NO. 20-322

IN THE

Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

ESTEBAN ALEMAN GONZALEZ, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RETIRED FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are retired federal judges who have substantial experience adjudicating immigration matters and interpreting federal statutes. They maintain an ongoing interest in ensuring that federal judges have the means to efficiently manage their growing caseloads and dispense equal justice under the law. *Amici* believe that the lessons drawn from their decades of judicial experience will assist the Court in its consideration of the second question presented.[1]

INTRODUCTION & SUMMARY OF ARGUMENT

Amici write to address the second question presented, which this Court added when it granted *certiorari*: whether, under 8 U.S.C. § 1252(f)(1), the courts below had jurisdiction to grant classwide injunctive relief. The answer to that question is yes.[2]

I. Section 1252(f)(1) preserves the authority of district courts to grant classwide injunctive relief in circumstances like these. That is true for two reasons.

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or *amici*'s counsel made a monetary contribution to the preparation or submission of this brief. A full list of *amici* is provided in the Appendix.

[2] 8 U.S.C. § 1252(f)(1) provides as follows:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the

First, Section 1252(f)(1) provides that district courts may afford injunctive relief "with respect to the application of [certain] provisions to an individual alien against whom proceedings under such part have been initiated." Where every single member of a class is "an individual alien against whom proceedings under such part have been initiated," district courts may use the class mechanism to provide each of them with injunctive relief. That follows from this Court's precedents, as well as from the statutory text and context.

Second, the limitations of Section 1252(f)(1) apply only to injunctions that would "enjoin or restrain the operation" of specific immigration laws. That is not the case here: the injunctions entered below require only that the agency adhere to 8 U.S.C. § 1231(a)(6) as properly interpreted. It would be passing strange to hold that a court "enjoin[s]" or "restrain[s]" the operation of a law when it requires the Government to comply with a correct interpretation of that law.

II. Based on their collective experience as federal district judges, *amici* believe that the Government's

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> action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

In this brief, except when quoting statutory language, *amici* "use[] the term 'noncitizen' as equivalent to the statutory term 'alien.'" *Barton v. Barr*, 140 S. Ct. 1442, 1446 n.2 (2020).

position would impose grave burdens on overworked district courts facing a judicial emergency. Indeed, this outcome is unavoidable if the Government prevails: rather than adjudicate claims in an aggregate manner where permitted under the rules of civil procedure, district courts would be forced to engage in *seriatim* review of cases filed by noncitizens facing removal proceedings—even where those cases present identical issues on identical facts and seek identical relief. This threatens more than inefficiency; it may also weaken the fair administration of civil justice. *See* Bert Huang, *Lightened Scrutiny*, 124 Harv. L. Rev. 1109, 1113–15, 1138, 1145–46 (2011) (concluding that "growing judicial burdens" may undermine accuracy, consistency, and integrity of court decisions from overburdened jurisdictions). The Court should avoid that result by rejecting the flawed interpretation advocated by the Government.

ARGUMENT

I. THE CLASSWIDE INJUNCTIONS HERE COMPLY WITH SECTION 1252(f)(1)

Section 1252(f)(1) does not foreclose classwide injunctive relief in this case. First, the plain language of Section 1252(f)(1) permits district courts to grant injunctive relief to noncitizens in removal proceedings, even when those noncitizens join together and seek relief as a class. Second, and in the alternative, the injunctions secured by Respondents do not "enjoin" or "restrain" the operation of the relevant statutory provisions, and so they do not implicate Section 1252(f)(1).

A. Section 1252(f)(1) Permits Classwide Injunctive Relief for Noncitizens in Removal Proceedings

Federal courts possess inherent authority to grant equitable relief—including classwide injunctions—unless Congress clearly indicates otherwise. *See, e.g.*, *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."); *see also Weinberger v. Romero-Barcelo,* 456 U.S. 305, 313 (1982) (same). Here, Congress has not demonstrated a clear intent to wrest from district courts their longstanding equitable power to grant classwide injunctive relief. To the contrary, Section 1252(f)(1) preserves the availability of such equitable remedies in cases like this one.

1. Section 1252(f)(1) generally prohibits the lower federal courts from issuing injunctions that "enjoin or restrain the operation" of specified immigration laws. But there is an important exception to that rule: district courts may issue injunctions "with respect to the application of [the specified immigration laws] to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1).

By virtue of this carve-out, district courts retain their equitable power to issue injunctive relief to "an individual alien against whom proceedings under such part have been initiated." And as a logical matter, if district courts can provide injunctive relief to every single such "individual alien," they can also provide injunctive relief to a class whose members consist

solely of such "individual alien[s]," since that relief is extended to a class every one of whose members is statutorily authorized to obtain an injunction. *See, e.g.*, *Padilla v. ICE*, 953 F.3d 1134, 1149–51 (9th Cir. 2020), *vacated on other grounds*, 141 S. Ct. 1041 (2021).

