

# IMMIGRATION REPORT



## Crucial Victory! Federal Judge Blocks Mayorkas' Subversion of Immigration Laws

In a crucial victory for the rule of law, a federal judge blocked the Department of Homeland Security (DHS) from implementing a series of guidelines issued last fall by Secretary Alejandro Mayorkas that effectively put nearly all immigration law violators off-limits to enforcement.

A 96-page decision handed down by Federal District Court Judge Drew Tipton ruled that Mayorkas overstepped any reasonable discretionary authority in determining how immigration laws are enforced. In the fall of 2021, Mayorkas issued three guideline memos that effectively limited the ability of the Immigration and Customs Enforcement (ICE) agency to arrest and remove the vast majority of illegal aliens who are present in the United States. Under the guise of setting priorities, only a small number of violent criminals and terrorists could be subject to arrest and deportation. Even most criminal aliens would be given safe harbor under the Mayorkas guidelines.

Judge Tipton issued his ruling in response to a lawsuit brought by the states of Louisiana and Texas, which argued that Mayorkas had effectively nullified federal law and replaced them with his own policies. Among those filing Friend of the Court legal briefs in support of Louisiana and Texas was FAIR's legal affiliate, the Immigration Reform Law Institute (IRLI).

The ruling emphatically rejected the Biden administration's claim that its enforcement guidelines were a legitimate exercise of discretionary authority and prioritization of limited resources. Judge Tipton called the administration's position "an implausible construction of federal law that flies in the face of the limitations imposed by Congress."

Judge Tipton acknowledged that DHS, like any other enforcement agency, has limited discretionary authority when it comes to enforcement of immigration laws on a "case-by-case" basis. However, that authority does not include excluding broad categories of lawbreakers

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from enforcement – so broad, in fact, that nearly all 15 million illegal aliens in the United States would be exempt from removal. “This case, however, does not involve individualized decision-making. Instead, this case is about a rule that binds Department of Homeland Security officials in a generalized, prospective manner—all in contravention of Congress’s detention mandate,” wrote Judge Tipton.

Judge Tipton went even further, accusing Mayorkas of attempting to rewrite constitutionally enacted immigration laws with the stroke of his own pen. “It is also true that the Executive Branch may prioritize its resources. But it must do so within the bounds set by Congress. Whatever the outer limits of its authority, the Executive Branch does not have the authority to change the law,” he charged. Mayorkas’ subversion of immigration laws could have had profound implications far beyond this one policy area. An across-the-board refusal of whatever administration is in office to enforce laws that conflict with its own political priorities would threaten Separation of Powers doctrine that our founders wrote into our Constitution.

On numerous occasions since he became Homeland Security secretary, Mayorkas has openly asserted that illegal presence in the United States, in and of itself, is not grounds for removal, even though

federal statutes clearly state that it is. “The fact that an individual is a removable noncitizen should not alone be the basis of an enforcement action against them,” he claimed. Even before the guidelines struck down by Judge Tipton were issued, Mayorkas’ DHS had all but ceased removal of illegal aliens. During President Biden’s first eight months in office, only about 28,000 illegal aliens (out of a population of 15 million) were removed from the country.

While the court ruling represents a huge victory for the rule of law, compliance with the court’s order is not guaranteed. The Biden administration remains in defiance of a legal settlement under which it agreed to reinstate the Migrant Protection Protocols, also known as Remain in Mexico. Only a few hundred migrants a month have been sent back to Mexico since the settlement was reached in December 2021, while some 234,000 people were encountered entering the country illegally in April alone.



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# Judicial Ruling Blocks Biden Administration from Lifting Title 42

A border crisis narrowly avoided becoming a border catastrophe when Federal District Court Judge Robert R. Summerhays blocked the Biden administration's plan to cancel Title 42, three days before it was to end on May 23. Title 42 is a public health provision that was invoked by the Trump administration at the onset of the COVID pandemic allowing Customs and Border Protection (CBP) to quickly remove illegal border-crossers from the United States. In recent months, about half of all illegal migrants were removed under Title 42, and more than 1 million migrants have been blocked from entry since the provision was implemented in March 2020.

