No. 21-40618

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

State of Texas; State of Louisiana,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR *AMICUS CURIAE* ADVOCATES FOR VICTIMS OF ILLEGAL ALIEN CRIME IN SUPPORT OF APPELLEE'S OPPOSITION TO INJUNCTION

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1 and Fed. R. App. 26.1, *amicus curiae* Advocates for Victims of Illegal Alien Crime, Attorneys United for a Secure America makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

3) The following entities have an interest in the outcome of this case: Advocates for Victims of Illegal Alien Crime, Attorneys United for a Secure America.

DATED: October 14, 2021

Respectfully submitted,

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INTEREST OF AMICI CURIAE

AVIAC is an advocacy organization founded and led by individuals, including residents of Texas and Louisiana, 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 on 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 federal immigration laws.

ARGUMENT

Issue No. 1

Whether 8 U.S.C. Sections 1226(c) and 1231(a)(2) of the Immigration and Naturalization Act (INA) mandate the detention of criminal aliens pending deportation?

Issue No. 2

The State of Texas and the State of Louisiana, like all states, depend on the federal government to ameliorate the impacts of illegal immigration. The States cannot enforce federal immigration laws themselves. Both the Biden Administration and the Department of Homeland Security have ignored a Congressional mandated law by suspending arrests and removals of criminal aliens. Whether federal agencies have decision making authority to use discretion to detain and remove criminal aliens?

SUMMARY OF ARGUMENT

Congress issued the Department of Homeland Security (DHS) a clear mandate to detain and remove criminal aliens, and the executive cannot ignore this mandate based on a policy disagreement. A mandate to detain and remove criminal aliens is different than prosecutorial discretion. The Biden Administration issued three (3) memoranda starting on January 20, Inauguration Day, February 18, and September 30, 2021 that are each in direct contradiction with Congress' mandate. The Administration and its agency, DHS, claimed it has authority to exercise discretion whether to detain and remove criminal aliens. In doing so, the Executive branch has placed its own policy preferences over the law of the land. The states and the American people have suffered greatly as a consequence of these reckless policy decisions and ignoring Congressional mandates.

The State of Texas and the State of Louisiana, along with other states, rely on the federal government for a critical law enforcement role; enforcement of our nation's immigration laws. One law enforce-

ment role provided by the federal government is the detention of criminal aliens pending deportation as required by Section 1226(c) of the Immigration and Naturalization Act (INA). 8 U.S.C. §1226(c). That section was added by Congress in 1996 to combat rising illegal alien crime and "to keep dangerous aliens off the streets." *Sylvain v. AG of the United States*, 714 F.3d 150, 159 (3d Cir. 2013). In Section 1226(c), Congress *mandates* that a criminal alien shall be detained. Section 1226(c) divested DHS' predecessor, INS, of any discretion over which aliens to detain or which to detain and release on bond. That discretion existed before Section 1226(c) was added to the INA and Congress found that that discretion was one of the primary factors for increasing rates of illegal alien crime. *Demore v. Hyung Joon Kim*, 538 U.S. 510, 518-519 (2003). Due to the Executive Branch's outright violation of Congress' federal immigration law mandates, the Fifth Circuit committed an error of law when it partly granted the Appellant's preliminary injunction.

ARGUMENT

I. THE ADMINISTRATION ACTED IN VIOLATION OF A CLEAR CONGRESSIONAL MANDATE

8 U.S.C. Sections 1226(c) and 1231(a)(2) of the Immigration and Naturalization Act (INA) mandate the detention of criminal aliens pending deportation. Once an order has been issued, the mandatory removal period starts.

Illegal alien crime has a deleterious effect on our nation's public safety and public health, including the mounting financial costs incurred on the states and their citizens. The State of Texas and the State of Louisiana, like all 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). When ICE and DHS are making arrests, they are performing a core law enforcement function on which Texas and Louisiana both rely on. If the federal government abandons its duties, states cannot not step in to fill the void. *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977) ("Control over immigration and

naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere").

Since the beginning of the Biden Administration, numerous news outlets (across the nation) have reported record-breaking illegal entries via the open and porous Southern border wreaking more havoc and hardship onto the states. It will only get worse.