This Court's precedents endorse that logic. In *Califano v. Yamasaki*, the Court held that a statute which authorized suit by "any individual" (and which contemplated "case-by-case adjudication") did not foreclose the availability of classwide injunctive relief. 442 U.S. 682, 700 (1979). *Califano*'s reasoning was straightforward: if "the district court has jurisdiction over the claim of each individual member of the class, Rule 23 provides a procedure by which the court may exercise that jurisdiction over the various individual claims in a single proceeding." *Id.* at 701. So too here. Because district courts are statutorily authorized to provide an injunction to each and every individual in the class, they may afford that individual relief on an aggregate basis when consistent with the rules of civil procedure.

Brown v. Plata is also instructive. *See* 563 U.S. 493 (2011). There, the Court affirmed a decision granting injunctive relief to a class of inmates who challenged prison overcrowding in California. *See id.* In so doing, the Court considered the Prison Litigation Reform Act's ("PLRA") limitations on the remedial powers of federal courts. These limits included a requirement that any remedy extend no further than necessary to remedy the violation of the rights of "a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1)(A). Rejecting arguments that the PLRA precluded

classwide injunctive relief that would have collateral benefits beyond "a particular plaintiff or plaintiffs," the Court held that this provision "means only that the scope of the order must be determined with reference to the constitutional violations established by the specific plaintiffs before the court." *Plata*, 563 U.S. at 531. In this respect, *Plata* properly recognized that the entry of classwide injunctive relief is consistent with a statutory restriction of district courts' remedial power to "a particular plaintiff or plaintiffs."

The Court's precedents thus confirm that Section 1252(f)(1) preserves a district court's authority to issue classwide injunctive relief to individual noncitizens, all of whom are facing immigration proceedings.

The Government would reach the opposite result, insisting that the Court has "already concluded—not once, but thrice—that classwide injunctions fall outside the exception to Section 1252(f)." Pet. Br. 26. This argument presupposes that the Court granted *certiorari*, and *sua sponte* added a question for review, on an issue that has already been settled "thrice." To state the obvious, that is not this Court's practice.

In any event, the Government's interpretation of precedent is mistaken. Two of the cases it cites were not class actions, and neither presented nor turned on the question whether Section 1252(f)(1) permits noncitizens to seek classwide injunctions where every member of the class is "an individual alien against whom proceedings under such part have been initiated." *See Nken v. Holder*, 556 U.S. 418, 431 (2009); *Reno v. Am.-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 481–82 (1999); *see also*

Jennings v. Rodriguez, 138 S. Ct. 830, 875 (2018) (Breyer, J., dissenting) ("[T]he court in *AADC* did not consider, and had no reason to consider, the application of § 1252(f)(1) to [] a class" in which "'[e]very member . . . falls within the provision's exception.'").

The Government's reliance on *Jennings* is equally misplaced. There, this Court remanded the litigation to the Ninth Circuit to determine in the first instance whether classwide injunctive relief was available under Section 1252(f)(1) as a remedy for the plaintiffs' *constitutional* claims. *See Jennings*, 138 S. Ct. at 851; *Padilla*, 953 F.3d at 1149. *Jennings* did not purport to settle that question, and certainly did not do so with respect to *statutory* claims (like those raised by the class members in this case). *See* 138 S. Ct. at 851.

2. The Government's textual arguments fare no better. The Government first contends that "the term 'individual' . . . unambiguously excludes classwide relief." Pet. Br. 28. The Government adds that Section 1252(f)(1) refers to "*an* individual alien," rather than "individual aliens." *Id.* at 28–29. But these arguments miss the point: when a district court grants classwide injunctive relief to a class like this one, every single concrete application of the district court's injunction is "with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." A class is merely a collection of individuals, and a classwide injunction is merely a remedy that covers each of those individuals.

The Government's fundamental error is to read Section 1252(f)(1) without attention to its context and history. Congress wrote the words "an individual

alien" not to separate individuals from classes, but rather to separate individuals from organizations. More precisely, Congress sought to ensure that courts could afford injunctive relief only where individuals faced active immigration proceedings—not in cases brought by organizations (and their members) to test provisions in more abstract pre-enforcement settings. *See Am. Immigr. Laws. Ass'n v. Reno*, 199 F.3d 1352, 1360 (D.C. Cir. 2000) ("Congress meant to allow litigation challenging the new system by, and only by, *aliens against whom the new procedures had been applied*." (emphasis added)); *see also Padilla*, 953 F.3d at 1150 ("Congress adopted § 1252(f)(1) after a period in which organizations and classes of persons, many of whom were not themselves in proceedings, brought preemptive challenges to the enforcement of certain immigration statutes." (citations omitted)).

