

No. 21-954

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In the  
**Supreme Court of the United States**

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JOSEPH R. BIDEN, JR., PRESIDENT OF THE  
UNITED STATES, ET AL.,  
*Petitioners,*

v.

TEXAS, ET AL.,  
*Respondents.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit**

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**BRIEF OF *AMICUS CURIAE* ADVOCATES FOR  
VICTIMS OF ILLEGAL ALIEN CRIME IN  
SUPPORT OF RESPONDENTS**

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**INTERESTS OF *AMICUS CURIAE***<sup>1</sup>

Advocates for Victims of Illegal Alien Crime (AVIAC) is an advocacy organization founded and led by individuals who have lost family members because of crimes committed by illegal aliens. AVIAC's mission is to be both a source of support for such victims across the country and an advocate for policies that will enforce the nation's immigration laws and prevent government actors from sheltering illegal aliens, particularly criminal aliens, from deportation. AVIAC presents the raw statistics of illegal alien crime. And it gives a face to these statistics with victims' stories. It also presents legal arguments unique from that being advanced by the parties. AVIAC, therefore, takes an interest in the case at bar challenging government action that frustrates the enforcement of immigration laws.

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<sup>1</sup> All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the *amicus curiae*, its members, or its counsel financed the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

When an alien arrives at the southern border, the Executive Branch has two options to process that alien – detention or return to contiguous territory.<sup>2</sup> The detention option arises from the Congressional mandate that an alien “not clearly and beyond a doubt entitled to be admitted . . . *shall be detained*” pending removal proceedings. 8 U.S.C. § 1225(b)(2)(A) (emphasis added). The return option arises from an alternative to mandatory detention that Congress offers for those aliens arrive at the U.S. border from Mexico or Canada. For those aliens, the Executive Branch may return them to Mexico (or Canada) while their application for asylum or admission on other grounds is processed. 8 U.S.C. § 1225(b)(2)(C).

The Fifth Circuit Court of Appeals correctly ruled that DHS violated the express statutory commands of Congress when it terminated MPP and, concurrently, refused to detain aliens pending removal. This Court should affirm.

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<sup>2</sup> Technically, the Executive Branch has a third choice that it can exercise in very limited circumstances when certain conditions are met. Under 8 U.S.C. § 1182(d)(5), DHS has the option “only a case-by-case basis for urgent humanitarian or significant public benefit” to parole certain aliens pending removal. But, DHS may not parole aliens *en masse* under this provision. *Texas v. Biden*, 20 F.4d 928, 997 (5th Cir. 2021).

## ARGUMENT

Among the Biden Administration's immigration failures has been the termination of the Migrant Protection Protocols ("MPP"), also known as the "remain in Mexico" program. Under the MPP, aliens arriving at the southern border who claim asylum would be required to remain in Mexico pending resolution of their asylum claims. The reason for the MPP was to prevent "country shopping" by aliens who had already passed through other safe countries where they could have and should have requested asylum. Application of the MPP helped reduce the number of fraudulent claims of asylum to enter the United States. It also helped with the backlog of asylum cases by ensuring that resources were focused on those who could prove a valid asylum claim.

The Biden Administration's lawless termination of the program has created a massive humanitarian crisis along the border. Human traffickers and other criminals have made enormous profits as they control the Southern border. These criminals take advantage of migrants by ensuring no one crosses without paying a steep price, including forced slave labor, drug trafficking, sex industry work, and organ harvesting. Illegal aliens are often forced to carry drugs across the border, such as fentanyl and methamphetamines that kill thousands of Americans annually. The recent explosion of illegal aliens has caused the largest crisis along the border in over 20 years. This is the result of the Administration's suspension on January 20, 2021 (mere hours after taking office) and then termination on June 1, 2021, of the MPP. These reckless and

unlawful actions violate the Administrative Procedure Act (“APA”), the Immigration and Nationality Act (“INA”), and the United States Constitution. Both the district court and the Court of Appeals agreed. This Court should, therefore, affirm the judgment of the Court of Appeals.

**I. ILLEGAL ALIENS HAVE A DELETERIOUS IMPACT ON THE UNITED STATES.**

Criminal illegal aliens have a deleterious effect on our nation’s public safety and public health. The states depend on the federal government to ameliorate these impacts because the states cannot do it themselves. *See Arizona v. United States*, 567 U.S. 387 (2012).

