No. 21-954

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.

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

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: DEC. 29, 2021
CERTIORARI GRANTED: FEB. 18, 2022

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
(AMARILLO)

Docket No. 2:21-cv-00067-Z

STATE OF TEXAS; STATE OF MISSOURI, PLAINTIFFS

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA; UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, IN HIS OFFICIAL CAPACITY AS ACTING COMMISSIONER OF THE UNITED STATES CUSTOMS AND BORDER PROTECTION; UNITED STATES OF AMERICA; TAE JOHNSON, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, DEFENDANTS

DOCKET ENTRIES

DATE	**DOCKET NUMBER**	**PROCEEDINGS**
4/13/21	1	COMPLAINT against All Defendants filed by State of Missouri, State of Texas. (Filing fee $402; Receipt number 0539-

DATE	DOCKET NUMBER	PROCEEDINGS
		11790322) Clerk to issue summons(es). In each Notice of Electronic Filing, the judge assignment is indicated, and a link to the Judges Copy Requirements and Judge Specific Requirements is provided. The court reminds the filer that any required copy of this and future documents must be delivered to the judge, in the manner prescribed, within three business days of filing. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms, instructions, and exemption information may be found at www.txnd.uscourts.gov, or by clicking here: Attorney Information—Bar Membership. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (Attachments: # 1 Exhibit(s) A—January 20, 2021 Memo, # 2 Exhibit(s) B—DHS and TX Agreement) (Thompson, William) (Entered: 04/13/2021)
4/13/21	2	ADDITIONAL ATTACHMENTS to 1 Complaint,,,,, by

DATE	DOCKET NUMBER	PROCEEDINGS
		Plaintiffs State of Missouri, State of Texas. (Thompson, William) (Entered: 04/13/2021)
		* * * * *
5/3/21	11	MOTION to Transfer Case out of District/Division filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America with Brief/Memorandum in Support. (Genova, Francesca) (Entered: 05/03/2021)
5/3/21	12	Appendix in Support filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America re 11 MOTION to Transfer Case out of District/

DATE	DOCKET NUMBER	PROCEEDINGS
		Division (Genova, Francesca) (Entered: 05/03/2021)
		* * * * *
5/14/21	30	MOTION for Preliminary Injunction filed by State of Missouri, State of Texas with Brief/Memorandum in Support. (Attachments: # 1 Proposed Order) (Thompson, William) Modified title on 5/17/2021 (awc). (Entered: 05/14/2021)
5/14/21	31	Appendix in Support filed by State of Missouri, State of Texas re 30 MOTION for Injunction (Attachments: # 1 Appendix in Support of Plaintiffs' Motion for Preliminary Injunction Vol. I, # 2 Appendix in Support of Plaintiffs' Motion for Preliminary Injunction Vol. II) (Thompson, William) (Entered: 05/14/2021)
5/17/21	32	ORDER: The parties are ORDERED to separately propose a briefing schedule with respect to Plaintiffs' Motion for Preliminary Injunction. ECF No. 30. This briefing shall address whether the Court should advance the trial on the merits and consolidate it with the preliminary injunction hearing. FED. R. CIV. P. 65(a)(2).

DATE	DOCKET NUMBER	PROCEEDINGS
		The parties shall also address whether, and to what extent, expedited discovery is necessary. All briefs shall be filed on or before Thursday, May 20, 2021. re: 30 MOTION for Preliminary Injunction (Ordered by Judge Matthew J. Kacsmaryk on 5/17/2021) (awc) (Entered: 05/17/2021)
5/17/21	33	MOTION to Stay *and Unopposed Motion to Expedite Briefing on Motion to Stay Proceedings* filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America with Brief/Memorandum in Support. (Genova, Francesca) (Entered: 05/17/2021)
		* * * * *
5/20/21	35	NOTICE of *Plaintiffs' Proposed Briefing Schedule* re: 32 Order Setting Deadline/Hearing,, filed by State of Missouri, State of

DATE	DOCKET NUMBER	PROCEEDINGS
		Texas (Thompson, William) (Entered: 05/20/2021)
5/20/21	36	NOTICE of *Defendants' Proposed Briefing Schedule* re: 32 Order Setting Deadline/Hearing,, filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America (Ward, Brian) (Entered: 05/20/2021)
5/21/21	37	ORDER: (SEE ORDER FOR SCHEDULE.) Plaintiffs' Unopposed Motion for Leave to Exceed Page Limits (ECF No. 29) is GRANTED. If necessary, the Court will amend this scheduling order dependent upon the Court's rulings on the pending Motions to stay and transfer the case. The Court will also issue an order, if necessary, scheduling a hearing on the Motion for Preliminary Injunction upon the receipt of all briefing required by this order.