In 2020, ICE arrested 103,603 illegal aliens, *approximately 90% of whom had prior criminal convictions or pending criminal charges*. ICE ANN. REP. (2020)[1]. While these statistics are jarring, they are still cold statistics. And the statistics also only count state level offenses committed by illegal aliens; not federal crimes. Moreover, the most recent study on the topic indicates approximately 90 percent of MS-13 gang members in the United States are illegal aliens.[2] And almost 17% of the federal prison population consists of non-US citizens.[3] In 2018, arrests of illegal aliens represented over two-thirds of all federal arrests.[4]

[1] https://www.ice.gov/doclib/news/library/reports/annualreport/iceReportFY2020.pdf
[2] 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)
[3] https://www.bop.gov/about/statistics/statistics_inmate_citizenship.jsp
[4] Department of Justice, *Immigration, Citizenship, and the Federal Justice System*, 1998-2018 (2021). https://www.bjs.gov/content/pub/pdf/icfjs9818.pdf

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. Fortunately, there was no round in the chamber and the officer's life was spared.[5]

In another case on March 7, 2021, three-time deported illegal alien Obduliu Godines, a Mexican national, tried to kill his neighbor in Collier County, Florida, by stabbing him. Godines allegedly kicked open his neighbor's door and said, "I'm going to kill you" before lunging towards the man with a knife.[6]

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.[7]

[5]https://www.inquirer.com/news/reynaldo-figueroa-ardon-attempted-murder-police-whitemarsh-township-20210311.html

[6]https://www.breitbart.com/politics/2021/03/11/three-time-deported illegal-alien-accused-of-stabbing-attack-in-Florida/

[7]https://boston.cbslocal.com/2020/03/09/florida-crash-lucas-dos-reis-laurindo-smith-family-whitman-massachusetts-disney-world-orlando/

These horrific crimes represent only a slice of the thousands of crimes illegal aliens commit 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.

DHS's abdication of its duties and issuing arbitrary policy memoranda will surely make these statistics increase and the states will be left picking up the pieces. The State of Texas and the State of Louisiana will 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 state prisons.

II. THE EXECUTIVE IS IGNORING THE CLEAR CONGRESSIONAL MANDATE OF A STATUTE DESIGNED TO COMBAT ILLEGAL ALIEN CRIME.

Congress enjoys almost exclusive authority to establish 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.").

Congress's exclusive power has played a role in checking executive immigration policies of administrations across the ideological spectrum. ADAM B COX & CRISTINA M. RODRIQUEZ, THE PRESIDENT AND IMMIGRATION LAW (2020). In *Trump v. Hawaii*, 138 S.Ct. 2392 (2018), the Supreme Court reaffirmed Congressional authority over immigration policy, but found it had delegated certain authority to the executive. There, the Supreme Court found it in 8 U.S.C. § 1182(a)(1) it had delegated to the President "the authority to suspend or restrict the entry of aliens in certain circumstances." *Id.*

In 2014, the Justice Department concluded that President Obama could not apply DACA to parents of children because it violated a clear Congressional mandate. The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and Defer Removal of Others, 38 O.P. O.L.C. 1, 31-33 (Nov. 19, 2014). In that memorandum, the Justice Department acknowledged that executive discretion in immigration policy is limited by the bounds of the INA.

Congress exercised its authority in 1996 and amended the Immigration and Naturalization Act, 8 U.S.C. §1226(c). That statute was designed primarily to do one thing and that is "to keep dangerous aliens off the streets." *Sylvain v. AG of the United States,* 714 F.3d 150, 159 (3d Cir. 2013). "Congress adopted this provision against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens."

Demore at 518. Therefore, Congress designed Section 1226(c) to serve an important public interest of combating criminal activity committed by illegal aliens.

