NO. 21-11715

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATE OF FLORIDA,

Plaintiff-Appellant

v.

The UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary of the United States Department of Homeland Security, in his official capacity; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, Acting Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDERPROTECTION; TAE JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, Acting Director of U.S. Citizenship and Immigration Services, in her official capacity; U.S. CITIZENSHIP AND IMMIGRATION SERVICES

Defendants-Appellees

On Appeal from the Unites States District Court for the Middle District of Florida, Tampa Division
No. 8:21-cv-541

MOTION FOR LEAVE TO FILE AMICUS BRIEF

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Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus curiae file this certificate of interested person and corporate disclosure statement, as required by Local Rule 26.1-1.

Amicus curiae, Advocates for Victims of Illegal Alien Crime, is a non-government non-profit corporation that has no parent corporation that is publicly held and that owns 10% or more of its stock.

All persons and entities identified on the Certificate of Interested Persons submitted by the parties in this case:

1. Advocates for Victims of Illegal Alien Crime, amicus curiae,
2. Attorneys United for a Secure America, and
3. Attorneys for amicus curiae: Walter S. Zimolong, Esq. and Lorraine G. Woodwark, Esq. (Attorneys United for a Secure America).

ARGUMENT

Under Federal Rule of Appellate Procedure 29(b) and Eleventh Circuit Rule 29-1, proposed amicus curiae, Advocates for Victims of Illegal Alien Crime, file this motion for leave to file an amicus brief. A copy of the brief is attached this motion. Appellant and Appellees do not oppose this motion.

Rule of Appellate Procedure 29(a)(3) permits a proposed amicus to move before this Court for leave to file an amicus filing in support affirmance or reversal of the lower court's ruling. Fed. R.A.P 29(a)(3). The Rules require the proposed amicus demonstrate why the matters asserted are relevant to the disposition of the case. "The criterion for deciding whether to permit the filing of an amicus brief should be ...: whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003).

Advocates for Victims of Illegal Alien Crime (AVIAC) is an advocacy organization founded and led by individuals, including Floridians, 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. Proposed brief, 4. And it gives a face on these statistics with victims' stories. Proposed brief, 5-6. It also presents legal arguments unique from that being advanced by the parties, such as the Congress' exclusive authority to regulate immigration policy. Proposed brief, 7-13. AVIAC therefore takes an interest in the case at bar challenging government action that frustrates the enforcement of federal immigration laws.

Based on the foregoing, AVIAC respectfully requests that this Court grant it leave to file the attached amicus brief.

Dated: June 16, 2021

Respectfully submitted,

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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: June 16, 2021 */s/ Walter S. Zimolong, Esquire*

NO. 21-11715

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No. 8:21-cv-541

AMICUS BRIEF OF ADVOCATES FOR VICTIMS OF ILLEGAL ALIEN CRIME IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PARTIES

In addition to those persons listed in Plaintiffs-Appellants' Statement of Interested Persons, the following persons have an interest in this amicus curiae brief:

1. Advocates for Victims of Illegal Alien Crime, amicus curiae,
2. Attorneys United for a Secure America, and
3. Attorneys for amicus curiae: Walter S. Zimolong, Esq. and Lorraine G. Woodwark, Esq. (Attorneys United for a Secure America).

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF AMICUS CURIAE

Amicus curiae files this certificate of interested persons and corporate disclosure statement, as required by Local Rule 26.1-1.

Amicus curiae, Advocates for Victims of Illegal Alien Crime, is a non-government, non-profit corporation that has no parent corporation that is publicly held and that owns 10% or more of its stock.

All parties have consented to the filing of this amicus curiae brief. No party or party's counsel authored any part of this brief. No person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to its preparation or submission.

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INTEREST OF AMICI CURIAE

Advocates for Victims of Illegal Alien Crime (AVIAC) is an advocacy organization founded and led by individuals, including Floridians, 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 different from those advanced by the parties. AVIAC therefore has an interest in this case.

STATEMENT OF ISSUES

Issue No. 1

The State of Florida, like all states, depends on the federal government to ameliorate the impacts of illegal immigration. The States cannot enforce federal immigration laws themselves. The Department of Homeland Security has ignored a Congressional mandated and has suspended arrests of criminal aliens. Has the federal government abdicated its duties and caused injury to State of Florida?

