals from the regulations governing the immigration-arrest power, the 2002 order does not clearly indicate that the Attorney General made such a discretionary decision or what the basis of that regulatory exemption might be.

Neither this Court nor the District Court are in a position to resolve these unsettled questions in the course of litigation. The *Chenery* doctrine ensures that courts do not "go[] astray" by "decid[ing] a question that has been delegated to an agency if that agency has not first had a chance to address the question." *Calcutt v. FDIC*, 143 S. Ct. 1317, 1321 (2023) (per curiam). Nor may this Court accept "post hoc rationalizations for agency action." *Conn. Dep't of Pub. Util. Control v. FERC*, 484 F.3d 558, 560 (D.C. Cir. 2007) (internal quotation marks omitted). Because the

2002 order does not answer these essential questions, this Court cannot accept it as a valid delegation of the Marshals' claimed power.

Here, the Marshals' entire reliance on the 2002 order is a post-hoc rationalization. The Marshals did not establish a policy to arrest individuals subject to an ICE detainer because they believed the 2002 order permitted it. They did not even know the 2002 order existed until after the preliminary injunction in this case. Rather, the Marshals engaged in the enjoined conduct, and then identified the 2002 order when they needed to find authority to try and justify it in this litigation.

Invoking § 1103(a) in the 2002 order would have been the first of several steps that might have clarified that the Attorney General understood he was delegating powers under the INA's comprehensive statutory and regulatory scheme, and that the terms of the 2002 order were crafted with those limitations in mind. But without any reference to § 1103(a) or the governing regulations, the scope of the order is ambiguous. Whether the Attorney General intended to delegate the power to make routine immigration arrests based on probable cause—with or without a warrant, with or without training requirements and other regulatory limitations—is simply unknown. The order fails under *Chenery*.

The District Court also correctly found that, even if the 2002 order were a valid delegation, it still would not, by itself, authorize the Marshals to make immigration arrests because they have not completed the required training in basic

immigration law enforcement. JA 133 (citing 8 C.F.R. § 287.5(c)). While Dixon claims that the "point" of the 2002 order was to "create an exception" to this training requirement, Dixon Br. 35, he identifies nothing in the text of the order or its surrounding documents that supports this claimed intent to make an exception. Nor does he cite any authority for the proposition that a person delegated a "function" is not subject to existing legal restrictions on the exercise of that function. At the very least, such an exemption would need to be articulated in the order. As explained above, it is not. Absent the required training, the Marshals may not make immigration arrests.

E. Dixon has abandoned other claimed sources of authority

On appeal, Dixon does not rely on several sources of authority he asserted in the District Court. Because he has abandoned these arguments, this brief does not address them. *See Williams v. Romarm, SA*, 756 F.3d 777, 783 (D.C. Cir. 2014).

Although Dixon does argue that the District Court erred in its analysis of 28 C.F.R. § 0.111(a), a regulation addressing the Marshals' execution of warrants, he asserts that § 0.111(a) applies only if the 1996 and 2002 orders themselves authorize the Marshals to make civil immigration arrests. Dixon Br. 36-37. Because Dixon makes no argument that § 0.111(a) *independently* authorizes the enjoined conduct, there is no need for the Court to consider these arguments. *See Williams*, 756 F.3d

at 783 n.2; *Sitka Sound Seafoods, Inc. v. N.L.R.B.*, 206 F.3d 1175, 1181 (D.C. Cir. 2000). [11]

II. The injunction is not barred by 8 U.S.C. § 1252(f)(1).

A. Dixon's claim is waived.

For the first time on appeal, Dixon argues that the injunction violates 8 U.S.C. § 1252(f)(1), which bars class-wide injunctions that "restrain the operation" of certain provisions of the INA. This Court should reject this belated claim as waived. Not once in the many rounds of litigation in the District Court did Dixon ever mention § 1252(f)(1). This Court follows the general rule that appellate courts are "not a forum in which a litigant can present legal theories that it neglected to raise