DATE	DOCKET NUMBER	PROCEEDINGS
		(Ordered by Judge Matthew J. Kacsmaryk on 5/21/2021) (awc) (Entered: 05/21/2021)
5/24/21	38	RESPONSE filed by State of Missouri, State of Texas re: 11 MOTION to Transfer Case out of District/Division (Attachments: # 1 Proposed Order) (Thompson, William) (Entered: 05/24/2021)
5/24/21	39	Appendix in Support filed by State of Missouri, State of Texas re 38 Response/Objection *to Defendants' Motion to Transfer Venue* (Attachments: # 1 Exhibit(s)) (Thompson, William) (Entered: 05/24/2021)
5/24/21	40	RESPONSE filed by State of Missouri, State of Texas re: 33 MOTION to Stay *and Unopposed Motion to Expedite Briefing on Motion to Stay Proceedings* (Attachments: # 1 Proposed Order) (Thompson, William) (Entered: 05/24/2021)
		* * * * *
5/28/21	43	REPLY filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United

DATE	DOCKET NUMBER	PROCEEDINGS
		States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America re: 11 MOTION to Transfer Case out of District/ Division (Genova, Francesca) (Entered: 05/28/2021)
5/28/21	44	REPLY filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America re: 33 MOTION to Stay *and Unopposed Motion to Expedite Briefing on Motion to Stay Proceedings* (Genova, Francesca) (Entered: 05/28/2021)
5/31/21	45	Administrative Record consisting of *DHS Administrative Record* filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud,

DATE	DOCKET NUMBER	PROCEEDINGS
		United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America. (Ward, Brian) (Entered: 05/31/2021)
6/2/21	46	ORDER: On June 1, 2021, the Department of Homeland Security published a memo titled "Termination of the Migrant Protection Protocols Program." In that memo, Secretary Mayorkas rescinded the January 20, 2021 memo titled "Suspension of Enrollment in the Migrant Protection Protocols Programs," which was the focus of this lawsuit. Accordingly, the parties are ORDERED to file a joint status update on the effect of the June 1 memo on the disposition of this case. If the parties cannot agree on the effect, they shall state their positions on how this case shall move forward in separate sections of the status update. The update is due Friday, June 4, 2021. No

DATE	DOCKET NUMBER	PROCEEDINGS
		other previously scheduled deadlines are affected by this order. (Ordered by Judge Matthew J. Kacsmaryk on 6/2/2021) (awc) (Entered: 06/02/2021)
6/3/21	47	ORDER—Defendants' evidence, taken as a whole, does not establish that the convenience of the parties and witnesses will be enhanced by transferring this case. Accordingly, the Court DENIES Defendants' Motion to Transfer Venue (ECF No. 11). Defendants' Motion to Stay (ECF No. 33) is DENIED as MOOT. (Ordered by Judge Matthew J. Kacsmaryk on 6/3/2021) (vls) (Entered: 06/03/2021)
6/3/21	48	AMENDED COMPLAINT against All Defendants filed by State of Missouri, State of Texas. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms, instructions, and exemption information may be found at www.txnd.uscourts.gov, or by clicking here: Attorney Information—Bar Membership. If admission requirements are not satisfied

