

Federal Judges Step into the Void to Set U.S. Immigration Policy

March 30, 2023 POLICY BEAT | By Muzaffar Chishti and Kathleen Bush-Joseph

In recent years, federal courts have assumed an oversized role in setting U.S. immigration policy, stepping in to fill the void left by a largely inactive Congress and blunting energetic actions undertaken by the past three administrations. As presidents of both political parties have increasingly relied on executive power to set immigration policy in the absence of legislative reform, their actions have been routinely halted by legal challenges. The turn to the courts, marked by persistent forum shopping, has increased as immigration has become more of a defining issue at state and local levels, with zealous officials in red and blue states alike eager to score political points.

The shift of power on immigration policy to the courts has been met with concern even in the judicial branch. Supreme Court justices are “not policymakers of last resort,” Justice Neil Gorsuch warned last year in a dissent—joined by Justice Ketanji Brown Jackson—to a ruling upholding the pandemic-era Title 42 border expulsions policy.

The drivers of this development are manifold. As Congress remains paralyzed on immigration, administrations have increasingly turned to executive actions to advance their agenda. President Joe Biden has established the most active pace, taking 403 immigration-related executive actions in his first two years in office, according to Migration Policy Institute (MPI) analysis, compared to 472 actions across all four years of the Trump administration.

Executive actions, which are less permanent than legislation and can be undone by a future administration, have proven attractive targets for state politicians—generally of the party different from the president in power—to challenge in federal court, typically in districts perceived as more favorable to their argument. Indeed almost every major Biden administration executive action has faced a legal challenge. The rush to courtrooms is fueled by the fact that individual district judges can issue orders with national reach. Layers of appeals—sometimes complicated by conflicting decisions in various district courts—leaves a confused legal landscape; the start-stop nature of policies leaves government personnel and publics whiplashed. Meanwhile, court-ordered actions can force federal agencies to redirect their resources to particular priorities, leaving unaddressed other important issues, including the strategic tackling of longer-term challenges.

To be sure, this has been a bipartisan development. The Obama administration’s immigration agenda faced a major blow when courts struck down the proposed Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program, but the legal challenges ramped up during the Trump years. The pace of litigation has increased dramatically since then, with the Biden administration on track to face more multistate-led lawsuits related to its immigration policies than its predecessors.

All told, ongoing litigation has impacted policies affecting millions of U.S. residents and an untold number of would-be immigrants. Among these are nearly 590,000 recipients of Deferred Action for Childhood Arrivals (DACA), which provides work authorization and protection from deportation to unauthorized immigrants who arrived as minors. The program, whose termination has been attempted for years, faces an existential moment in the coming months, as the federal district judge in Texas who in 2021 ruled DACA unlawful is expected to decide whether a Biden regulation to fortify the program from legal challenge passes muster. Elsewhere, federal courts are considering state-led lawsuits to halt policies granting humanitarian parole to hundreds of thousands of migrants and to end recent U.S. Immigration and Customs Enforcement (ICE) guidelines that prioritize which of the estimated 11 million unauthorized immigrants should be targeted for enforcement.

This article assesses how legal challenges have stalled much of the Biden administration's immigration agenda. It reviews past immigration-related litigation and highlights a lesser-examined trend—the impact of litigation on lower-level agency actions—that has affected countless individuals and created new challenges for an already dysfunctional immigration system.

A Policy Agenda Blunted

Some aspects of Biden's immigration agenda were at the courts' mercy even before his administration began. Facing an incumbent whose opposition to unauthorized immigration was central to his appeal, Biden launched his campaign against the backdrop of lawsuits challenging Trump administration policies such as the Migrant Protection Protocols (MPP, informally known as the Remain in Mexico policy) and Title 42. He promised to end President Donald Trump's border policies and protect Dreamers. But those promises have proven difficult to keep amid ongoing litigation.

Table 1. Litigation Involving Select U.S. Immigration Policies

Policy	Case Name	Initial Case Number	Date Initiated	Current Status
Deferred Action for Childhood Arrivals (DACA) program	<i>State of Texas v. United States of America</i>	1:18-cv-00068	May 2018	Sent back to Southern District of Texas from Fifth U.S. Circuit Court of Appeals
Title 42 border expulsions	<i>Huisha-Huisha v. Mayorkas / Arizona v. Mayorkas</i>	1:21-cv-00100	January 2021	Paused at Supreme Court
	<i>Louisiana v. Centers for Disease Control</i>	6:22-cv-00885	April 2022	Paused at Fifth U.S. Circuit Court of Appeals
Migrant Protection Protocols (MPP)	<i>State of Texas v. Joseph R. Biden</i>	2:21-cv-00067	April 2021	Appeal pending at Fifth U.S. Circuit Court of Appeals
Immigration enforcement priorities	<i>State of Texas v. United States of America</i>	6:21-cv-00016	April 2021	Supreme Court heard arguments in November 2022; ruling forthcoming
	<i>State of Arizona v. Biden</i>	3:21-cv-00314	November 2021	Paused at Southern District of Ohio
Cuba, Haiti, Nicaragua, and Venezuela parole program	<i>State of Texas v. U.S. Department of Homeland Security</i>	6:23-cv-00007	January 2023	Pending at Southern District of Texas