[11] In any event, § 0.111(a) does not apply for several reasons. First, as the District Court correctly found, I-200 warrants are not "warrants" within the meaning of § 0.111(a). JA 99, 106, 153. Unlike the other warrants listed in § 0.111(a)—arrest warrants, parole-violator warrants, and extradition warrants—which are issued by a disinterested magistrate in criminal matters, I-200 warrants are issued in administrative proceedings by an investigating law enforcement officer. As an officer's own assertion of probable cause, they are more akin to an *application* for a warrant than a warrant itself. Second, § 0.111(a) is not a delegation of power at all. Rather, its purpose was organizational. It transferred supervision of the Marshals from the Deputy Attorney General and established the USMS "a separate unit of [DOJ]" with "greater autonomy." Order No. 516-73, 38 Fed. Reg. 12917 (May 17, 1973). The regulation empowers the USMS's Director to "direct and supervise" functions, such as executing warrants, that the Marshals already had under existing statutes and court rules. It does not purport to delegate new powers. Third, as explained on pp. 26-29, *supra*, the Marshals' conduct in this case does not involve executing a warrant. Finally, the specific DHS regulations specifying that "only" trained immigration officers may execute an I-200 prevail over any general authorization to execute warrants. *See Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1031 (D.C. Cir. 2016).

in a timely manner in proceedings below." *Kattan by Thomas v. District of Columbia*, 995 F.2d 274, 278 (D.C. Cir. 1993); *see also, e.g.*, *Singletary v. District of Columbia*, 766 F.3d 66, 72 (D.C. Cir. 2014) ("[T]he District forfeited any issue-preclusion argument by failing to raise it before the district court."); *United States v. British Am. Tobacco (Investments) Ltd.*, 387 F.3d 884, 892 (D.C. Cir. 2004).

Perhaps most significant is Dixon's failure to plead § 1252(f)(1) as an "avoidance or affirmative defense" in his Answer. Fed. R. Civ. P. 8(c)(1) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense . . . ."). "[I]t is well-settled that '[a] party's failure to plead an affirmative defense . . . generally "results in the waiver of that defense and its *exclusion from the case*."'" *Harris v. Sec'y, U.S. Dep't of Veterans Affairs*, 126 F.3d 339, 343 (D.C. Cir. 1997) (quoting *Dole v. Williams Enters., Inc.*, 876 F.2d 186, 189 (D.C. Cir. 1989)) (second and third alterations in original) (emphasis in *Dole*).

Section 1252(f)(1) is an "avoidance or affirmative defense." An "affirmative defense" includes "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's . . . claim, even if all the allegations in the complaint are true." *Thirteen Inv. Co., Inc. v. Foremost Ins. Co. Grand Rapids Mich.*, 67 F.4th 389, 392 (7th Cir. 2023) (internal quotation marks and citations omitted); *accord* 5 Fed. Prac. & Proc. Civ. § 1271 (4th ed.). An "affirmative defense" also includes "'a response to a plaintiff's claim which attacks the plaintiff's *legal* right to bring an action.'" *Am.*

First Fed., Inc. v. Lake Forest Park, Inc., 198 F.3d 1259, 1264 (11th Cir. 1999) (quoting *Black's Law Dictionary* 38 (6th ed. 1991)) (emphasis in original).

Dixon's § 1252(f)(1) claim meets either definition—it is an argument that the requested relief is unavailable even if everything N.S. alleges is true. And it is an attack on N.S.'s legal right to seek class-wide injunctive relief. This is a classic affirmative defense. *See Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir. 1987) (reliance on statute limiting damages is an affirmative defense); *cf. Fed. Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 704, 707 (D.C. Cir. 1996) (litigant's "assertion that the FEC is unconstitutionally composed cannot be regarded as anything other than an affirmative defense").