DATE	DOCKET NUMBER	PROCEEDINGS
		within 21 days, the clerk will notify the presiding judge. (Attachments: # 1 Ex. A—January 20, 2021 DHS Memorandum, # 2 Ex. B—Agreement between U.S. Dept. of Homeland Security and State of Texas, # 3 Ex. C—June 1, 2021 DHS Memorandum) (Thompson, William) (Entered: 06/03/2021)
		* * * * *
6/4/21	50	Joint STATUS REPORT filed by State of Missouri, State of Texas. (Thompson, William) (Entered: 06/04/2021)
6/4/21	51	RESPONSE filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America re: 30 MOTION for Injunction (Ward, Brian) (Entered: 06/04/2021)
6/7/21	52	ORDER: After reviewing the parties' positions regarding the

DATE	DOCKET NUMBER	PROCEEDINGS
		mootness of Plaintiffs' Motion for Preliminary Injunction, the Court DENIES Plaintiffs' Motion as moot and enters a new scheduling order re: 30 MOTION for Preliminary Injunction. (SEE ORDER FOR SCHEDULE SPECIFICS.) (Ordered by Judge Matthew J. Kacsmaryk on 6/7/2021) (awc) (Entered: 06/07/2021)
6/8/21	53	MOTION for Injunction *Preliminary* filed by State of Missouri, State of Texas (Attachments: # 1 Proposed Order) (Thompson, William) (Entered: 06/08/2021)
6/8/21	54	Appendix in Support filed by State of Missouri, State of Texas re 53 MOTION for Injunction *Preliminary* (Attachments: # 1 Exhibit(s), # 2 Exhibit(s)) (Thompson, William) (Entered: 06/08/2021)
		* * * * *
6/16/21	59	Brief/Memorandum in Support filed by Immigration Reform Law Institute as amicus curiae re 53 MOTION for Injunction *Preliminary*. (awc) (Entered: 06/16/2021)

DATE	DOCKET NUMBER	PROCEEDINGS
6/18/21	60	ORDER granting 56 Motion for Extension of Time to File Answer re 48 Amended Complaint. Accordingly, Defendants' answer or response to Plaintiffs' Amended Complaint is due 30 days after the Court rules on the Plaintiffs' pending Motion for Preliminary Injunction (ECF No. 53). This Order shall not be construed to prejudice Plaintiffs regarding collateral issues such as the availability of discovery or consolidation under Rule 65. (Ordered by Judge Matthew J. Kacsmaryk on 6/18/2021) (awc) (Entered: 06/18/2021)
6/22/21	61	Administrative Record consisting of Record for June 1 Memorandum filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America. (Ward, Brian) (Entered: 06/22/2021)

DATE	DOCKET NUMBER	PROCEEDINGS
6/25/21	62	MOTION to Strike 54 Appendix in Support *and Extra Record Evidence in Support of Plaintiffs' Motion for Preliminary Injunction* filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America with Brief/Memorandum in Support. (Attachments: # 1 Proposed Order) (Darrow, Joseph) (Entered: 06/25/2021)
6/25/21	63	RESPONSE filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America re: 53 MOTION for Injunction *Preliminary*

DATE	DOCKET NUMBER	PROCEEDINGS
		(Ward, Brian) (Entered: 06/25/2021)
6/25/21	64	Appendix in Support filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America re 63 Response/Objection, (Ward, Brian) (Entered: 06/25/2021)
6/28/21	65	Joint STATUS REPORT *Joint Statement Regarding Discovery and Consolidation under FRCP 65(a)(2)* filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America. (Darrow, Joseph) (Entered: 06/28/2021)

DATE	DOCKET NUMBER	PROCEEDINGS
6/29/21	66	ORDER: The Court hereby NOTIFIES the parties that the Court will consolidate the preliminary injunction with trial on the merits under Rule 65. To allow the parties to fully develop their case, the parties shall file supplemental briefs no longer than 15 pages. Defendants' brief is due on July 7. Plaintiffs' brief is due on July 9. Furthermore, the parties are ORDERED to file a joint statement regarding the hearing itself. This statement shall address: (1) the anticipated length of time; (2) the format of presentation; (3) proposed dates for the hearing (4) the anticipated disputed questions of law; (5) and the anticipated disputed questions of fact. The joint statement shall be filed by July 2. The Court will issue an order scheduling a hearing upon the receipt of the briefing required by this order. (SEE ORDER FOR FURTHER SPECIFICS.) (Ordered by Judge Matthew J. Kacsmaryk on 6/29/2021) (awc) (Entered: 06/29/2021)

