No. 21A21

In the Supreme Court of the United States

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, *ET. AL.*,

Petitioners,

v.

STATE OF TEXAS, *ET AL.*,

Respondents.

On Application for a Stay of the Injunction Issued by the United States District Court for the Northern District of Texas and for an Administrative Stay

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF STATE RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Movant Immigration Reform Law Institute ("IRLI") respectfully seeks leave to file the accompanying brief as *amicus curiae* in support of the state respondents' opposition to the stay application filed by the federal applicants.* The federal applicants affirmatively took no position on IRLI's motion (*i.e.*, they responded but chose not to state a position), and the state respondents consented to its filing.

IDENTITY AND INTERESTS OF MOVANT

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization.

REASONS TO GRANT LEAVE TO FILE

By analogy to this Court's Rule 37.2(b), movant respectfully seeks leave to file the accompanying *amicus curiae* brief in support of the respondents'

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* Consistent with FED. R. APP. P. 29(a)(4)(E) and this Court's Rule 37.6, counsel for movant and *amicus curiae* authored this motion and brief in whole, and no counsel for a party authored the motion and brief in whole or in part, nor did any person or entity, other than the movant/*amicus* and its counsel, make a monetary contribution to preparation or submission of the motion and brief.

opposition to the stay application. Movant respectfully submits that its proffered *amicus* brief brings several relevant matters to the Court's attention, including the narrowness of the exception from judicial review on which the federal applicants seek to rely and the unlawfulness under the Immigration and Nationality Act of the policies that the federal applicants seek to adopt via the unexplained policy shift that they seek to promulgate without either notice-and-comment rulemaking or even a rational explanation.

These issues are all relevant to deciding the stay application, and movant Immigration Reform Law Institute respectfully submits that filing the brief will aid the Court.

Dated: August 24, 2021

Respectfully submitted,

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INTRODUCTION

Amicus Curiae Immigration Reform Law Institute ("IRLI") respectfully submits that the Court should deny the stay application.

INTEREST OF *AMICUS CURIAE*

The accompanying motion sets out IRLI's interest in this action.

STANDARD OF REVIEW

A stay pending the timely filing and ultimate resolution of a petition for a writ of *certiorari* is appropriate when there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant *certiorari*; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). For "close cases," the Court "will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.*

STATEMENT OF THE CASE

Congress has charged the Department of Homeland Security ("DHS") with the responsibility of securing the nation's borders against illegal immigration. *See* 6 U.S.C. § 202 ("The [DHS] Secretary shall be responsible for … (2) [s]ecuring the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States …."); 8 U.S.C. § 1103(a)(5) (the DHS Secretary "shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry

of aliens"). In order to meet this responsibility, DHS implemented the Migrant Protection Protocols ("MPP"), also referred to as the "remain in Mexico" policy in January 2019. The MPP proved effective at reducing the number of aliens attempting to cross the southern border, reducing the number of aliens released into the United States, and reducing the number of frivolous asylum claims burdening the immigration system. *See* App. 43a-44a.

But on this administration's first day in office,[1] it immediately began dismantling programs and policies designed to secure the nation's borders and enforce the Immigration and Nationality Act ("INA"). For example, Executive Order 13993, 86 Fed. Reg. 7051 (Jan. 25, 2021), revised immigration enforcement priorities, and Proclamation 10142, 86 Fed. Reg. 7225 (Jan. 27, 2021), terminated border wall construction. DHS also issued a memorandum entitled "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities," in which it announced an immediate 100-day pause of all removals[2] and extremely narrow immigration enforcement priorities consisting of

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[1] Although the federal applicants refer to themselves as the "government," the state respondents are also governments, and they "entered the federal system with their sovereignty intact." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991). IRLI refers to the applicants as the "Administration."

[2] On January 26, 2021, a district court entered a nationwide temporary restraining order against the 100-day stay of removals, and on February 23, that court converted the TRO into a preliminary injunction. See *Texas v. United States*, 2021 U.S. Dist. LEXIS 33890, *9, *147-48, 2021 WL 723856 (S.D. Tex. Feb. 23, 2021).

recent arrivals, aggravated felons, terrorists, spies, or other national security risks. *See Texas v. United States*, 2021 U.S. Dist. LEXIS 156642, *18-23 (S.D. Tex. Aug. 19, 2021) (describing DHS's January 20, 2021, enforcement memorandum). Finally, DHS announced the "suspension" of the MPP program. *See* App. 49a.