The law of forfeiture is particularly strict with affirmative defenses. A court may consider a forfeited affirmative defense "only in distinct and narrow circumstances in which the judiciary's own interests are implicated." *Maalouf v. Islamic Republic of Iran*, 923 F.3d 1095, 1112 (D.C. Cir. 2019).[12] Here, any "interests" at stake are those of the executive branch and not the judiciary. Section 1252(f)(1) prevents systematic interference with executive-branch conduct. Executive officials, represented by the DOJ, are best situated to decide if and when

[12] Though not material here, *Maalouf* also held that a court cannot consider a forfeited affirmative defense if the forfeiting party is absent from the litigation. *See Maalouf*, 923 F.3d at 1112.

to use § 1252(f)(1) to protect their own interests. They may instead choose to litigate a claim on the merits in the hopes of vindicating their conduct. *See Carroll v. Trump*, 88 F.4th 418, 427 (2d Cir. 2023) (holding that executive-branch interests "militate in favor of, not against, recognizing presidential immunity as waivable" because "a President *should* be able to litigate if he chooses" (emphasis in original)). Because no judicial interests are at stake, the District Court would have abused its discretion by raising § 1252(f)(1) sua sponte. It logically follows that this Court cannot hold that the District Court abused its discretion by issuing a class-wide injunction absent any claim that § 1252(f)(1) barred such relief.

While an affirmative defense omitted from the answer may be salvaged if the litigant raises the issue elsewhere in the trial proceedings, here Dixon never raised § 1252(f)(1) in the District Court. For example, although Dixon now cites § 1252(f)(1) as a bar to class-wide relief, he did not cite it in opposing class certification. Nor in his motion to reconsider, nor in his summary judgment papers. By failing "to complain at the obvious time, before the court ruled against him, [Dixon] waived his procedural objection." *Whelan v. Abell*, 48 F.3d 1247, 1253 (D.C. Cir. 1995).

Section 1252(f)(1) is a non-jurisdictional, waivable defense. Although § 1252(f)(1) uses the phrase "jurisdiction or authority," the Supreme Court has held that it is *not* a jurisdiction-stripping provision. *See Biden v. Texas*, 142 S. Ct. 2528,

2538-39 (2022) ("The question, then, is whether section 1252(f)(1) strips the lower courts of subject matter jurisdiction over these claims. The parties agree that the answer to that question is no, and so do we."). Although the Court expressed "no view" on whether § 1252(f)(1) may be forfeited, *id.* at 2540 n.4, other precedent dictates that the answer to that question is a straightforward "yes."

Just recently, the Supreme Court held that another provision in the very same statute, 8 U.S.C. § 1252(d)(1) (barring judicial review of removal orders absent exhaustion of administrative remedies), is waivable precisely "because" (and only because) it is non-jurisdictional: "*Because* § 1252(d)(1)'s exhaustion requirement is not jurisdictional, *it is* subject to waiver and forfeiture." *Santos-Zacaria v. Garland*, 143 S. Ct. 1103, 1116 (2023) (emphases added).

The same straightforward analysis applies here: A defense that is non-jurisdictional is, essentially by definition, waivable and forfeitable. *See, e.g.*, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envt'l Prot.*, 560 U.S. 702, 729 (2010) ("[S]ince neither [objection] is jurisdictional, we deem both waived." (footnote omitted)); *Dufur v. U.S. Parole Comm'n*, 34 F.4th 1090, 1095 (D.C. Cir. 2022) (holding that "the habeas channeling rule is *not a jurisdictional bar* and *therefore can be forfeited*" (emphases added)); *see also Carroll*, 88 F.4th at 429 (presidential immunity is non-jurisdictional and thus waivable); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1157 (10th Cir. 2013) (en banc) (Gorsuch,

J., concurring) ("So long as the [Anti-Injunction Act] affords the government only a *waivable defense*—so long as it doesn't impose on the courts a *jurisdictional limit* on our statutory authority to entertain this case—we are bound to reach the merits." (emphases in original)), *aff'd*, 573 U.S. 682 (2014).