That background illuminates the plain text. The term "an individual alien" covers individuals while excluding organizations. And to ensure that only people with a personal stake could obtain injunctive relief, Congress limited injunctions to noncitizens "against whom proceedings under such part have been initiated." This is not an anti-class action device; the Government's insistence otherwise is mistaken.

Any doubt on that score is settled by the first half of Section 1252(f)(1). There, the statute *expressly* contemplates that an action may be brought by a "party *or parties*." 8 U.S.C. § 1252(f)(1) (emphasis added). So there may well be multiple plaintiffs in a single action. Yet, according to the Government, injunctive relief in any such case is confined to "an individual alien." That makes no sense. Where the

"parties bringing the action" prevail and demonstrate an entitlement to injunctive relief, Section 1252(f)(1) authorizes that remedy, so long as each of those parties is a noncitizen "against whom proceedings under such part have been initiated."

3. Attention to the overarching statutory scheme reinforces that conclusion. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").

The same Congress that passed Section 1252(f)(1) simultaneously enacted one of its neighbors, Section 1252(e)(1)(B). That provision bans federal courts from "certify[ing] a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection." 8 U.S.C. § 1252(e)(1)(B). Looking at this text, we see that Congress knew *exactly* how to prohibit the availability of classwide relief—and that it spoke in unmistakable terms when doing so.

Congress could have included that same language in Section 1252(f)(1). But it did not. That decision must be respected in analyzing Section 1252(f)(1): "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (internal quotation marks omitted). While the Government would prefer to rewrite Section 1252(f)(1) so that it includes Section 1252(e)(1)(B)'s express bar on classwide relief, "those

are not the words that Congress wrote, and this Court is not free to 'rewrite the statute' to the Government's liking." *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 629 (2018).

4. Interpreting Section 1252(f)(1) as permitting classwide injunctive relief also promotes Congress's stated goals. Specifically, "Congress was concerned that § 1252(f)(1) not hamper a district court's ability to address imminent rights violations." *See Padilla*, 953 F.3d at 1151 (citing H.R. Rep. No. 104-469, pt. 1, at 161 (1996)). But under the Government's interpretation of the law, a district court would lack authority to grant injunctive relief to more than one noncitizen at a time—even in cases where (as here) those noncitizens raise materially indistinguishable claims and seek identical relief. In practice, that regime would sow confusion and inefficiency throughout the judiciary. It would also defeat effective vindication of the rights of noncitizens, especially where the Government adopts an unlawful policy or practice resulting in imminent rights violations affecting many people all at once.

Adhering to the plain text and proper meaning of Section 1252(f)(1), there is no reason for the Court to follow the Government down that misguided path.

B. The Injunctions Here Do Not "Enjoin" or "Restrain" the Operation of Section 1231(a)

In the alternative, the Court should reject the Government's position on the ground that the injunctions here do not enjoin or restrain the operation of Section 1231(a)(6); instead, the

injunctions merely require the Government to *comply* with that statute.

The limitations on injunctive relief discussed above (in Part I.A) apply only where a court seeks to "enjoin or restrain the operation of the provisions of part IV of this subchapter . . . ." Giving that language its plain meaning, it has no bearing on this case. "Enjoin" means "to prohibit or restrain by a judicial order";[3] "restrain" means "to moderate or limit the force, effect, development, or full exercise of";[4] and "operation" means "the quality or state of being functional or operative."[5] Taken together, these definitions confirm that Section 1252(f)(1) applies only to injunctions that prohibit the application or functioning of the covered immigration laws (which include Section 1231(a)(6)). *See Jill E. Family, Another Limit on Federal Court Jurisdiction? Immigrant Access to Class-Wide Injunctive Relief*, 53 Clev. St. L. Rev. 11, 29 (2005) ("[T]o enjoin the 'operation of' a statute is to foreclose completely its application in any instance . . . ."). This understanding of the text is consistent with Congress's intent. *See* H.R. Rep. No. 104-469, pt. 1, at 161 (1996) (explaining that Section 1252(f)(1) "limits the authority of Federal courts other than the Supreme Court to enjoin the operation of the new removal procedures established in this legislation. . . . [S]ingle district courts or courts of appeal do not have authority to enjoin procedures established by

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[3] *Webster's Third New International Dictionary* 754 (2002).