Collectively, these Administration actions signal to potential border crossers that the Administration is uninterested in securing—or unwilling to secure—our border, and these actions have resulted in the ongoing, record-setting surge of migrants at the southwest border. Indeed, the actions by the Administration reflect a conscious decision to cease effective immigration enforcement policies and to pursue a general policy of non-enforcement. This case arises in the context of the Executive branch's ongoing abdication of its duty to enforce the nation's immigration laws.

SUMMARY OF ARGUMENT

First, this Court is unlikely to grant *certiorari* in this case because the Administration lacks the right to administer immigration policy inconsistently with the INA, and there is no evidence of foreign-policy issues with Mexico (Section I).

Second, the Administration is unlikely to prevail in reversing the injunction on the merits both because its actions are inconsistent with the INA and because the commitment-to-discretion exception to judicial review is very narrow and agency rules—such as the MPP—can provide the "law to apply" to defeat the exception even if the statute does not (Section II).

Third, the Administration's proffered harm—having to comply with the INA—is no harm at all, but any such harm would be outbalanced by the States' harms from the massive influx of illegal aliens prompted by the Administration's lax policies (Section III).

ARGUMENT

I. THE ADMINISTRATION FAILS TO SHOW A LIKELIHOOD THAT THIS COURT WILL GRANT *CERTIORARI*.

The Administration argues that there is a reasonable possibility that this Court will grant *certiorari* if the Fifth Circuit Court of Appeals upholds the district court's nationwide injunction because this case raises "numerous issues of exceptional importance." Application for a Stay ("Stay App.") at 13 (citing Sup. Ct. R. 10(a)). None of the Administration's arguments has merit.

First, the Administration suggests that this case raises serious foreign policy concerns inasmuch as the district court's order reflects an attempt to conduct "foreign policy by injunction," requiring the Administration to secure the cooperation of the Government of Mexico in order to reinstate the MPP. Stay App. at 13-14. But as the courts below noted, MPP was initially instituted unilaterally, Mexico has already committed to cooperate with MPP, and the Administration fails to show that Mexico has withdrawn its commitment to cooperate or that it will do so if MPP is reinstated. App. 31a.

Next, the Administration argues that the district court's injunction "dramatically interferes" with DHS's management of border operations in a way that

is "inconsistent with this Administration's priorities and immigration-enforcement strategies." *Id.* at 14. But the Administration can only set priorities or adopt strategies that are consistent with the laws enacted by Congress. It is Congress's prerogative in the first instance to set immigration-enforcement priorities, mandating certain enforcement actions while merely authorizing others. Here, Congress mandates the detention and removal of certain arriving aliens and, in the alternative, authorizes their return to contiguous territory in lieu of such mandated detention. *See* App. at 76a-77a (describing the relevant statutory provisions). The district court's injunction merely requires the Administration to comply with these mandatory provisions or choose to take the discretionary action. What the injunction prohibits is the Administration's choosing to ignore both of these options. Thus, even if the injunction is "inconsistent with" the Administration's enforcement policies (which seem to be non-enforcement of either option), it merely requires the Administration to comply with *Congress's* enforcement strategies.

Because Congress has "never" appropriated enough funds to detain every alien who crosses the border and because no prior administration has fully complied with the law, the Administration finds it "extraordinary" that the district court concluded that section 1225 leaves the Administration with only "two options" with respect to certain inadmissible "aliens seeking asylum: (1) mandatory detention; or (2) return to a contiguous territory." Stay App. at 14-15. The plain meaning of the statute, however, supports the district court's ruling, and the mere fact that no

prior administration has fully complied with the law does not affect the meaning of the law. And the lack of congressional appropriations for detention costs are inapposite because Congress gave the Executive branch the ability to avoid such costs by returning aliens to a contiguous territory as an alternative to mandatory detention.