This Court should deem the § 1252(f)(1) claim not merely forfeited by inadvertent omission, but deliberately waived. *See Wood*, 566 U.S. at 474 (explaining difference between forfeiture and waiver of appellate claims). While appellate courts have narrow discretion to overlook a party's forfeiture in "exceptional cases," they abuse that discretion if they reach a claim that has been waived. *Id.*; *see also Day v. McDonough*, 547 U.S. 198, 202 (2006); *Maalouf*, 923 F.3d at 111 ("[I]t would be an abuse of discretion for a court to override a defendant's deliberate waiver of a defense."). To waive a claim, a litigant need not affirmatively concede it; a party waives a claim when it is aware of a potential defense but "deliberately steer[s]" the trial court toward the merits—even if it expressly refuses to concede the issue. *Wood*, 566 U.S. at 474.

Dixon's conduct in the District Court amounts to waiver. Dixon does not and cannot plausibly claim that the failure to invoke § 1252(f)(1) was inadvertent. Dixon was represented in District Court, as on appeal, by DOJ lawyers. When the government wants to, it knows how to invoke § 1252(f)(1)—it frequently cites this provision to object to class-wide injunctive relief, including in the very same

courthouse where this case was litigated. *See, e.g.*, *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 198 (D.D.C. 2020); *O.A. v. Trump*, 404 F. Supp. 3d 109, 158 (D.D.C. 2019); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 327 (D.D.C. 2018). The fact that DOJ lawyers invoked § 1252(f)(1) in all these other cases, but not in this case, suggests that the omission was deliberate.

There are legitimate tactical reasons for that choice. As this Court has observed, "[g]overnment litigants may sometimes 'want to waive or forfeit certain non-jurisdictional, non-merits threshold defenses so as to permit or obtain a ruling on the merits.'" *Flytenow, Inc. v. F.A.A.*, 808 F.3d 882, 889 (D.C. Cir. 2015) (citation omitted). That may well be the case here. Dixon may have preferred a shot at victory on the merits against an entire certified class rather than trying for a procedural win that would not bar future claimants or other forms of relief.

Even if forfeited rather than waived, Dixon has not asserted any "exceptional circumstances" that would allow the Court to reach the § 1252(f)(1) claim. *Kattan*, 995 F.2d at 278. And there are good reasons for the Court not to consider it.

First, considering that claim now would prejudice N.S. and the class. *See United States v. TDC Mgmt. Corp.*, 288 F.3d 421, 427 (D.C. Cir. 2002) (citing prejudice to other party as a reason not to excuse a waiver). Even assuming Dixon is correct that § 1252(f)(1) applies, the statute expressly permits individual injunctions. *See Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2065 (2022)

("[Section] 1252(f)(1) does not preclude a court from entering injunctive relief on behalf of a particular alien . . . ."). Thus, had Dixon raised § 1252(f)(1) below, other class members could have intervened in the District Court to seek individual injunctive relief. Instead, they reasonably relied on the certified class to pursue their interests. *Cf. Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 544-45 (1974) (holding that members of a putative class may reasonably rely on a pending class action). At this late stage, years later, it would be impracticable to attempt to identify all these class members; and even if found, many would need to overcome mootness or standing obstacles if they sought individual injunctive relief now.

And one alternate remedy is now foreclosed to the plaintiff class, which includes future detainees. The District Court ruled that the class effectively "conceded" its habeas corpus claim by failing to address it on summary judgment. JA 161. The time for cross-appealing that ruling expired long before Dixon first invoked § 1252(f)(1). The class had no reason to press for habeas relief when no one disputed that a class-wide injunction was available. But now class members, including future detainees, are precluded from seeking habeas relief.