DATE	DOCKET NUMBER	PROCEEDINGS
6/30/21	67	REPLY filed by State of Missouri, State of Texas re: 53 MOTION for Injunction *Preliminary* (Thompson, William) (Entered: 06/30/2021)
7/2/21	68	REPLY filed by State of Missouri, State of Texas re: 66 Order Setting Deadline/Hearing,,, (Thompson, William) (Entered: 07/02/2021)
7/6/21	69	ORDER: After receiving the parties' joint statement (ECF No. 68), the Court sets this case for a consolidated Rule 65 hearing to begin on Thursday, July 22, 2021 at 10:00am. To accommodate this date, the Court sets an expedited briefing schedule for Defendants' pending Motion to Strike (ECF No. 62). Plaintiffs' Response is due Friday, July 9. Defendants' Reply is due Friday, July 16. The Court anticipates ruling on the pending Motion before the July 22 hearing. The Court will not permit attorneys to appear virtually. (See order for further specifics.) (Ordered by Judge Matthew J. Kacsmaryk on 7/6/2021) (awc) (Entered: 07/06/2021)

DATE	DOCKET NUMBER	PROCEEDINGS
7/7/21	70	Supplemental Document by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America as to 66 Order Setting Deadline/Hearing,,, *Supplemental Brief Addressing Matters Related to Consolidation under Rule 65(a)(2)*. (Darrow, Joseph) (Entered: 07/07/2021)
7/9/21	71	Supplemental Document by State of Missouri, State of Texas as to 66 Order Setting Deadline/Hearing,,, *Plaintiffs' Supplemental Brief*. (Thompson, William) (Entered: 07/09/2021)
7/9/21	72	RESPONSE AND OBJECTION filed by State of Missouri, State of Texas re: 62 MOTION to Strike 54 Appendix in Support *and Extra Record Evidence in Support of Plaintiffs' Motion for Preliminary Injunction* (Thompson, William) (Entered: 07/09/2021)

DATE	DOCKET NUMBER	PROCEEDINGS
7/9/21	73	MOTION to Introduce Extra-Record Evidence re 72 Response/Objection, 62 MOTION to Strike 54 Appendix in Support *and Extra Record Evidence in Support of Plaintiffs' Motion for Preliminary Injunction* filed by State of Missouri, State of Texas with Brief/Memorandum in Support. (Attachments: # 1 Proposed Order) (Thompson, William) (Entered: 07/09/2021)
7/16/21	74	REPLY filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America re: 62 MOTION to Strike 54 Appendix in Support *and Extra Record Evidence in Support of Plaintiffs' Motion for Preliminary Injunction* (Darrow, Joseph) (Entered: 07/16/2021)
7/16/21	75	RESPONSE filed by Joseph R Biden, Jr, Tae Johnson, Alejandro

DATE	DOCKET NUMBER	PROCEEDINGS
		Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America re: 73 MOTION to Introduce Extra-Record Evidence re 72 Response/Objection, 62 MOTION to Strike 54 Appendix in Support *and Extra Record Evidence in Support of Plaintiffs' Motion for Preliminary Injunction* (Darrow, Joseph) (Entered: 07/16/2021)
7/19/21	76	ORDER: Before the Court is Defendants' Motion to Strike Plaintiff's Extra Record Material (ECF No. 62). After considering the Response, Reply, and the applicable law, the Court DENIES the Motion. Plaintiffs' related Motion to Introduce Extra-Record Evidence (ECF No. 73) is GRANTED. (See order for further specifics.) (Ordered by Judge Matthew J. Kacsmaryk on 7/19/2021) (awc) (Entered: 07/19/2021)

DATE	DOCKET NUMBER	PROCEEDINGS
7/19/21	77	NOTICE of *Supplemental Authority* filed by State of Missouri, State of Texas (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Thompson, William) (Entered: 07/19/2021)
7/20/21	78	NOTICE of *Filing Corrected Administrative Record Certification, Index, and Record Document* re: 61 Administrative Record, filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America (Attachments: # 1 Exhibit(s) Corrected Certification and Index for Administrative Record, # 2 Exhibit(s) Record Document—"Assessment of the Migrant Protection Protocols (MPP)", # 3 Exhibit(s) Declaration of Juliana Blackwell) (Darrow, Joseph) (Entered: 07/20/2021)