In 2020, ICE arrested 103,603 illegal aliens, *approximately 90% of whom had prior criminal convictions or pending criminal charges*. ICE ANN. REP. (2020).<sup>3</sup> While these statistics are jarring, they are cold hard facts. More worrying is that these statistics only count state level offenses committed by illegal aliens; not federal crimes. Moreover, approximately 90% of MS-13 gang members in the United States are illegal aliens,<sup>4</sup> and almost 17% of the federal prison population consists of non-US citizens.<sup>5</sup>

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<sup>3</sup> <https://www.ice.gov/doclib/news/library/reports/annualreport/iceReportFY2020.pdf>

<sup>4</sup> Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 Geo. Immigr. L.J. 459, 462 (2008)

<sup>5</sup> [https://www.bop.gov/about/statistics/statistics\\_inmate\\_citizenship.jsp](https://www.bop.gov/about/statistics/statistics_inmate_citizenship.jsp)

In 2018, arrests of illegal aliens represented over two thirds of all federal arrests.<sup>6</sup>

The Texas Department of Public Safety keeps records on the impact of illegal alien crime specific to Texas. Relying on the Department of Homeland Security's ("DHS") own statistics, the Texas Department of Public Safety reported 300,000 illegal aliens, *who DHS had previously identified as being in the country illegally*, committed crimes, including major felonies, in the state of Texas, between June 1, 2011 and January 31, 2021:

According to DHS status indicators, over 334,000 criminal aliens have been booked into local Texas jails between June 1, 2011 and January 31, 2021, of which over 228,000 were classified as illegal aliens by DHS. Between June 1, 2011 and January 31, 2021, these 228,000 illegal aliens were charged with more than 368,000 criminal offenses which included arrests for 681 homicide charges; 42,698 assault charges; 6,950 burglary charges; 45,557 drug charges; 590 kidnapping charges; 18,662 theft charges; 28,892 obstructing police charges; 2,050 robbery charges; 4,505 sexual assault charges; 5,651 sexual offense charges; and 3,871 weapon charges.

Texas Criminal Illegal Alien Crime Data, <https://www.dps>.

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<sup>6</sup> Department of Justice, *Immigration, Citizenship, and the Federal Justice System*, 1998-2018 (2021), <https://www.bjs.gov/content/pub/pdf/icfjs9818.pdf>

[texas.gov/section/crime-records-service/texas-criminal-illegal-alien-data](https://www.texas.gov/section/crime-records-service/texas-criminal-illegal-alien-data).

While these statistics are staggering, they underreport the true number of crimes illegal aliens commit in Texas each year meaning the true count is likely much higher. The Texas Department of Public Safety’s statistics count only those illegal aliens that “had an encounter with DHS that resulted in their fingerprints being entered into the DHS IDENT database.” *Id.* As the report notes, “[f]oreign nationals who enter the country illegally and avoid detection by DHS but are later arrested by local or state law enforcement for a state offense will not have a DHS response in regard to their lawful status and do not appear in these counts.” *Id.* Furthermore, the statistics also only count state level offenses committed by illegal aliens not federal crimes.

What happens when our immigration laws are not enforced? On March 11, 2021, illegal alien Reynaldo Figueroa-Ardon, a Honduran national, got into an altercation with a Pennsylvania police officer who was trying to detain him for breaking into cars. He wrestled away the officer’s firearm, held it to the officer’s head, and pulled the trigger three times. Luckily, there was no round in the chamber and the officer’s life was spared.<sup>7</sup>

In another case on March 7, 2021, thrice deported illegal alien Obduliu Godines, a Mexican national, tried to kill his neighbor in Collier County, Florida, by

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<sup>7</sup> <https://www.inquirer.com/news/reynaldo-figueroa-ardon-attempted-murder-police-whitemarsh-township-20210311.html>

stabbing him. Godines allegedly kicked open his neighbor's door and said, "I'm going to kill you" before lunging toward the man with a knife.<sup>8</sup>

In March 2020, illegal alien Lucas Dos Reis Laurindo killed Julie Smith, age 41, her 5-year-old daughter Scarlett, her 12-year old son Jaxson, and their grandmother, who were on their way to Disney World, in a careless driving accident.<sup>9</sup>

In 2012, in Texas, Antonio Miranda Cota assaulted an American citizen and was removed from the United States. Cota returned to Texas and this time assaulted a law enforcement officer who required surgery, paid for by worker's compensation, for the injuries inflicted by Cota. In 2019, Cota violently assaulted construction worker and family man Guston Smith with the claw end of a hammer, striking him in the head four times and rendering him permanently disfigured and disabled. Mr. Smith, a U.S. citizen, was almost killed, remained in a coma for several days after the attack, and is now unable to work or pay for basic expenses and is unsure of his future because of Cota's brutal attack. Cota is currently serving time in a correctional institute.<sup>10</sup>

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<sup>8</sup> <https://www.breitbart.com/politics/2021/03/11/three-time-deported-illegal-alien-accused-of-stabbing-attack-in-Florida/>

<sup>9</sup> <https://boston.cbslocal.com/2020/03/09/florida-crash-lucas-dos-reis-laurindo-smith-family-whitman-massachusetts-disney-world-orlando/>

<sup>10</sup> <http://caseinfo.nvsupremecourt.us/public/case View.do?csIID=56321>

These horrific crimes represent only a glimpse at the thousands of often violent crimes committed by illegal aliens each year. There is one thing these crimes have in common; they would not have happened if these individuals were not in the country illegally. Termination of the MPP combined with the refusal to detain illegal aliens permits such criminals free-reign in U.S. cities.