[4] *Id.* at 1936.

[5] *Id.* at 1581.

Congress to reform the process of removing illegal aliens from the U.S.").

The injunctions entered here do not prohibit the application or functioning of Section 1231(a)(6). To be sure, they mandate bond hearings in a limited set of circumstances—namely, cases in which noncitizens have been detained for more than six months without a hearing. But that procedural requirement does not *prohibit* the operation of Section 1231(a)(6); it requires only that the Government implement and apply Section 1231(a)(6) properly by its terms. *See* 8 U.S.C. § 1252(a)(2)(A)(i) (distinguishing "implementation" from "operation"); *see also Texas v. Biden*, No. 21-cv-67, 2021 WL 3603341, at *15 (N.D. Tex. Aug. 13, 2021) ("[T]his section does not apply because Plaintiffs are not seeking to *restrain* Defendants from enforcing Section 1225. Plaintiffs are attempting to make Defendants comply with Section 1225."), *appeal filed*, No. 21-10806 (5th Cir.); *cf. AADC*, 525 U.S. at 481–82 (observing that Section 1252(f)(1) prohibits district courts from issuing injunctions "*against* the operation of §§ 1221–1231" (emphasis added)).

Confirming that this interpretation reflects plain English and common sense, many courts have adopted it. *See, e.g.*, *Grace v. Barr*, 965 F.3d 883, 907 (D.C. Cir. 2020) ("[Section 1252(f)(1)] places no restriction on the district court's authority to enjoin agency action found to be unlawful." (emphasis omitted)); *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010) ("Section 1252(f) prohibits only injunction of 'the operation of' the detention statutes, not injunction of a violation of the statutes. This is a distinction we have made before in a decision vacated on unrelated grounds."); *C.G.B.*

v. Wolf, 464 F. Supp. 3d 174, 199 (D.D.C. 2020) ("Numerous courts—including ones in this jurisdiction—have held . . . that § 1252(f)(1) 'prohibits only injunction of "the operation of" the detention statutes, not injunction of *a violation of* the statutes.'" (collecting cases)).

Accordingly, the Government's contention that the injunctions here restrain or enjoin the operation of Section 1231(a)(6)—and that they therefore implicate the strictures of Section 1252(f)(1)—is incorrect.

II. THE GOVERNMENT'S POSITION WOULD IMPOSE EXTRAORDINARY BURDENS ON FEDERAL DISTRICT COURTS

As retired federal district judges, *amici* have unique insight into the operation and workload of the federal district courts. Based on our collective experience and expertise, *amici* have concluded that the Government's interpretation of Section 1252(f)(1) is not only wrong, but would also create unworkable burdens for federal district courts across the country.

This Court knows well that the federal district courts are badly overburdened. The Federal Judicial Caseload Statistics for Fiscal Year 2020 show that combined filings in district courts totaled 425,945 cases—a steep 13 percent jump from 2019. *See* Federal Judicial Caseload Statistics 2020, U.S. Courts (2020).[6] During that same period, civil cases involving immigration increased by 28 percent (to 2,388), and criminal immigration filings increased by 11 percent

[6] https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020.

(to 33,663). *Id.* Meanwhile, the number of authorized district judgeships remained the same. This unnerving asymmetry is nothing new: according to the Chair of the Judicial Conference of the United States's executive committee, "district court filings have increased 47% since 1990 while the number of district judges has risen 'barely' 5%." Andrew Kragie, Federal Judiciary Seeks 79 New Judgeships Nationwide, Law360 (Mar. 16, 2021).[7]

These immense demands on district courts have not gone unnoticed. Recently, Senators Todd Young and Chris Coons introduced bipartisan legislation to address the current "judicial emergencies taking place in district courts across America" by recommending the creation of 77 new district judgeships. *See* Press Release, Young and Coons Reintroduce JUDGES Act to Address Judicial Emergencies (July 29, 2021).[8] In promoting the legislation, Senators Young and Coons recognized that "overburdened" district courts across the country are "struggling to keep up with growing caseloads." *Id.* Sadly, though, the odds of swift relief for our former judicial colleagues remain low due to partisan gridlock. *See* Thomas Berry, Opinion, *The U.S. Needs More Federal Judges*, Wall St. J. (Mar. 9, 2021).[9] And even if the proposed legislation were enacted, the 77 new judgeships would not be created

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[7] https://www.law360.com/articles/1364434/federal-judiciary-seeks-79-new-judgeships-nationwide?copied=1.

[8] https://www.young.senate.gov/newsroom/press-releases/young-and-coons-reintroduce-judges-act-to-address-judicial-emergencies.