Since taking office in January 2021, the Biden administration has either canceled or subverted just about every policy or law designed to secure our borders and enforce immigration laws. Title 42 is the last remaining mechanism under which illegal migrants have been denied entry to the country. By the Department of Homeland Security's own reckoning, ending Title 42 would have resulted in as many as 18,000 illegal border crossings each day. April's single month record of 234,000 border encounters, not including migrants who got away, averaged out to about 7,800 illegal crossings per day. And, in anticipation of the May 23 termination of Title 42, unprecedentedly large migrant caravans were making their way north.

The Biden administration's initial announcement that Title 42 would end was issued in early April. The announcement resulted in an immediate lawsuit filed by Arizona, Louisiana and Missouri, arguing that the expected increased number of illegal migrants – whom the Biden administration planned to disperse around the country – would cause significant and irreparable harm to the states and communities where they settled. Subsequently, 21 additional states signed on to the lawsuit.

Though the public health threat from COVID has abated in recent months, it has not gone away. China's largest city, Shanghai, has been under a complete and extended lockdown as part of Communist Party's heavy-handed effort to prevent a new outbreak. Moreover, argued the states, the Centers for Disease Control (CDC) has declared the fentanyl fueled opioid crisis to be a public health emergency, much of it smuggled across the border by the same criminal cartels that control the human smuggling operations – a public health crisis that would only be exacerbated by even greater chaos at the border.

The Biden administration immediately pledged to appeal Judge Summerhays' ruling. "As the appeal proceeds, the Department of Homeland Security will continue planning for the eventual lifting of Title 42 in light of CDC's public health judgment," stated White House press secretary Karine Jean-Pierre, one week into her new job. Jean-Pierre disingenuously added that after Title 42 is lifted, "anyone who attempts to enter the country unlawfully will be subject to Title 8 Expedited Removal proceedings, if they do not have grounds to remain in the United States," knowing full-well that the proceedings would neither be expedited, nor in most cases would the illegal migrants ever be removed.

While the administration's public position was that it would continue to pursue termination of Title 42, news reports indicate that many high level officials were breathing a sigh of relief in response to Judge Summerhays' ruling. Faced with myriad other crises – 40-year high rates of inflation, soaring energy costs, baby formula shortages, crashing financial markets and rising interest rates, to name just a few – an even larger surge of illegal migrants pouring across the border and into communities all across the country, was the last thing the floundering administration (much less the

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nation) really needed. The ruling was more overtly welcomed by moderate Democrats seeking reelection, especially those serving purple states and districts.

While the administration publicly pledged to abide by the judge's ruling, compliance is not assured. After agreeing to reinstate the Migrant Protection Protocols,

the administration has failed to honor its commitment in any meaningful way. Judge Summerhays' ruling, at least for the time being, has avoided an exponentially greater crisis at the border. But so long as other Biden policies remain in place, the nation will still be faced with the reality of a quarter of a million people pouring across the border illegally each month.

## Faced with Unprecedented Illegal Migration, Biden Strikes Deal to Manage, Not Stop It

Faced with record numbers of migrants crossing our borders illegally (and numerous other domestic and international crises), President Biden seemingly recognized the political cost his policies are taking on his own approval ratings and the fortunes of Democrats running for office in the fall. In response, at June's Summit of the Americas in Los Angeles, the president took the opportunity to, once again, deceive the American public into believing that he is trying to fix the mess.

The Summit of the Americas was, in itself, a misnomer. In addition to Cuba, Venezuela and Nicaragua, three Marxist nations that were excluded from the hemispheric conference, the presidents of Mexico, Bolivia, El Salvador, Guatemala and Honduras snubbed President Biden's invitation and decided to skip the meeting. Mexico and the so-called Northern Triangle nations of Central America are, of course, key players in the migration crisis.

The Los Angeles meeting was capped by a *Declaration on Migration and Protection at the Summit of the Americas*. The most notable aspect of the declaration, however, is that it made no pretense at even attempting to stem the unprecedented flow of regional migrants, or those from other parts of the world transiting through Central America and Mexico in hopes of reaching the United States. Instead, a White

House statement asserted that, "The Declaration seeks to mobilize the entire region around bold actions that will transform our approach to *managing migration* in the Americas."