Issue No. 2

Section 1226(c) of the Immigration and Naturalization Act (INA) mandates that DHS detain criminal aliens pending deportation. DHS is ignoring that mandate. Does DHS have any discretion to ignore this Congressional mandate?

SUMMARY OF ARGUMENT

Congress issued DHS a clear mandate to detain criminal aliens, and the executive cannot ignore this mandate based on a policy disagreement. Yet, in both Executive Order 13993—a revision of Civil Immigration Enforcement Policies—and a DHS memorandum dated January 20, 2021, in which the agency purports to exercise discretion whether to detain criminal aliens, the executive has done just that, placing its own policy preferences over the law of the land.

The State of Florida relies on the federal government for a critical law enforcement role; enforcement of our nation's immigration laws. One law enforcement role provided by the federal government is the detention of criminal aliens pending deportation, as required by 8 U.S.C. §1226(c). Section 1226(c) 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, Immigration and Naturalization Service, 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 district court should have granted the State of Florida's motion, and committed an error of law when it failed to enter a preliminary injunction.

ARGUMENT

I. ILLEGAL ALIEN CRIME HAS A DELETERIOUS EFFECT ON OUR NATION'S PUBLIC SAFETY AND PUBLIC HEALTH

Illegal alien crime has a deleterious effect on our nation's public safety and public health. The State of Florida, like all states, depends 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 Immigration and Customs Enforcement (ICE) and DHS are making arrests, they are performing a core law enforcement function on which Florida relies. 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").

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]. Those arrested included 4,067 known or suspected

[1] https://www.ice.gov/doclib/news/library/reports/annualreport/iceReportFY2020.pdf

gang members, including 675 members of MS-13. According to ICE Enforcement and Removal Operations statistics for Miami, the principial Florida office for which statistics are publicly available, ICE arrested 7,397 illegal aliens in 2020. Of those, 4,249 were convicted criminals and 2,374 had pending criminal charges, meaning over 90% of those arrested had criminal convictions or pending criminal charges. 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]

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

[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

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.[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]

These horrific crimes represent only a small sample 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 had not been in the country.

[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/

Then there 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[8]. That study indicated that Florida's share of that total was $537 million.

DHS's abdication of its duties will surely make these statistics increase, and Florida will be left picking up the pieces. The State of Florida and her 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 Florida 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

[8] 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/USCost-Study_2010.pdf

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 that in 8 U.S.C. § 1182(f) 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 the Obama administration could not apply the Deferred Action for Childhood Arrivals (DACA) policy 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. §1101, et. seq., (INA) when it passed 8 U.S.C. §1226(c). That statute was designed primarily to do one thing: "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 that 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)[9].

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 the 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' status as 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.

Congress identified INS' failure to detain criminal aliens and the Attorney General's discretion to release criminal aliens from custody on

[9] 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. *"Clark v. Martin*, 543 U.S. 371, 375, n. 1; *Ulysse v. Dep't of Homeland Sec.*, 291 F. Supp. 2d 1318 (M.D. Fla. 2003)

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 release aliens.

It is true that the executive enjoys a certain amount of discretion on issues of immigration and enforcement procedures. *See* 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 unambiguously 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 the agency 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) ("Title 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*, 208-CV-272-FTM-99DNF, 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*, 3:15-CV-1217-J-34MCR, 2016 WL 3645116, at *2 (M.D. Fla. May 19, 2016), report and recommendation adopted in part, 3:15-CV-1217-J-34MCR, 2016 WL 3552718 (M.D. Fla. June 30, 2016).

DHS's memorandums dated January 20 and May 27 simply ignore Congress's mandate in Section 1226(c) and place a virtual halt on all detentions of criminal aliens. 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,"[10] 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, 2. 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

[10] 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.

statute nor the intent of Congress confers any discretion on DHS over which criminal aliens to detain and which to allow to roam free.

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 them. "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, the district court erred when it did not enter a preliminary injunction.

CONCLUSION

Based on the foregoing, amicus respectfully requests that the Court grant the State of Florida's requested relief.

Dated: June 16, 2021

Respectfully submitted,

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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 3,976 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).

Respectfully submitted,

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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: June 16, 2021 */s/ Walter S. Zimolong, Esquire*