[9] https://www.wsj.com/articles/the-u-s-needs-more-federal-judges-11615311539.

until after future presidential elections—half in 2025 and half in 2029. Simply put, the cavalry is not coming.

In light of all this, *amici* consider it all the more imperative to ensure that district judges retain the tools that are necessary to manage their burgeoning caseloads in an efficient and expeditious manner.

The Government's position, however, is squarely inconsistent with that objective. If the Government prevails, then in any cases involving a challenge to the covered immigration provisions, judges would be powerless to issue injunctive relief to more than one noncitizen at a time. Instead of joining together as a class, noncitizen detainees would be forced to flood district court dockets with individual habeas actions raising materially indistinguishable claims and requesting materially indistinguishable injunctive relief. District courts, in turn, would be required to address hundreds or thousands of similar claims and issue individual injunctive relief in all of them where the Government's conduct is indeed unlawful.

That is a recipe for inefficiency and confusion—and it would have far-reaching implications throughout immigration litigation. *See, e.g.*, *Rivera v. Holder*, 307 F.R.D. 539, 553–54 (W.D. Wash. 2015) (issuing classwide injunctive relief addressing immigration judges' erroneous view that release under Section 1226(a)(2) requires a monetary bond); *Ramirez v. ICE*, No. 18-cv-508, 2021 WL 4284530, *9–*14 (D.D.C. Sept. 21, 2021) (granting classwide injunctive relief addressing agency's failure to apply Section 1232(c)(2)(B) to unaccompanied children who turn 18).

Yet that is just the tip of the iceberg. Taken to its logical conclusion, the Government's position extends beyond the class context and would likely preclude a district court from issuing a single injunction granting relief to two family members who have been detained in the same facility for the same period and for the same reasons, where they seek the same relief in a single proceeding before the same judge.

There is absolutely no good reason to tie the hands of resource-strapped district courts in this manner—and Section 1252(f)(1) certainly does not require it.[10]

[10] These inefficiencies would result regardless of the Court's decision with respect to the first question presented (*i.e.*, whether Section 1231(a)(6) requires a bond hearing). Even if this Court were to hold that Section 1231(a)(6) does not entitle detained noncitizens to a bond hearing after six months, those noncitizens will still be able to file habeas petitions seeking a bond hearing on constitutional grounds. *See* Question Presented 1 (whether "an alien who is detained under 8 U.S.C. § 1231 is entitled *by statute*, after six months of detention, to a bond hearing" (emphasis added)).

CONCLUSION

For the foregoing reasons, *amici* urge the Court to hold that the courts below had jurisdiction under Section 1252(f)(1) to grant classwide injunctive relief.

Respectfully submitted,

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APPENDIX

APPENDIX

List of *Amici Curiae*

The *amici* listed below join this brief as individuals; institutional affiliation is noted for informational purposes only and does not indicate endorsement by institutional employers of the positions advocated in this brief.

The Hon. Mark W. Bennett (ret.) served on the United States District Court for the Northern District of Iowa from 1994 to 2019. Judge Bennett is currently Director of the Institute for Justice Reform & Innovation at Drake University Law School and works as an arbitrator and mediator.

The Hon. Nancy Gertner (ret.) served on the United States District Court for the District of Massachusetts from 1994 to 2011. Judge Gertner is currently a Senior Lecturer on Law at Harvard Law School.

The Hon. John Gleeson (ret.) served on the United States District Court for the Eastern District of New York from 1994 to 2016. Judge Gleeson is currently a Partner at Debevoise & Plimpton LLP. He is a Fellow of the American College of Trial Lawyers.

The Hon. Timothy K. Lewis (ret.) served on the United States District Court for the Western District of Pennsylvania from 1991 to 1992 and on the United States Court of Appeals for the Third Circuit from 1992 to 1999. Judge Lewis is currently co-chair of the

ADR Practice Group at Schnader Harrison Segal & Lewis LLP and serves as a mediator, arbitrator, settlement counselor, and trial and appellate practitioner.

The Hon. A. Howard Matz (ret.) served on the United States District Court for the Central District of California from 1998 to 2013. Judge Matz is currently Senior Counsel at Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow P.C. He is a Fellow of both the American College of Trial Lawyers and the College of Commercial Arbitrators.

The Hon. Thomas I. Vanaskie (ret.) served on the United States District Court for the Middle District of Pennsylvania from 1994 to 2010 and on the United States Court of Appeals for the Third Circuit from 2010 to 2019. Judge Vanaskie is currently Of Counsel at Stevens & Lee, where he chairs the firm's Appellate and Mediation, Neutral Services, and Alternative Dispute Resolution practice groups.