Note: This listing is not exhaustive; other cases have been filed on some of the same policies.

Source: Authors' analysis.

As it has sought to issue new policies, the Biden administration has again been impeded by litigation. GOP-led states, often banding together, have challenged almost all its major immigration policies, in many cases resulting in nationwide injunctions. Among these were new enforcement guidelines directing ICE and U.S. Customs and Border Protection (CBP) to prioritize for enforcement removable noncitizens who pose national security or safety risks (the Trump administration had functionally made all 11 million unauthorized immigrants priorities for removal). Republican-led states filed several lawsuits against the policy, leading a district judge in Texas to strike down the priorities last June and block their use. The Supreme Court heard arguments in the case in November and is expected to rule later this term. Similarly, GOP-led state challenges have been filed against other administration policies: allowing nationals of Cuba, Haiti, Nicaragua, and Venezuela to enter on a

temporary immigration status known as parole; releasing noncitizens with monitoring devices or other conditions as alternatives to detention; and screening children in their countries of origin for humanitarian visas under the Central American Minors Refugee and Parole Program.

A decision in one case could potentially affect other programs that are not themselves facing legal challenge. For instance, the popular Uniting for Ukraine program, which offers legal entry and two-year parole to Ukrainians with a sponsor in the United States, is based on the same legal provisions as the humanitarian parole programs for Cubans, Haitians, Nicaraguans, and Venezuelans, and thus could be affected by future rulings.

Federalism and Immigration in the Courts

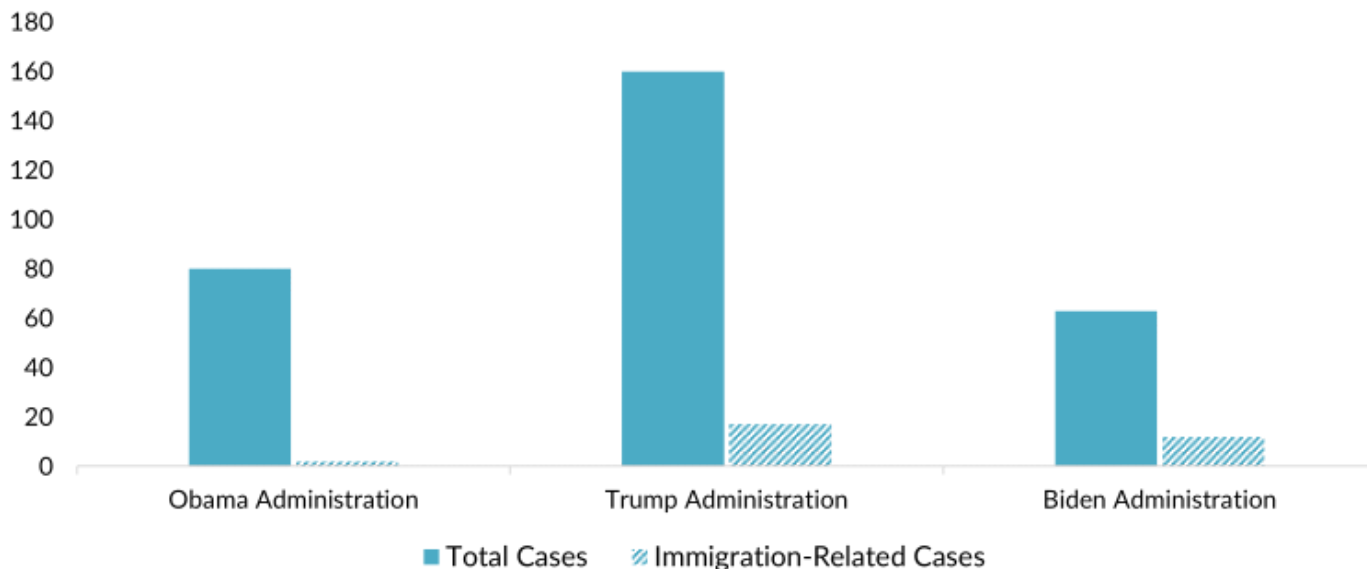
The contention between the federal government and states for authority over immigration dates back to at least 1849, when the Supreme Court in the *Passenger Cases* ruled that only the federal government had the authority to legislate and enforce immigration restrictions, and thus invalidated a “head tax” on arriving immigrants imposed by Massachusetts and New York. Other court cases affirmed federal supremacy in immigration law, often in the context of attempts to regulate who could enter the country. For instance, in *Chy Lung v. Freeman*, the Supreme Court in 1875 ordered the release of 22 women whom the California Commissioner of Immigration had detained and barred from entering the country on suspicion of being prostitutes because they travelled from China alone. The high court held that only the federal government could determine immigrant admission.

