

# Transportation of Migrants Facilitated by States

October 20, 2022

On September 15, 2022, [two planes landed at the airport in Martha's Vineyard, MA](#), with approximately 50 non-U.S. nationals ([aliens, as the term is used in the Immigration and Nationality Act \[INA\]](#)) who had been released from Department of Homeland Security (DHS) custody. DHS placed the individuals into immigration removal proceedings, but [released them](#) from physical custody pending scheduled immigration court hearings, where those individuals may [seek asylum](#). After release, the migrants were flown from Texas to Massachusetts, reportedly at the [State of Florida's expense](#).

[Since April](#), Texas has been using state funds to finance bus travel for released aliens in Texas to areas such as the District of Columbia, New York, and Chicago. The [State of Arizona has also funded](#) the travel of aliens from that state to Washington, DC. As of mid-September, [more than 13,000 aliens had been transported out of Texas and Arizona](#).

Certain aliens [are required by law to be detained](#) during removal proceedings. However, DHS has the discretion to release others, including many apprehended at the border, while their proceedings are pending. Nondetained aliens may receive [assistance from nonprofit organizations and local governments](#) (some of which is financed through the [Federal Emergency Management Agency](#)) for [necessities](#) such as shelter and food, and sometimes for transportation. This assistance can aid in dispersing large groups of migrants away from the border.

The transportation of aliens from the border to other parts of the country is not a new occurrence. The federal government relocates aliens between DHS facilities for processing, and has also bused nondetained aliens to [other U.S. regions](#). The recent transportation *arranged by states*, however, may raise several questions under federal law. This Insight examines two legal questions with respect to states' recent actions—whether they raise federalism concerns, and whether certain federal criminal statutes may apply. Although not addressed in this Insight, some have [claimed](#) that state transportation of aliens may violate [state laws](#). In addition, [at least one lawsuit](#) has been filed against the State of Florida and Florida officials by some affected individuals raising federal civil rights claims, among other things.

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## Federalism

The transportation of aliens, arranged by states, from Southwest border states further into the country's interior may raise questions over whether such action intrudes upon the federal government's authority to regulate immigration. The U.S. Constitution establishes a system of shared authority between the federal and state governments, while declaring under the [Supremacy Clause](#) that federal law is "the supreme Law of the Land." When Congress exercises its enumerated powers, it may preclude, or [preempt](#), certain state laws and policies. The Supreme Court has [repeatedly recognized](#) that federal law preempts a broad range of state or local activities addressing immigration-related matters, though [not every single state enactment](#) "which in any way deals with aliens is a regulation of immigration and thus *per se* preempted." For example, the Supreme Court [held](#) that federal immigration laws did not preempt a state from suspending or revoking the business license of an entity that employed aliens who the federal government had not authorized to work in the United States.

State laws or activities can be [preempted](#) either impliedly or through explicit preemptive language. There are two types of implied preemption. Under [field preemption](#), a state cannot regulate in a field over which Congress has exclusive authority. [Conflict preemption](#) occurs when it is impossible to comply with both federal and state regulations or in cases where the "challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" In the context of state transportation of aliens from the Southwest border, it appears that the aliens were released from DHS custody pending removal proceedings in compliance with federal law (e.g., [parole](#)). If a state were to interfere with the free movement of aliens authorized to be present by the United States (e.g., requiring aliens to board a bus to leave a state), a reviewing court would likely conclude those actions [intrude upon the federal government's immigration authority or serve as an obstacle to the execution of federal immigration laws](#). In contrast, if an alien voluntarily chooses to travel to a certain region with assistance by a state, it seems much less likely that such assistance would raise the same legal concerns absent extenuating circumstances.

## Federal Criminal Laws

[Some commentators](#) have questioned whether the state-arranged transportation of aliens [through](#) alleged [deceptive tactics](#) may violate federal criminal laws prohibiting human trafficking, transporting unlawfully present aliens, and kidnapping. [Federal human trafficking statutes](#) are likely not relevant because they generally require the transportation to be against the individual's will for the purpose of forced labor (e.g., certain sex acts or domestic labor). Nor does it appear likely the statute prohibiting [transportation of unlawfully present aliens](#) is pertinent. The [statute](#) requires a person—knowing or in reckless disregard of the fact that an alien "has *come to, entered, or remains in the United States in violation of law*"—to have knowingly transported the alien *for the purpose* of helping him or her further such violation of law. First, the involved aliens would likely not be [considered in violation of law](#) for purposes of this statute, as they were released from DHS custody and [authorized to remain](#) pending removal proceedings. Second, transportation of aliens under the statute must be [in furtherance](#) of their [violation of law](#), which appears unlikely here.

At least one [commentator](#) has asserted that the [federal kidnapping statute](#) could also apply in these circumstances. The statute [applies](#) to those who "unlawfully seize[], confine[], inveigle[], decoy[], kidnap[], abduct[], or carr[y] away and hold[] for ransom or reward or otherwise any person." One of the statutory bases, "inveigling," [generally means](#) "luring" or "enticing" [through deceit](#). As such, if it were the case that particular aliens were induced to be transported through false representations [as alleged](#), such conduct could [potentially fall](#) within the meaning of inveigling, although the other elements of the statute, including the requisite intent, would still have to be proved.

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