According to the White House, the regional agreement "is organized around four key pillars: (1) stability and assistance for communities; (2) expansion of legal pathways; (3) humane migration management; and (4) coordinated emergency response." Explicitly absent from this multilateral agreement is any mention of deterring, preventing, or interdicting massive flows of illegal migrants. The implication of the absence of any such language is that the Biden administration does not want to end the massive flow of illegal migration that was triggered by its own policies.

Under the declaration, regional partners commit to offering nominal numbers of work visas and opportunities to seek asylum to migrants transiting through their countries. However, there is little reason to believe that economic migrants (who make up the vast majority of the flow) from one impoverished country are going to be interested in enhanced job opportunities in another impoverished nation, rather than continuing on their journey to the U.S. border where they stand a good chance of being admitted under policies put in place by the Biden administration.

For his part, President Biden committed to increasing the number of “temporary” work visas available to Central American and Haitian migrants and to increase admissions of refugees (who don’t necessarily meet the legal definition of refugees). The administration also pledged to expand the president’s already abused power of parole to admit otherwise inadmissible Haitian and Cuban citizens with relatives in the United States.

The Summit of the Americas agreement followed closely on the heels of a Biden administration announcement that Spain had agreed to issue an unspecified number of work visas to Central American migrants. Additionally, Vice President Kamala Harris, who has been tasked with addressing the “root causes of migration” secured “commitments” from 10 U.S.-based corporations to invest \$1.9 billion to create jobs in Guatemala, El Salvador and Honduras. While

the White House ballyhooed Vice President Harris’ accomplishment – the first results of her efforts to address the root causes since she was assigned the job in March 2021 – it should be noted that there is a huge difference between a commitment and actual investment. Moreover, given the level of corruption in the target nations, there is no assurance that it will actually achieve the goal of lifting very many people out of poverty.

The Summit of the Americas declaration, along with side deals with Spain and a handful of corporations, do not amount to a serious effort to address the migration crisis the Biden administration willfully created. Rather, as the White House’s own statement attests, the aim is to manage the crisis and mitigate the political damage the president is inflicting on himself and his party (but not the damage he is inflicting on the country).

## Supreme Court Rules against Class Action Suits by Aliens Seeking Release

In a landmark decision, the U.S. Supreme Court ruled in June that noncitizens cannot file suit seeking class-wide relief from detention. In *Garland v. Gonzalez*, the Court affirmed that judicial review of orders of removal can only be sought on a case-by-case basis, based on the unique circumstances that might mitigate an unfavorable ruling. Justice Samuel Alito wrote the majority opinion in the 6-3 ruling.

Justice Alito wrote that the relevant immigration statute from 1996 “does not preclude a court from entering injunctive relief on behalf of a particular alien” but that “injunctive relief on behalf of an entire class of aliens is not allowed because it is not limited to remedying the unlawful ‘application’ of the relevant statutes to ‘an individual alien.’” The decision means that the ruling of Federal District Court Judge Drew Tipton a few days earlier, blocking efforts by Homeland Security Secretary Alejandro Mayorkas to grant class-wide relief from immigration enforcement to broad categories of lawbreakers, is consistent with the

thinking of the Supreme Court. Thus, in the opinions of both the lower court and the Supreme Court, the discretionary authority of both Executive Branch and the judiciary can only be exercised based the unique circumstances of the individual seeking relief. The decision may even have implications for challenges to former President Barack Obama’s Deferred Action for Childhood Arrivals (DACA), granting relief from enforcement to an entire class of illegal aliens.

The Supreme Court decision reversed a ruling by the Ninth Circuit Court of Appeals in *Garland v. Gonzalez*, allowing class-action lawsuits by detained aliens. In that case the plaintiffs demanded bond hearings for their release, to proceed. FAIR’s legal affiliate, the Immigration Reform Law Institute (IRLI), filed a friend-of-the-court brief in the Supreme Court urging the Court to review the appellate court ruling, and, when review was granted, a second brief urging the Court to reverse the Ninth Circuit ruling.



## FAIR Ad Campaign Targets Biden’s ‘Fly by Night’ Illegal Alien Resettlement Program

A national ad campaign launched by the Federation for American Immigration Reform (FAIR) in June highlights the Biden administration’s ongoing effort to relocate thousands of illegal aliens to communities all across the United States. For more than a year, the Biden administration has flown paneloads of newly arrived illegal aliens on charter flights, landing them in the dead of night with no warning or coordination with local authorities.

