

# Supreme Court Limits States' Ability to Challenge Immigration Enforcement Policies

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The Department of Homeland Security (DHS) is one of the key agencies responsible for the enforcement of federal immigration laws against [aliens](#) who lack a legal basis to remain in the United States. Citing resource and humanitarian concerns, DHS, during the Biden Administration, has [generally limited](#) its enforcement actions to cover only those who pose a threat to national security, public safety, or border security. On June 23, 2023, the Supreme Court held in [United States v. Texas](#) that Texas and Louisiana lacked legal standing to challenge DHS's immigration enforcement guidelines, reversing lower court [rulings](#) that had [blocked](#) their implementation. More broadly, the Court's decision seems likely to affect states' ability to challenge federal enforcement policies, whether they involve immigration or other issues, going forward. This Legal Sidebar provides an overview of the relevant background on DHS's enforcement powers, the *Texas* case's procedural history, and the Court's decision, as well as certain considerations for Congress.

## Background: DHS's Enforcement Powers and Discretion

DHS has authority to arrest, detain, and remove aliens suspected of being unlawfully present in the United States. Under [8 U.S.C. § 1226\(a\)](#), DHS may, but is not required to, arrest and detain an alien who is placed in formal removal proceedings. [Section 1226\(c\)](#), however, instructs that DHS “shall take into custody” an alien who is removable because of specified criminal or terrorist-related grounds, and authorizes the alien's release only in limited circumstances (e.g., for witness protection purposes). Following the completion of removal proceedings, if it is determined that an alien is subject to a final order of removal, [8 U.S.C. § 1231\(a\)\(1\)\(A\)](#) provides that DHS “shall remove” the alien from the United States within a 90-day “removal period.” A separate provision, [8 U.S.C. § 1231\(a\)\(2\)](#), states that DHS “shall detain” the alien during that 90-day period, and that “[u]nder no circumstances during the removal period” may DHS release an alien who is removable on certain criminal or terrorist-related grounds.

While DHS is charged with immigration enforcement, the Supreme Court has held that the executive branch has considerable discretion to determine when or whether it is appropriate to pursue the removal of aliens who lack a legal basis to remain in the United States. In [Arizona v. United States](#), the Supreme Court recognized that “[a] principal feature of the removal system is the broad discretion exercised by immigration officials,” and that the decision whether to pursue an alien's removal may be based on

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various factors, including public safety, humanitarian concerns, and the alien's equities and ties to the United States. Similarly, in *Reno v. American-Arab Anti-Discrimination Committee (AAADC)*, the Court observed that immigration officials can make discretionary enforcement decisions at any stage of the removal process.

## The Biden Administration's Immigration Enforcement Guidelines

During the Trump Administration, DHS adopted a [policy](#) that generally required the enforcement of immigration laws against all removable aliens. The Trump Administration also [prioritized](#) the removal of aliens who engaged in criminal activity, those who committed fraud, those who posed threats to national security, recent arriving aliens and unlawful entrants who were inadmissible, and those subject to final orders of removal.

This policy shifted somewhat under the Biden Administration. In a September 30, 2021, memorandum to DHS components, DHS Secretary Mayorkas announced new [immigration enforcement guidelines](#), [asserting](#) that DHS lacks the resources to pursue every removable alien, and that many otherwise removable aliens have been “contributing members of our communities for years.” Secretary Mayorkas [argued](#) that “[t]he fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them.” He announced that DHS would use its discretion and resources to prioritize the apprehension and removal of aliens who fall within three categories: (1) threat to national security, (2) threat to public safety, and (3) threat to border security.

As relevant here, aliens falling within the “threat to public safety” category [generally include](#) those who have engaged in “serious criminal conduct.” The guidelines require consideration of aggravating and mitigating [factors](#)—rather than the fact of a criminal conviction alone—in assessing whether enforcement action under this category is warranted [based on](#) “the totality of the facts and circumstances of the conduct at issue.” The aggravating factors include the gravity and nature of the criminal offense, the degree of harm to the victim or community, and the alien's prior criminal record. Mitigating factors include the alien's advanced or tender age, mental condition, evidence of rehabilitation, length of presence in the United States, and the impact of removal on the alien's family. Another consideration is the broader public interest in determining whether apprehension and removal is warranted.

## The *Texas* Case's Procedural History

In October 2021, Texas and Louisiana challenged the Biden Administration's immigration enforcement guidelines in the U.S. District Court for the Southern District of Texas. The states argued that DHS's failure, under the guidelines, to apprehend and detain aliens who are otherwise removable because of serious criminal convictions is unlawful and would impose significant costs to the plaintiffs. On June 10, 2022, the district court [vacated](#) Secretary Mayorkas's September 2021 immigration enforcement guidelines memorandum. First, the court [determined](#) that the plaintiff states had [legal standing](#) to sue. To [establish standing](#), a plaintiff (1) must have suffered a concrete and particularized injury; (2) show that the injury is “fairly traceable” to the defendant's challenged conduct; and (3) demonstrate that the court is able to redress the injury. The district court [explained](#) that only one plaintiff needed to show standing to proceed to the merits, and [determined](#) that Texas made such a showing based on evidence that DHS's policy would harm the state and its residents through increased costs for health care, education, and other social services available to unlawfully present aliens, and increased criminal activity by aliens whom DHS declines to detain.