Yet only during the Obama administration, as attitudes to immigration became more polarized, did states start to sue the federal government over aspects of national immigration policy. Texas sued to halt the relocation of refugees from Syria to the state. Moreover, an important new trend of states banding together emerged when 26 Republican-led states challenged the 2014 DAPA program, which would have offered protection to millions of unauthorized adult immigrants. It was the first multistate case filed on immigration, according to the State Litigation and Attorney General Activity Database.

When Trump took office in 2017, Democrat-led states doubled down on the tactic. Of the 160 multistate cases filed against the Trump administration, 17 concerned immigration. These included challenges to the administration’s attempts to ban travel by nationals from multiple Muslim-majority countries, end DACA, add a question on citizenship to the decennial census, restrict access to a green card based on public-charge grounds, and use billions of dollars in military funds to build a wall along the southwestern border. In some cases, multiple lawsuits were brought on the same issue by different states.

Two years into the Biden administration, states have filed 63 multistate lawsuits against the federal government, 12 of which are immigration related. At this pace, multistate litigation challenging federal immigration policy will reach a new high. Indeed, the drive to sue the federal government can have political appeal for state politicians and would-be elected officials; during his successful run for Kansas attorney general in 2022, Republican Kris Kobach pledged to create a special unit devoted to litigation against the federal government.

Figure 1. Multistate Lawsuits Filed against Recent Administrations, Overall and Immigration-Focused, 2012-23*



* Data for 2023 run through February.

Note: Data refer to lawsuits filed against policies of the presidential administration and not necessarily the administration in office at the time; for instance, lawsuits filed while the Trump administration was in office targeting Obama regulations have been classified as being filed against the Obama administration.

Source: State Litigation and Attorney General Activity Database, “Multistate Litigation Database,” updated February 25, 2023, [available online](#).

While the pace of state-led litigation has picked up, interest groups across the political spectrum have brought legal challenges of their own or intervened in ongoing cases against federal immigration policy, although their pockets tend not to be as deep as those of state attorneys general. Groups including the American Civil Liberties Union (ACLU), Immigration Reform Law Institute (IRLI), Mexican American Legal Defense and Educational Fund (MALDEF), and National Immigration Law Center (NILC) have intervened in state-initiated cases. Newer entrants include the Innovation Law Lab, which opposed Trump’s immigration policies, and America First Legal, formed by former Trump aides Stephen Miller and Gene Hamilton to litigate Biden policies.

Importantly, many cases have been directed to a select group of judges, as states have capitalized on the structure of the court system to seek venues seemingly favorable to them. For instance, Texas has filed at least seven lawsuits in the Southern District of Texas’s rural Victoria Division, where they are almost guaranteed to land before a single judge who has repeatedly ruled against the Biden administration. The judge earlier this month denied the Justice Department’s effort to transfer a case out of the district, saying he did not believe his involvement created a public perception of unfairness. Similarly, Democratic attorneys general were accused of bringing lawsuits against the Trump administration in courts seen as hospitable to their arguments. The trend of forum shopping has received the attention of both Congress and the judiciary; Supreme Court Chief Justice John Roberts recently requested a report on the matter from the Judicial Conference of the United States, the courts’ national policymaking body.

Litigation Impacts: Delay and Uncertainty

Beyond generating sometimes sharp policy swings, the surge in litigation has profoundly taxed the judiciary. Judges and law clerks who tend not to be immigration law experts have been tasked with sorting through voluminous administrative records and difficult-to-interpret data, which individual,

lower-level judges use to issue orders that can apply nationwide. Multiple lawsuits on the same issue have produced conflicting judgments.