In anticipation of dramatic increases in illegal migration – in response to the Biden administration’s intention to cancel Title 42, the only remaining mechanism to remove illegal border-crossers – increasing the number of secret flights is a cornerstone of the Department of Homeland Security’s (DHS) response to the crisis.

The administration’s stealthy program of moving ever-increasing

numbers of migrants away from the border and dispersing them around the country is anything but a fly-by-night operation. It is a well-planned and federally-financed effort to force local communities to accommodate untold numbers of illegal aliens and provide for the needs of these migrants who are flown in under the cover of darkness.

In addition to alerting the public that these federally-funded relocations of illegal aliens are occurring, the ads seek the public’s assistance in identifying where flights are being directed. The first of these secret flights was detected last year in Westchester County, New York, where residents observed unusual late-night flights arriving at a small municipal airport. Other such operations were observed in Jacksonville, Florida, and other locations nationwide, with little or no transparency from the Biden administration about what happens to these migrants

once they get off the DHS financed flights. Moreover, contrary to claims by the administration that the passengers are exclusively unaccompanied minors or families with young children, many of those seen getting off the planes appear to be working-age adult men.

Since the Biden administration’s policy hinges on secrecy, the ad encourages citizens to shine a light on what is going on. Early on in DHS’s existence, they sought public input to alert the agency to potential threats using the tagline ‘See something, say something.’ Little did anyone expect that we would have to rely on the public to keep us safe from the secret operations of DHS itself.

The FAIR ads, “Stop the Night Flights,” are appearing online and on media outlets across the country. They can also be viewed on FAIR’s YouTube channel.



## News from State and Local Operations

### Massachusetts

Massachusetts became the 17th state to grant driver's licenses to illegal aliens when both chambers of the state legislature voted to override a bill that was vetoed by Gov. Charlie Baker. Gov. Baker rejected the bill arguing that it would compromise public safety by requiring the commonwealth to issue licenses to people whose identities could not be verified. Nevertheless, his concerns were ignored as the State House voted 119-36 to override the veto, while the vote in the State Senate was 32-8. The law is scheduled to go into effect on July 1, 2023. However, the legislature may face another obstacle before the first license is issued: The people of Massachusetts. A citizens' group immediately began preparation to put the matter before the voters on the November 2022 ballot. The Fair and Secure Massachusetts committee filed the necessary paperwork with the state Office of Campaign and Political Finance in order to begin collecting the 40,120 signatures needed to put the question to voters. The committee is

spearheaded by Maureen Maloney and Kevin Dube. Maloney's son, Matthew Denice, was killed by an illegal alien who was driving while drunk who dragged him a quarter of a mile before finally stopping. "I do not think that we should be rewarding people for being in the country illegally. I think the RMV [Registry of Motor Vehicles] is not equipped to properly vet people coming to the United States from over 100 different countries and being able to reliably decipher their documentation that, first of all, in the different language and second of all, for validity," Maloney said in an interview with WGBH radio. Ms. Maloney has worked closely with FAIR and is a frequent guest at FAIR's annual Hold Their Feet to the Fire radio row.

### Ohio

Voters in Ohio will get to vote on the question of who gets to vote. The Ohio legislature has authorized a constitutional amendment on the November ballot to limit voting to American citizens and to ensure local governments cannot grant voting privileges to anyone who

is not a U.S. citizen. Granting the franchise to foreign nationals has become the new frontier in the radical left's efforts to erase any distinction between citizens and noncitizens. The amendment to the state constitution was spurred by an effort by the village of Yellow Springs to allow noncitizens to vote in local elections – a decision that was never implemented because of the threat of a lawsuit by Ohio Secretary of State Frank LaRose. As currently worded, the Ohio Constitution states that "[e]very citizen of the United States, of the age of eighteen years ... is entitled to vote at all elections." The amendment that will appear on the November ballot would change the wording to state that "only a citizen" will be allowed to vote in Ohio and would prohibit local governments from creating voting rights for anyone else. (They're looking at you, Yellow Springs.) House Joint Resolution 4, which authorizes the ballot measure was approved with bipartisan support by the Ohio House by a vote of 68-28 and unanimously by the State Senate.

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