Second, allowing Dixon to raise § 1252(f)(1) now would waste judicial and litigant resources, with potentially no significant change in outcome. Section 1252(f)(1) does not bar other forms of class-wide relief, such as declaratory relief, or vacatur under the APA. *See Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 635

(D.C. Cir. 2020) (holding that § 1252(f)(1) "does not proscribe issuance of a declaratory judgment"); *accord Nielsen v. Preap*, 139 S. Ct. 954, 962 (2019) (plurality) (same); *Texas v. United States*, 40 F.4th 205, 220 (5th Cir. 2022) (same as to APA vacatur). All those remedies were sought in the complaint, JA 17-19, and Dixon does not dispute that they are available. The District Court, presented with no claim that class-wide injunctive relief was barred, did not need to consider these alternate remedies. And the plaintiff class, faced with no claim that § 1252(f)(1) barred a class-wide injunction, had no reason to press for such alternative remedies. Thus, if this Court were to hold that § 1252(f)(1) bars class-wide injunctive relief, it would be compelled to remand for consideration of these alternative remedies, as well as individual injunctive relief. Such a remand would create additional work for the parties and the District Court—work that could have been avoided or completed years ago. Dixon's claim is waived, where timely asserting it "would have fundamentally changed the course of the litigation" and "ensured a more expedient and efficient resolution of the [case]." *In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litig.*, 790 F.3d 1112, 1119 (10th Cir. 2015).

B. Section 1252(f)(1) does not apply.

Dixon's § 1252(f)(1) claim is not only waived but meritless. Section 1252(f)(1) applies only to injunctions that "enjoin or restrain the operation of the provisions of part IV of this subchapter." 8 U.S.C. § 1252(f)(1). Not every injunction

restraining the INA is prohibited. Rather, injunctions are barred only if they restrain operation of "part IV of this subchapter," i.e., 8 U.S.C. §§ 1221-32. "[T]he statute's plain text makes clear that its limitations on injunctive relief do *not* apply to *other* provisions of the INA." *Gonzalez v. United States Immigration & Customs Enf't*, 975 F.3d 788, 813 (9th Cir. 2020) (emphases in original).

The enjoined conduct in this case relates to § 1357—not one of the provisions covered by § 1252(f)(1). *See Gonzalez*, 975 F.3d 788 at 812-15. Section 1357 authorizes warrantless civil arrests based on probable cause to believe there is an immigration violation. 8 U.S.C. § 1357(a)(2). It is also the only provision of the INA authorizing detainers. *Id.* § 1357(d); *Gonzalez*, 975 F.3d 788 at 813-24 & nn.16-17.[13] The provisions covered by § 1252(f)(1), in contrast, authorize arrest and detention with a warrant or final order of removal. *See* 8 U.S.C. §§ 1226(a), § 1231(a)(2).

As explained on pp. 26-29 above, the arrests in this case are warrantless. Thus, the injunction does not affect a provision covered by § 1252(f)(1).

Moreover, the injunction entered in this case does not "enjoin or restrain the operation of" any provision of the INA. Every provision of the INA, including

[13] Although § 1357(d) refers to detainers for drug offenses, the Ninth Circuit recognized this statute and a regulation, 8 C.F.R. § 287.7, are the only authorities for the issuance of detainers. *See Gonzalez*, 975 F.3d 788 at 813-24 & nn.16-17. Neither is a provision covered by § 1252(f)(1). *Id.*

§§ 1221-32, continues to operate as before. Nothing in the District Court's orders narrows or alters the government's interpretation of those statutes.

The injunction restrains only specific personnel (the Marshals). It does not restrain the "operation" of the specified provisions of the INA, which do not assign any powers or duties to the Marshals. By confining the Marshals to their scope of lawful authority, the District Court did not enjoin the operation of the INA.

The two cases cited by Dixon both involved injunctions that restrained the operation of the INA because they enjoined the entire government. *See Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2062-63 (2022) (government barred from detaining non-citizens without bond hearings); *Biden v. Texas*, 142 S. Ct. 2528, 2536-37 (2022) (ordering government to return migrants to Mexico). In both cases, the government was barred from operating the enumerated statutes as it understood them.