II. THE ADMINISTRATION FAILS TO SHOW A LIKELIHOOD THAT THIS COURT WOULD OVERTURN THE INJUNCTION.

The Administration argues that DHS's discretionary determination to return aliens to a contiguous territory pending their removal hearing is unreviewable because it is "committed to agency discretion by law." Stay App. at 17-19 (citing *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993); 5 U.S.C. § 701(a)). "This is a very narrow exception," and "it is applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (interior quotation marks omitted). Even if a statute provides "no law to apply," moreover, the agency's own regulations can supply that law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 318 & n.48 (1979); *id.* at 301 ("the appropriate inquiry is whether OFCCP's regulations provide the 'authorization by law' required by the statute") (alterations omitted); *accord Ellison v. Connor*, 153 F.3d 247, 251 (5th Cir. 1998) ("agency's own regulations can provide the requisite 'law to apply'") (collecting cases).

So the exception is even more narrow here, where the agency is changing its policy. When an agency

changes its existing policy, it "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate[,]" but it must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis deleted).

Here, the statute states that DHS "may return the alien to" a contiguous territory pending his or her removal hearing. 8 U.S.C. § 1225(b)(2)(C). The Administration contends that this language gives DHS unreviewable discretion to return such aliens. Stay App. at 17-19. The courts below concluded that the alternative mandatory detention standards in section 1225 cabined DHS's discretion under 1225(b)(2)(C). *See* App. at 16a-17a. In other words, DHS could decline to return aliens under (b)(2)(C), but only if it complied with the only statutory alternative, detention of the aliens.

But more importantly, even if the discretion to return aliens to a contiguous territory under 1225(b)(2)(C) were committed to DHS's discretion by law, DHS set forth its own guidelines for how it would exercise that discretion when it initiated the MPP. *See* App. 18a (describing MPP as a government program—replete with rules, procedures, and dedicated infrastructure); AR 151-62 (memoranda establishing MPP describing classes of aliens amenable to the program and noting classes of aliens excepted from the program). Once those guidelines were in place, the Administrative Procedure Act ("APA") requires that DHS give a reasoned explanation for changing its policy. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*

Auto. Ins. Co., 463 U.S. 29, 42 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."). As the court of appeals held, the DHS Secretary failed to consider several relevant factors, including the States' reliance interests in the MPP, DHS's prior factual findings regarding the benefits of the MPP, and alternative policy choices. App. 20a-24a. This Court is unlikely to overturn an agency action that fails to consider such factors.

This Court's decision in *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020), is fatal to the Administration's argument that its discretion under section 1225(b)(2)(C) is unreviewable or its reasoning in terminating MPP is sufficient. In *Regents*, this Court acknowledged that the Deferred Action for Childhood Arrivals ("DACA") program was a discretionary program unconstrained by statutory text. *See* 140 S. Ct. at 1910. DACA, like MPP, set forth guidelines for which classes of aliens would be amenable for the program. *See id.* at 1901 (describing the classes of aliens who "warranted" deferred action under DACA). Nevertheless, this Court faulted DHS's action terminating DACA because it failed to consider certain relevant factors, including reliance interests. *See id.* at 1910-12. Because the courts decisions below are consistent with, if not mandated by, *Regents*, it is unlikely that the Court would rule for the Administration on the merits.

The Administration again expresses disbelief that the discretionary MPP program can be tied to the only statutory alternative—mandatory detention. Stay

App. at 21-22. But reading section 8 U.S.C. § 1225 as a whole makes clear that Congress intended for all inadmissible arriving aliens to be either removed without a hearing, detained pending adjudication of any asylum claim, detained pending a regular removal hearing, or returned to a contiguous territory pending a regular removal hearing.

Section 1225(a)(1) requires that "an alien present in the United States who has not been admitted … shall be deemed for purposes of this chapter an applicant for admission." This designation triggers section 1225(a)(3), which requires that all applicants for admission "shall be inspected by immigration officers." This in turn triggers section 1225(b), which governs inspection of applicants for admission. Section 1225(b)(1) mandates the expedited removal of aliens who either have no entry documents or attempt to gain admission through misrepresentation. 8 U.S.C. § 1225(b)(1)(A)(i). If such an alien requests asylum, the statute mandates detention of such an alien pending consideration of an application for asylum. 8 U.S.C. § 1225(b)(1)(B)(ii), (iii)(IV).