On the merits, the court [held](#) that the guidelines' directive allowing immigration officials to weigh aggravating and mitigating factors not specified in statute "flatly contradicts" the detention mandates of 8 U.S.C. §§ 1226(c) and 1231(a)(2). Such a directive, according to the court, conferred impermissible discretion to DHS to decide whether an alien who has [committed specified crimes](#) or [has a final order of removal](#) is subject to enforcement action. In the court's view, the use of "shall" in these statutes "[unambiguously means 'must,'](#)" and DHS's enforcement discretion does not supersede "[Congress's clear commands.](#)" The court [also ruled](#) that the guidelines violated the [Administrative Procedure Act](#) because they were "arbitrary and capricious" and did not comply with the applicable [notice-and-comment requirements](#).

The Fifth Circuit [denied](#) the government's motion to stay the district court's decision pending adjudication of its appeal. The Fifth Circuit [rejected](#) the government's contention that the states lacked standing to challenge DHS's immigration enforcement guidelines. The Fifth Circuit also agreed with the lower court that DHS's enforcement guidance [violates](#) the "[incontrovertibly mandatory](#)" detention provisions of 8 U.S.C. §§ 1226(c) and 1231(a)(2), and fails to satisfy the APA's [standards](#) and [procedural requirements](#).

On July 21, 2022, the Supreme Court [granted](#) the government's request to review the case and [heard arguments](#) on November 29, 2022.

## The Supreme Court's Decision in *United States v. Texas*

On June 23, 2023, in an 8-1 [decision](#), the Supreme Court reversed the Fifth Circuit's ruling. In the majority opinion authored by Justice Kavanaugh (joined by Chief Justice Roberts and Justices Sotomayor, Kagan, and Jackson), the Court [held](#) that Texas and Louisiana lacked standing to challenge DHS's enforcement guidelines. The Court [explained](#) that, although Texas and Louisiana alleged monetary costs resulting from DHS's policy, they [failed to show](#) a "legally and judicially cognizable" injury that is traditionally addressed through the judicial process.

The Supreme Court [described](#) the states' case as "an extraordinarily unusual lawsuit" that asks federal courts "to order the Executive Branch to alter its arrest policies so as to make more arrests." The Court [observed](#) that the states cited no judicial precedent, history, or tradition of federal courts considering lawsuits of this kind. The Court instead recognized that it has held there is no standing to bring that type of lawsuit. The Court, in particular, cited its 1973 decision in *Linda R.S. v. Richard D.*, which held that a plaintiff lacked standing to challenge a state's policy of declining to prosecute certain child support violations, which, if prosecuted, would have resulted in the incarceration of the nonpaying parent. In so concluding, the Court held that a party has no "judicially cognizable interest" in challenging prosecutorial authorities' policies "when he himself is neither prosecuted nor threatened with prosecution." The Court, in *Texas*, [determined](#) that this principle applied to legal challenges to the executive branch's exercise of discretion over decisions whether to arrest or prosecute.

The Court [explained](#) that several reasons supported the application of this principle in this case. First, when the executive branch declines to arrest or prosecute, "it does not exercise coercive power over an individual's liberty or property, and thus does not infringe upon interests that courts often are called upon to protect." Second, lawsuits challenging the executive branch's number of arrests or prosecutions, in the Court's view, potentially infringe upon the President's authority under [Article II of the Constitution](#) to hold "executive Power" and to "take Care that the Laws be faithfully executed." These Article II provisions, the Court stated, vest the executive branch with the power to decide which cases to prioritize for enforcement. Citing *Arizona* and *AAADC*, the Court [observed](#) that this concept of enforcement discretion "extends to the immigration context," and that the executive branch has broad discretion over whether to remove a person from the United States. Finally, the Court cautioned that courts "generally lack meaningful standards" to review enforcement decisions, which are [influenced](#) by resource

constraints, public safety needs, and other factors that courts are ill-equipped to assess. For that reason, the Court **determined**, “federal courts are generally not the proper forum for resolving claims that the Executive Branch should make more arrests or bring more prosecutions.” Otherwise, the Court signaled, there would be “expansive judicial direction” of DHS’s enforcement policies and an “uncharted path” of future litigation over the executive enforcement decisions in other areas of law.

The Court held that courts could consider challenges to the executive branch’s failure to make more arrests in some cases. According to the Court, standing might be shown when (1) a person claims to be subject to selective prosecution in violation of the Equal Protection Clause; (2) Congress has authorized lawsuits from those who have suffered harm resulting from under-enforcement policies; (3) the executive branch’s policy is an “**extreme case of non-enforcement**” that amounts to an abdication of its statutory responsibilities; (4) the challenged policy goes beyond enforcement discretion and confers legal benefits; or (5) the policy governs the continued detention of those who have already been arrested. The Court determined that none of these circumstances were present in this case.