Section 1226(c) is clear, unequivocal, and mandatory in that criminal aliens *shall be* detained. The text of 8 U.S.C. §1226(c) reflects Congress' intent in which DHS *shall* detain criminal aliens:

> **"(c) Detention of criminal aliens.**
> **(1)** Custody. The Attorney General shall take into custody any alien who—
> **(A)** is inadmissible by reason of having committed any offense covered in section 212(a)(2),
> **(B)** is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D),
> **(C)** is deportable under section 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentence [sentenced] to a term of imprisonment of at least 1 year, or
> **(D)** is inadmissible under section 212(a)(3)(B) or deportable under section 237(a)(4)(B), when the alien is released, without regard to

> whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense."

8 U.S.C.A. § 1226(c)[8].

When Congress passed section 1226(c), it knew what it was facing, increasing illegal alien crime that INS was not combatting. When Section 1226(c) was passed, "Congress also had before it evidence that one of the major causes of INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings."

Demore, 538 U.S. at 519. That evidence included illegal aliens being the fastest growing segment of the prison population, a failure of INS to locate criminal aliens, quick re-entry by deported aliens, and a 77% recidivism rate among aliens awaiting deportation.

8 U.S.C. section 1231(a)(2) also mandates the Attorney General to detain an alien during the removal period. Further, it states "… Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section

[8] The Attorney General's obligations have been transferred to DHS. 8 U.S.C. §1103(a)(1) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of...all other laws relating to the immigration and naturalization of aliens. *Ulysse v. Dep't of Homeland Sec.*, 291 F. Supp. 2d 1318 (M.D. Fla. 2003)

1182(a)(2) or 1182(a)(3(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title." Unlike prosecutorial discretion as to whether or not prosecute, Congress made clear their intent to be mandatory.

Congress identified INS' failure to detain criminal aliens and the Attorney General's discretion to release criminal aliens from custody on bond pending their deportation hearings as causes of increased illegal alien crime. Therefore, Congress used the word "shall" for a reason: to make clear that detainment of criminal aliens was mandatory and remove any discretion of the Attorney General to refuse to detain criminal aliens.

Me. Cnty. Health Options v. United States, 140 S. Ct. 1308 (2020) ("[T]he word 'shall' usually connotes a requirement.") It did not use the terms may, can, shall *not*, or the phrase "if the current administration's policy is in accord." Indeed, if it used those words or that phrase, it would not have achieved much of its policy goal; to keep illegal aliens off the streets. Nor would it have addressed the perceived cause of rising illegal alien crime; the discretion to detain aliens.

It is true that the executive enjoys a certain amount of discretion on issues of immigration and enforcement procedures. 8 U.S.C. §1103(a)(3);8 U.S.C. §1182(f); *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) ("§ 1182(f) grants the President broad discretion to suspend the entry of aliens into the United States.") But that discretion, particularly as it relates to the INA, is not unbounded. The President and an executive agency cannot override express mandates in the INA. *Id.* at 2411; *Texas v. United States*, 6:21-CV-00003, 2021 WL 723856, at *37 (S.D. Tex. Feb. 23, 2021) ("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.") (Citations omitted).

It has long been the law that when the intent of Congress is clear on the face of a statute, an agency is divested of authority to issue rules in contravention of that statute. *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambig-

uously expressed intent of Congress.") And "federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreements with Congress,"

In re Aiken Cnty., 725 F.3d 255, 260 (D.C. Cir. 2013) nor are they "free simply to disregard statutory responsibilities" when Congress has circumscribed agency discretion.

Lincoln v. Vigil, 508 U.S. 182, 193, (1993)

Here, Congress left no room for executive or agency discretion when it comes to detaining criminal aliens because Congress has stripped it of all discretion.

Heckler v. Chaney, 470 U.S. 821, 833, n. 4 (1985). Numerous circuit and district courts are in accord. In reviewing Section 1226(c) they have found its requirement regarding the detention of criminal aliens is *mandatory*.