Section 1225(b)(2)(A), which applies to all applicants for admission, mandates that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title." Section 1229a governs regular removal proceedings before an immigration judge. Tellingly, nowhere does the INA authorize the simple release of illegal aliens into the United States pending removal proceedings. The only potential avenue for release

into the United States is parole under 8 U.S.C. § 1182(d)(5)(A), which allows DHS to parole aliens into the country only "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A).

III. EVEN IF THE CASE WERE CLOSE, THE BALANCE OF HARMS WOULD COUNSEL AGAINST A STAY.

At the outset, this Court need not consider the harm that the Administration claims because the Administration is unlikely to prevail on the merits. But even if the case were close enough to warrant balancing of harms, *Hollingsworth*, 558 U.S. at 190, the balance of harms counsels against a stay.

The Administration argues that the "denial of a stay will result in serious and irreparable harm to the government," while suggesting that respondents' harms are "entirely speculative" and "insufficient to overcome the government's interests." Stay App. at 35. (internal quotations omitted). The Administration also asserts that the district court's injunction would require that the Administration "immediately negotiate with Mexico to reinstate MPP." *Id.* The Administration's arguments amount to hyperbole.

Although the memorandum terminating MPP discussed the bilateral relationship with Mexico and suggested that "MPP played an outsized role in the Department's engagement with Mexico" over the past two-and-a-half years, nowhere in the memorandum does the Secretary suggest that reinstating the then-suspended MPP would require renegotiation with Mexico. AR 6. Tellingly, Mexico had already agreed to cooperate with respect to the MPP program, and the

Administration points to no evidence that Mexico would no longer honor that agreement. *See* App. 12a (noting that nothing in the record suggests Mexico has since retracted consent to cooperate with DHS with respect to MPP).

The Administration also faults the court of appeals for concluding that the harms to the Administration "do not count" because they are "self-inflicted." Stay App. at 38 (citing App. 29a). According to the Administration, "the court of appeals' argument is hard to take seriously, as it would effectively require the Administration to treat all pending lawsuits as *de facto* injunctions, thereby severely constricting the Executive's statutory and constitutional authority." *Id.* at 39. Yet DHS arbitrarily "suspended" MPP on January 20, 2021, with absolutely no explanation, and only belatedly provided an explanation for the "termination" of MPP after respondents had filed suit and fully briefed a request for a preliminary injunction. Further, as the district court noted, DHS started dismantling the MPP program well before it "terminated" the program on June 1. App. 81a-82a. Avoiding the self-inflicted harms that resulted from these unlawful actions was required by law, not by a pending lawsuit.

Next, the Administration absurdly claims that it is mere "speculation that the rescission of MPP would increase the number of aliens present within the plaintiff States," Stay App. at 39, even though they acknowledge that "tens of thousands" of aliens had been returned to Mexico under MPP during the "short-lived" program. *See* Stay App. at 8; *see also* 43a (noting that more than 55,000 aliens had been

returned to Mexico under the MPP between late-January 2019, when the MPP was initiated, and late-October 2019, when DHS issued its assessment of the program). In addition, the current number of aliens crossing the southwest border since the suspension/termination of the MPP is at record levels.

Finally, to the extent the injunction causes the Administration to incur additional detention costs, such detention costs are mandated by statute and should not be weighed against the harm plaintiff States are suffering due to the Administration's non-enforcement policies.

In sum, from its first day in office, the Biden administration has taken almost every step imaginable to minimize immigration enforcement. It "suspended" the MPP, instituted a 100-day "pause" on all removals, and narrowed enforcement priorities to an unacceptable degree (focusing mainly on terrorists, spies, and aggravated felons). As a result, we are witnessing today record-level border crossings that impose costs on America as a whole, but border States in particular. Because the balance of harms weighs against a stay pending appeal and *certiorari*, the Court should deny the application.

CONCLUSION

This Court should deny the Administration's stay application.

Dated: August 24, 2021

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