The Court **emphasized** that its decision only addressed the “narrow Article III standing question” of whether federal courts can require the executive branch to alter its enforcement policies. The Court took no position on whether DHS’s enforcement guidelines violate 8 U.S.C. §§ 1226(c) and 1231(a)(2), and indicated that its decision **does not imply** that the executive branch has a “freestanding or general constitutional authority to disregard statutes requiring or prohibiting execution action.”

In a **concurring opinion**, Justice Gorsuch (joined by Justices Thomas and Barrett) agreed that Texas and Louisiana lacked standing. Justice Gorsuch, however, **argued** that the states’ lack of standing was not because they had no “judicially cognizable” interest or injury; rather, he **contended** that the states lacked standing because federal courts do not have authority to redress their injuries. In his view, 8 U.S.C. § 1252(f)(1) bars lower courts from issuing class-wide “injunctive relief” that compels federal officials to enforce specified statutes (including those concerning the detention of aliens). Furthermore, Justice Gorsuch argued that even if § 1252(f)(1) does not bar orders of vacatur (as the Fifth Circuit **held**), an order vacating the guidelines would also be **ineffectual** because it does not change the fact that DHS officers still “possess the same underlying prosecutorial discretion.”

In another **concurring opinion**, Justice Barrett (joined by Justice Gorsuch) also agreed that Texas and Louisiana lacked standing, but argued that the absence of standing resulted from the courts’ inability to order effective relief rather than the states’ lack of a judicially cognizable interest.

In a **dissenting opinion**, Justice Alito argued that the states showed standing to challenge DHS’s enforcement guidelines. Justice Alito **asserted** that Texas, in particular, established the requisite injury in the form of increased financial costs and criminal activity of those whom DHS refuses to detain, and that the injury is capable of being redressed by courts (e.g., by vacating the Mayorkas memorandum). Justice Alito **rejected** the majority’s determination that courts generally lack jurisdiction to review the executive branch’s apprehension and prosecution policies, and warned that this “**grossly inflated conception**” of executive branch power intrudes upon Congress’ power to control immigration and the states’ ability to address harms resulting from the executive branch’s policies.

## Considerations for Congress

The Supreme Court’s *Texas* decision limits states’ ability to challenge federal immigration enforcement policies, holding that they lack a “**judicially cognizable interest**” in the government’s decision whether to apprehend or detain removable aliens. The Court’s decision may suggest, more broadly, that states generally lack standing to challenge federal enforcement policies in other, non-immigration contexts. For example, *Texas* may have implications for states’ ability to satisfy standing requirements to challenge

federal policies that exercise enforcement discretion in limiting the criminal prosecution of [marijuana-related offenses](#) or the regulation of [certain tobacco products](#).

The Supreme Court [indicates](#) in *Texas* that plaintiffs might have standing in some cases, including if they challenge the executive branch's provision of legal benefits in addition to its enforcement policies, or if they challenge the executive branch's total "abdication" of its responsibilities. In his dissent, Justice Alito [argues](#) that the Court insufficiently explained when these exceptions would arise, or how they can be distinguished from the Court's "general rule" that there is no standing to challenge the exercise of enforcement discretion. Consequently, there may be some uncertainty about the extent to which states can challenge the executive branch's enforcement policies in the future.

The Supreme Court has previously [recognized](#) that law enforcement officials retain broad discretion "even in the presence of seemingly mandatory legislative commands," but indicated that a "true mandate" of enforcement action requires "some strong indication" that there is limited discretion. If Congress has any concern over whether immigration officials should retain discretion over the apprehension and detention of aliens who committed serious crimes, it could, as the Court [suggests](#), influence the executive branch's policies through legislation. For instance, Congress could clarify that immigration officials have no discretion to release individuals described within 8 U.S.C. §§ 1226(c) and 1231(a)(2) (other than those subject to the exceptions in § 1226(c)(2)), or clarify that those officials may release them in their discretion only in specified situations or after consideration of certain factors. In the alternative, and more generally, Congress could itself set immigration enforcement guidelines specifying which classes of aliens, in addition to those who have committed serious crimes, should be prioritized for removal.

The *Texas* decision [suggests](#) another legislative option in which Congress could authorize lawsuits from those who have suffered harm resulting from "under-enforcement" policies, and enable courts "to enter appropriate orders" requiring additional arrests. As the Court [explained](#) in a footnote, these types of statutes might raise [separation of powers issues](#) by infringing upon the executive branch's enforcement discretion. Relatedly, in another [case](#) decided by the Court during the same term as *Texas*, [several](#) Justices [called](#) into question whether a [statute](#) allowing private parties to initiate civil enforcement actions on behalf of the federal government under the [False Claims Act](#) interferes with the executive branch's Article II power.

Beyond legislation, the *Texas* opinion suggests that Congress "[possesses an array of tools](#)" to influence the executive branch's immigration policy, such as through its oversight, appropriations, and Senate confirmation authorities. In the aftermath of *Texas*, Congress may consider these and other measures in deciding to what extent immigration officials retain enforcement discretion, including with respect to those who have committed serious crimes and who may potentially be threats to public safety.

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