Sylvain, 714 F.3d at 159 ("Congress adopted the *mandatory-detention* statute against a backdrop of rising crime by deportable aliens.");

Hosh v. Lucero, 680 F.3d 375, 377 (4th Cir. 2012) ("8 United States Code, Section 1226(c) requires the *mandatory* federal detention, without the possibility of bond, of certain deportable criminal aliens 'when' those

aliens are released from other custody.");

Mapp v. Reno, 241 F.3d 221, 224 (2d Cir. 2001) Section 1226(c), [], provides for *mandatory detention* of criminal aliens such as Mapp.");

Douglas v. Mukasey, 2008 WL 3889737, at *2 (M.D. Fla. Aug. 20, 2008) ("The statue *requires* the Attorney General to take into custody and detain aliens with certain enumerated criminal convictions pending removal proceedings.");

Gjergji v. Johnson, 2016 WL 3645116, at *2 (M.D. Fla. May 19, 2016), report and recommendation adopted in part, 2016 WL 3552718 (M.D. Fla. June 30, 2016). Section 1231(a)(2) also has mandatory language that does not permit agency discretion. Once a removal order has been issued, the criminal alien must be detained and removed.

DHS's memorandums dated January 20, February 18 and September 30, 2021 simply ignore Congress's mandate in Section 1226(c) and places a virtual halt on all detentions of criminal aliens. While the first two memoranda remain in effect, the September 30, 2021 memorandum does not go into effect until "November 29, 2021." See Guidelines for the Enforcement of Civil Immigration Law (September 30, 2021). All three memorandums leave a permanent pockmark on the Nation.

Instead of detaining all criminal aliens and getting them "off the streets" as Congress intended, DHS is selectively detaining only those illegal aliens (1) who are currently in jail, (2) who will be released after January 1, 2021, (3) who have committed an "aggravated felony,"[9] as that term is defined in the INA, *and* (4) who "are determined to pose a threat to public safety." Dep't Hom. Sec., January 20, 2021 Memorandum. All other illegal alien criminals get a pass, including criminals released from jail after January 20, 2021 who have committed crimes other than "aggravated felonies." Even criminal aliens convicted of aggravated felonies would get a pass if it were "determined [they] pose [no] threat to public safety." DHS is incorrect to describe detention under Section 1226(c) as a "discretionary enforcement decision" *Id.* Congress expressly *revoked* any discretion to detain criminal aliens when it passed Section 1226(c). *Demore*, at 519. Neither the text of the statute nor the intent of Congress confers any discretion on DHS over which criminal aliens to detain and which to allow to roam free.

[9] The INA, 8 U.S.C.A § 1101(a)(43), defines "aggravated felony" to include rape, murder, sexual abuse of a minor, drug trafficking, illegal firearms trafficking, money laundering, certain firearms offenses, a crime of violence punishable by a term of imprisonment more than a year, theft, burglary, ransom, child pornography, prostitution, espionage, fraud, counterfeiting a passport, perjury, bribery of a witness, and failure to appear before a court related to a felony charge.

In sum, under the pretext of discretion, both the Executive Office and DHS are circumventing a Congressional mandate and exercising discretion that Congress has not granted it. "Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers."

Chaney, 470 U.S. at 833. Accordingly, on September 15, 2021, on page five of their opinion, the Fifth Circuit misinterpreted the mandatory language when it partly granted the injunction. The Fifth Circuit's confusion occurred when it assumed prosecutorial discretion also permitted the federal government to have "broad discretion" in the detention of criminal aliens after an alien had been ordered removed. Contrary to the opinion, Congress, in fact, mandates the federal government to detain and remove criminal aliens. Section 1231(a)(2) does not permit "broad discretion" as the trigger occurs upon the order of removal. Congress mandates removal and does not permit discretion to "turn back the hands of time." Criminal aliens with removal orders must be detained and removed. There is no other option.

CONCLUSION

Based on the foregoing, amicus respectfully requests that the Court grant the State of Texas and the State of Louisiana's request for an En Banc Hearing and denial of the injunction in toto.

Dated: October 14, 2021

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B), 28.1(e)(2), and 29(d). The brief contains words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or Federal Rule of Appellate Procedure 28.1(e) and the type of style requirements of Federal Rule of Appellate Procedure 32(a)(6).

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CERTIFICATE OF SERVICE

I hereby certify the foregoing has been filed electronically and is available for viewing and downloading from the Electronic Case Filing System of the United States Court of Appeals for the 11th Circuit.

Date: October 14, 2021 *<u>/s/ Walter S. Zimolong, Esquire</u>*