



UNITED STATES SUPREME COURT DECISION BRIEF

Texas Conservative Coalition
Research Institute

Biden v. Texas

(Decided on June 30, 2022)

FACTS AND BACKGROUND

In January 2019, the Department of Homeland Security (DHS) under the Trump Administration initiated the Migrant Protection Protocols (MPP), also known as the “remain in Mexico” policy, a policy under which certain non-Mexican immigrants who entered the U.S. illegally from Mexico, in lieu of being held in detention in the U.S., would be returned to Mexico while their removal proceedings in the U.S. were pending. DHS’ previous policy had been to release thousands of illegal immigrants into the U.S. and trust that they would appear at their removal proceedings.

Immediately upon President Biden’s inauguration in January 2021, his administration suspended the application of MPP to illegal immigrants who otherwise would have been subject to its provisions. A DHS memorandum dated June 1, 2021 officially terminated the program. Texas and Missouri sued the federal government and obtained an injunction in federal district court requiring the federal government to continue the MPP in good faith until the federal government increased its capacity to detain illegal immigrants. In October 2021, days before oral arguments before the Supreme Court, the Biden Administration issued two new memoranda that superseded the June 1st memorandum and purported to re-terminate the MPP.

LOWER COURT RULING

The federal district court and the Fifth Circuit Court of Appeals held that the Biden Administration’s DHS had violated both the Administrative Procedure Act (APA), which in part limits the discretion federal agencies can exercise, and the Immigration and Nationality Act (INA), a federal immigration statute which in relevant part governs the detention and removal of certain illegal immigrants.

QUESTION PRESENTED FOR THE U.S. SUPREME COURT

1. Did DHS’s termination of the MPP violate the INA?
2. Did the October 29, 2021 memoranda constitute final agency action by DHS?

HOLDING BY THE U.S. SUPREME COURT

The Court held by a 5-4 margin that DHS's termination of the MPP did not violate the INA, and that the October 29th memoranda constituted final agency action.

The merits of the case turn on three provisions in the INA. The first states that, if an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, he or she "shall be detained" for a hearing. However, an exception to this rule provides that the alien "may" be removed to Mexico while his or her hearing is pending (i.e., this option is the MPP). Third, the U.S. Attorney General is granted the power to "parole" aliens into the U.S. temporarily, but only on a case-by-case basis and only when doing so provides humanitarian or public benefits.

The majority attached great weight to the discretionary "may" in the portion of the statute authorizing the MPP. It further noted that the relevant language had been added in 1996 as a clarification of longstanding policy after the legitimacy of the remain in Mexico policy had been questioned, and that every presidential administration since 1996 has viewed the removal to Mexico option as discretionary. Finally, interpreting the removal to Mexico policy as mandatory would interfere with the President's foreign policy powers by complicating diplomacy with Mexico.

A strong dissent by Justice Alito argued that the INA has to be read in full, as opposed to simply reading a permissive sentence in isolation. The INA in this context gives DHS three options: detain illegal immigrants, or if that is not done, satisfy the MPP or the parole exceptions. All parties agreed that detention of all illegal aliens was not possible due to DHS's resource limitations. And the release of thousands of illegal aliens after a perfunctory examination (which sometimes did not even include a criminal background check) cannot be viewed as granting parole on a case-by-case basis. Given that the federal government is not detaining many illegal immigrants and is not meeting the case-by-case requirement for parole, the only remaining option is the use of the MPP.

The dissent further noted that immigration laws are the responsibility of Congress, and that a failure by previous administrations to enforce the law do not somehow alter the interpretation of a statutory command. Indeed, the dissent and Justice Kavanaugh's concurring opinion acknowledge that the federal government is not enforcing the INA, and even the majority all but concedes that point.

Finally, the Court ruled that the October 29th memoranda was indeed a final agency action by DHS rather than an uncritical re-formulation of the June 1st memorandum. This part of the ruling carries great significance, because on remand the federal district court will consider whether the October 29th memoranda complied with the APA.

MEANING FOR TEXAS

The case has significant implications for Texas. If the district court on remand finds that the October 29th memoranda complied with the APA, then the MPP will be terminated. With the federal

government refusing to increase its detention capabilities, large numbers of illegal immigrants detained at the border will be released into the United States, many of whom will undoubtedly make their way to Texas or simply remain here. As noted in a TCCRI brief on a different U.S. Supreme Court case this term:

Texas, along with other southwestern states on the U.S.-Mexico border, is facing a flood of illegal immigration under the Biden Administration. From May 2021 to April 2022, U.S. Customs and Border Protection had, incredibly, more than 2.25 million “encounters” (i.e., apprehensions and expulsions) with migrants on the border.ⁱ It is unclear how many more illegal immigrants cross the border undetected. Faced with a federal government that refuses to vigorously enforce immigration law, Governor Abbot launched Operation Lone Star in March of last year to protect the Texas counties on the border.

It is unclear how the Biden Administration will act with respect towards the MPP while the federal district court considers the case on remand,ⁱⁱ but is a near certainty that it will continue its failure to vigorously protect the country’s borders.

ⁱ See <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>

ⁱⁱ See <https://www.texastribune.org/2022/06/29/supreme-court-migrant-protection-protocols-remain-mexico-biden/>.