An additional consideration is the fiscal toll of illegal alien crime. One study pegged the fiscal damage of illegal alien crime at over \$8 billion, much of that sustained by the states.<sup>11</sup> That study indicated that Texas' share of that total was over \$728 million.

DHS's abdication of its duties will surely make these costs and crimes increase and states like Texas will be left picking up the pieces. States like Texas and their citizens pay the price for these crimes in the form of the victim's emotional toll and the tax dollars spent processing the accused through the justice system and ultimately incarcerating them in Texas prisons.

## **II. DHS IS IGNORING A CLEAR CONGRESSIONAL MANDATE**

The executive branch may not "disregard legislative direction in the statutory scheme that [it] administers." *Heckler v. Chaney*, 470 U.S. 821, 833, (1985). Nor may it "ignore statutory mandates or prohibitions merely

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<sup>11</sup> Jack Martin & Eric Ruark, Federation for American Immigration Reform, *The Fiscal Burden of Illegal Immigration on Unites States Taxpayers*, (Feb. 2011), [https://www.fairus.org/sites/default/files/2017-08/USCostStudy\\_2010.pdf](https://www.fairus.org/sites/default/files/2017-08/USCostStudy_2010.pdf)

because of policy disagreements with Congress.” *In re Aiken Cnty.*, 725 F.3d 255, 260 (D.C. Cir. 2013) This is perhaps most pronounced in our immigration laws.

This Court has long recognized Congress’ supreme and almost exclusive power to set immigration policy. *Galvan v. Press*, 347 U.S. 522, 530-31 (1954) (“The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security.”); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”). Absent express delegation from Congress, the executive branch may not set its own immigration policy in contravention of congressional intent. “Whatever ‘inherent authority’ the Executive may have in the area of immigration, that authority, along with the executive Power, does not include the authority to ‘suspend’ or ‘dispense with’ Congress’s exercise of legislative Powers in enacting immigration laws.” *Texas v. United States*, 2021 WL 723856, at \*37 (S.D. Tex. Feb. 23, 2021).

While the constitution does not expressly address whether the power to regulate immigration belongs to Congress or the President, this Court has found Congress’ power over immigration flows from two sources: the commerce clause and the treaty clause. Before congress enacted legislation that broadly regulated immigration, this Court, in *Henderson v. Mayor of City of New York*, 92 U.S. 259 (1875), considered a law requiring the owner of a boat docking

in New York to post a \$300 bond for each foreign person that landed. The Court invalidated the law based on the commerce clause, specifically the legislative branch's power to regulate commerce with foreign nations.: "a law or a rule emanating from any lawful authority, which prescribes terms or conditions on which alone the vessel can discharge its passengers, is a regulation of commerce; and, in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations." *Id.* at 271. The treaty clause of the United States Constitution, U.S. Const. Art. II, § 2, cl. 2, vest in the President the power to make treaties with foreign nations, but those treaties must still be ratified by two-thirds of the Senate. So, the President can negotiate a treaty with a nation regarding immigration but his power is not unilateral.

Congress exercised its power to establish immigration policy through the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101, et. seq. ("INA"). The mandate of Section 235 of the INA, codified at 8 U.S.C. § 1225, is clear: when an alien claiming asylum arrives in the United States, *the alien shall be detained*. 8 U.S.C. § 1225(b)(2)(A); *Texas v. Biden*, 20 F.4th 928, 996 (5th Cir. 2021) ("So in short, § 1225(b)(2)(A) sets forth a general, plainly obligatory rule: detention for aliens seeking admission."). If the alien arrives from Mexico or Canada, the INA gives DHS discretion to return the alien to those countries. 8 U.S.C. § 1225(b)(2)(C). So, for aliens arriving from Mexico and Canada, the INA gives DHS two choices: detention or return. These options are exhaustive. *Texas*, 20 F.4th at 996.

The Court of Appeals correctly held that DHS's decision to terminate MPP tied its hands. DHS could not terminate MPP (the remain option), and then ignore its only remaining option—alien detention. *Texas v. Biden*, 20 F.4th at 997. In other words, if DHS is not going to return aliens to Mexico or Canada it is obligated to detain them. Termination of MPP and failure to detain such aliens is a clear violation of a congressional mandate. Congress has issued a clear command and DHS has no authority to ignore it, even under the guise of prosecutorial discretion. *Heckler v. Chaney*, 470 U.S. 821, 833, n. 4 (1985). DHS is “consciously and expressly adopt[ing] a general policy, which is in effect an abdication of its statutory duty.” *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973).

Congress has established a detailed practice for how DHS processes aliens arriving from Mexico. Only Congress can change that practice. DHS cannot refuse to exercise its discretionary option to have aliens remain in Mexico and it cannot ignore a mandate of Congress to craft a third option that fits its desired immigration policy. That is lawmaking by agency in its rankest form. DHS is bound to follow the mandate of Congress and when it refuses, as here, the courts must override its recalcitrance. The district court and the Court of Appeals properly did so.

**CONCLUSION**

Based on the foregoing, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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