Appeals mean that cases drag on for years, often leaving policies suspended and with significant numbers of people in limbo or facing confusing twists and turns. For example, the DACA litigation, filed in 2018, is challenging a program created in 2012; more than a decade later, almost 590,000 participants fear they will lose their status with each new judicial opinion. The likelihood of additional appeals means uncertainty could go on for years.

At the U.S.-Mexico border, the steady stream of court orders has seriously complicated federal operations. Policies and programs change with each new court decision, making it difficult for CBP and ICE to plan ahead and recruit and train officers. The way migrants are treated after arrival is arbitrarily determined by which policy or authority has been blocked by the courts. Depending on precisely when and where an asylum seeker or other migrant arrived irregularly in recent years, they may have been forced to wait in Mexico under MPP, expelled there via Title 42, detained in an ICE facility, paroled into the United States with an ankle monitor or tracking technology, or put into quick removal proceedings.

Other Lawsuits Challenge Agencies' Policies and Priorities

While state-led litigation tends to dominate the headlines, there has also been a less-noted uptick in litigation brought by private individuals and organizations that similarly affects large numbers of immigrants. These cases mostly relate to the government's handling of backlogs in immigration case processing, which remain at unprecedented levels due to rising volumes and pandemic-related service slowdowns. Nearly 8.7 million applications were pending at U.S. Citizenship and Immigration Services (USCIS) at the end of fiscal year (FY) 2022, and visa applicants can in some cases expect to wait more than one year for an interview at U.S. consular posts abroad. Given that, individuals have taken to the courts to force action on their cases.

Such lawsuits may have prompted a range of policy changes including automatic work authorization for Afghans and Ukrainians who entered through humanitarian programs; a change in how qualifying age is determined for visa applications for certain children; automatic work authorization for spouses of temporary workers from nations with which the United States has a treaty relationship and intracompany transferees (the E and L visas, respectively); and diversity visa processing. In two cases, district judges prevented thousands of diversity visas from expiring due to COVID-19-related travel bans and administrative backlogs, though an appeal of the consolidated cases is pending.

At the individual case level, attorneys have sought judicial intervention at rates never seen before, mostly to compel government action through orders known as writs of mandamus. Nearly 650 immigration-related lawsuits for writs of mandamus were filed in May 2022 alone, according to the Transactional Records Access Clearinghouse, the most in a single month since at least 2007, the earliest date for which data are available. At that rate, the courts appeared on track to receive nearly 6,300 such lawsuits in FY 2022, up from 4,300 a year earlier. While these lawsuits can achieve the desired outcomes for individuals, they may shift agency resources away from cases without legal challenges, leading to an imbalance in the adjudicative system.

Funding, Limitations, and the Reach of Judicial Authority

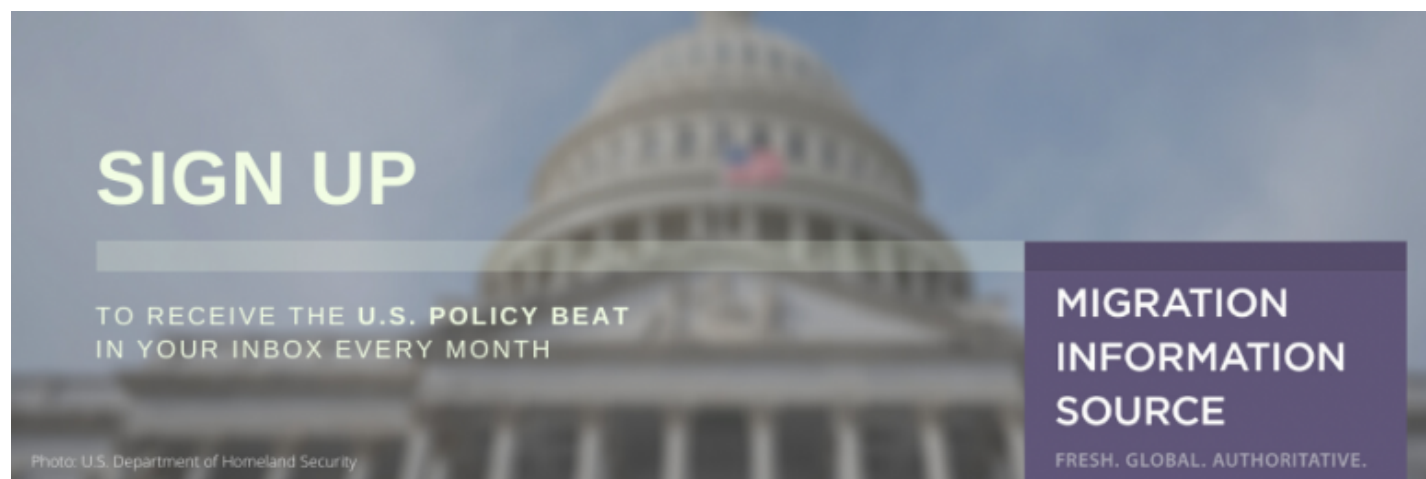
Government agencies' ability to carry out their missions is determined by funding, which often fails to meet their needs. The Department of Homeland Security (DHS) is constrained by congressional budgetary allocations that do not come close to the levels required to carry out statutory mandates