That is not the case here. The government may continue to arrest and detain individuals, including any class member, as authorized by § 1226 and § 1331. *Cf. Texas v. United States*, 50 F.4th 498, 529 (5th Cir. 2022) (holding that injunction barring deferred-removal program did not violate § 1252(f)(1) because it "d[id] not require DHS to remove anyone"). At most, this injunction would have only a "collateral effect on the operation" of the INA, and is therefore permissible under §

1252(f)(1). *Aleman Gonzalez*, 142 S. Ct. at 2067 n.4; *Gonzales v. DHS*, 508 F.3d 1227, 1233 (9th Cir. 2007).

Even if § 1252(f)(1) applied and the Court were to excuse the government's failure to raise it below, the Court should affirm the injunction on behalf of N.S. and remand for consideration of vacatur or other class-wide relief.

III. The threat of irreparable injury justified the injunction.

The District Court correctly held that being shackled and detained for hours without lawful authority is an irreparable injury, and that the threat of future injury in this case justified injunctive relief. JA 159. Dixon argues that N.S.'s unlawful arrest and detention by the Marshals was not a "deprivation of liberty" because he *could have* been lawfully arrested by ICE immediately after his release Dixon Br. 42. The Court should reject this crabbed understanding of liberty.

Dixon does not dispute that the Marshals deprived N.S. of his physical liberty by detaining him in shackles in the cellblock of the courthouse. Nor does Dixon dispute that, but for the Marshals' illegal detention, N.S. would have left the courthouse instead of being shackled and detained for hours. Dixon instead claims that, because ICE had probable cause to arrest him for civil immigration infractions, N.S. had "no right to be free." Dixon Br. 42. That argument is flawed on both the facts and the law.

First, because there is no evidence in the record that ICE had issued a warrant to arrest N.S., or that ICE had reason to believe that N.S. was likely to escape before a warrant could be obtained, *see* pp. 26-29, 31-32 *supra*, Dixon lacks any factual basis in the record to claim that N.S. was subject to a lawful arrest by ICE as soon as he was ordered released.

Second, even if ICE had issued a warrant of N.S.'s arrest, that did not mean that N.S. had "no right to be free." As long as ICE had not lawfully arrested him, N.S. *did* have a right to be free, as he had been ordered released in his criminal case and was free to leave the courthouse at will. The USMS's unlawful arrest and detention of N.S. at *that* moment—when he had a right to be free, and when ICE had not yet lawfully arrested him—was an unlawful deprivation of liberty that constitutes an irreparable injury.

The cases cited by Dixon appear to reason that a claimant lacks injury if, despite a legal error, he *would* have been detained anyway. *See* Dixon Br. 42-43 (citing cases). But here, the best Dixon can say is that it maybe was possible that ICE *could* have detained N.S. (but only if a warrant actually existed) or other class members had the Marshals not held them illegally. As the District Court found, there is "absolutely no evidence" that ICE would take immediate custody of "every or even most" class members. JA 159-60. But for their *illegal* arrest by the Marshals, these defendants would have been *legally* at liberty.

Dixon's additional argument—that the injunction was improper because N.S. himself did not face an imminent risk of being detained by the Marshals in the future, Dixon Br. 44—was not raised in the District Court and is therefore waived. *See Gonzales v. Mathis Indep. Sch. Dist.*, 978 F.3d 291, 295 n.6 (5th Cir. 2020) (defendant waived claimed lack of irreparable injury). In any event, the injunction was properly granted based on irreparable injury to the certified class. The class includes future arrestees to be presented in Superior Court, for whom the imminent threat of irreparable injury is undisputed. A class-wide injunction barring an "inherently transitory" period of detention, such as the hours-long detention here, is valid even if the named plaintiff has already been released and does not himself face imminent injury. *Nielsen v. Preap*, 139 S. Ct. 954, 963 (2019) (plurality); *see also Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991); *Gerstein v. Pugh*, 420 U.S. 103, 111 n.11 (1975).

CONCLUSION

N.S. respectfully requests that this Court affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because this brief contains 12,952 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman type style.

February 2, 2024.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of February, 2024, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF.

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