such as detaining certain noncitizens. Nor do congressional appropriations and user fees, which fund many immigration operations, come close to providing resources needed to eliminate backlogs at DHS and the State Department, likely prompting applicants to file more lawsuits to compel action.

The Biden administration has called for more funds from Congress to work through the backlogs and add infrastructure at the border. It is also turning to formal rulemaking processes to try to further bolster the legality of policies, but those efforts take time and may not be enough to preserve programs such as DACA or its recent proposal to incentivize asylum seekers to arrive at ports of entry.

Therefore, judges' authority in interpreting immigration policy and law will become all the more important. The Supreme Court has questioned whether individual district judges should be allowed to continue issuing nationwide injunctions and, if not, what remedies are available. The high court's forthcoming decision in the ICE enforcement priorities case may provide answers to some of these questions, but others will certainly remain. In the meantime, the administration of the immigration system will continue to be profoundly shaped by the rulings of federal courts, with profound effects not only for immigrants and would-be arrivals but for broader U.S. communities.

The authors thank Caitlin Davis and Nicole Ward for their research assistance.



Sources

Arizona v. Mayorkas. 2022. No. 22A544. Supreme Court of the United States, on application for stay, December 27, 2022. [**Available online.**](#)

American Immigration Lawyers Association (AILA). 2022. Featured Issue: Migrant Protection Protocols (MPP). Doc No. 19091660, Washington, DC, AILA. October 7, 2022. [**Available online.**](#)

Buehler, Katie. 2022. DC Circ. Sees History as Hurdle in Diversity Visa Fight. Law360, September 16, 2022. [**Available online.**](#)

Cohn, D’Vera. 2015. How U.S. Immigration Laws and Rules Have Changed through History. Pew Research Center, September 30, 2015. [**Available online.**](#)

Eakin, Britain. 2023. Litigation, Advocacy May Have Spurred New Age-Out Policy. Law360, February 15, 2023. [**Available online.**](#)

Immigration and Ethnic History Society. N.d. Timeline: Immigration History. Accessed March 16, 2023. **Available online.**

Kobach, Kris. N.d. *Kris Kobach's Five Point Plan for the Kansas Attorney General's Office*. Salina, Kansas: Kris Kobach for Attorney General. Accessed March 29, 2023. **Available online.**

Masters, Jonathan. 2016. The U.S. Supreme Court and Obama's Immigration Actions. Council on Foreign Relations, June 23, 2016. **Available online.**

Sneed, Tierney. 2023. Court Rejects DOJ Bid to Transfer Texas Immigration Lawsuit because of Alleged 'Judge Shopping.' CNN, March 10, 2023. **Available online.**

State Litigation and Attorney General Activity Database. 2023. Multistate Litigation Database. Updated February 25, 2023. **Available online.**

Supreme Court of the United States (SCOTUS). 2021. *2021 Year-End Report on the Federal Judiciary*. Washington, DC: SCOTUS. **Available online.**

Transactional Records Access Clearinghouse. 2022. Government Inaction on Immigration Paperwork Leads to Record High Lawsuits. Updated July 12, 2022. **Available online.**

U.S. Citizenship and Immigration Services (USCIS). 2022. *Number of Service-Wide Forms by Quarter, Form Status, and Processing Time July 1, 2022 - September 30, 2022*. Washington, DC: USCIS. **Available online.**

U.S. State Department, Bureau of Consular Affairs. 2023. Global Visa Wait Times. Updated March 28, 2023. **Available online.**

Vladeck, Stephen I. 2023. Don't Let Republican 'Judge Shoppers' Thwart the Will of Voters. *The New York Times*, February 5, 2023. **Available online.**

Winograd, Ben. 2013. Federal Judge Leaves Anti-DACA Lawsuit Hanging by a Thread. *Immigration Impact*, January 30, 2013. **Available online.**

IF YOU HAVE QUESTIONS OR COMMENTS ABOUT THIS ARTICLE, CONTACT US AT **Source@MigrationPolicy.org**

Source URL: <https://www.migrationpolicy.org/article/courts-set-us-immigration-policy>