DATE	DOCKET NUMBER	PROCEEDINGS
7/21/21	79	RESPONSE filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America re: 77 Notice (Other) (Darrow, Joseph) (Entered: 07/21/2021)
7/21/21	80	MOTION to Exclude Evidence or, in the alternative, Require Production of Witnesses for Live Testimony re 78 Notice (Other),, filed by State of Missouri, State of Texas (Attachments: # 1 Proposed Order) (Walters, Ryan) (Entered: 07/21/2021)
7/21/21	81	ORDER: Defendants are ORDERED to file a responsive brief by today, July 21, 2021 at 5:00pm (CT). re: 80 MOTION to Exclude Evidence or, in the alternative, Require Production of Witnesses for Live Testimony re 78 Notice. (Ordered by Judge Matthew J. Kacsmaryk on 7/21/2021) (awc) (Entered: 07/21/2021)

DATE	DOCKET NUMBER	PROCEEDINGS
7/21/21	82	RESPONSE AND OBJECTION filed by Joseph R Biden, Jr, Immigration Reform Law Institute, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America re: 80 MOTION to Exclude Evidence or, in the alternative, Require Production of Witnesses for Live Testimony re 78 Notice (Other),, (Darrow, Joseph) (Entered: 07/21/2021)
7/21/21	83	RESPONSE AND OBJECTION filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America re: 80 MOTION to Ex-

DATE	DOCKET NUMBER	PROCEEDINGS
		clude Evidence or, in the alternative, Require Production of Witnesses for Live Testimony re 78 Notice (Other),, (Darrow, Joseph) (Entered: 07/21/2021)
7/21/21	84	MOTION leave to correct the administrative record re 78 Notice (Other),, 45 Administrative Record, filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America with Brief/Memorandum in Support. (Darrow, Joseph) (Entered: 07/21/2021)
7/21/21	85	ORDER—Plaintiffs' Motion is DENIED re: 80 MOTION to Exclude Evidence or, in the alternative, Require Production of Witnesses for Live Testimony, and Defendants Motion is GRANTED re: 84 MOTION leave to correct the administrative record. (Ordered by Judge Matthew J. Kacsmaryk on

DATE	DOCKET NUMBER	PROCEEDINGS
		7/21/2021) (vls) (Entered: 07/21/2021)
7/22/21	86	ORDER: On this date, the Court held a consolidated hearing on Plaintiffs' Motion for Preliminary Injunction and a trial on the merits. The parties are ORDERED to file proposed findings of fact and conclusions of law by 5:00pm, Tuesday, July 27, 2021. In addition, the parties shall file briefs regarding the appropriate relief for Plaintiffs if the Court determines they should prevail on any of their claims. These briefs are due at the same time as the proposed findings of fact and conclusions of law. (Ordered by Judge Matthew J. Kacsmaryk on 7/22/2021) (awc) (Entered: 07/22/2021)
7/22/21	89	ELECTRONIC Minute Entry for proceedings held before Judge Matthew J. Kacsmaryk: Bench Trial completed on 7/22/2021. Written Order to follow. Attorney Appearances: Plaintiff—William Thomas Thompson/Jesus A Osete; Defense—Brian C Ward/ Joseph Anton Darrow. (Court Reporter: Stacy Morrison) (No

DATE	DOCKET NUMBER	PROCEEDINGS
		exhibits) Time in Court—4:16. (vls) (Entered: 07/27/2021)
		* * * * *
7/27/27	90	SUPPLEMENTAL Brief/Memorandum in Support filed by State of Missouri, State of Texas re 86 Order Setting Deadline/Hearing,, (Thompson, William) Modified title on 7/28/2021 (daa). (Entered: 07/27/2021)
7/27/21	91	NOTICE of *Plaintiffs' Proposed Findings of Fact and Conclusions of Law* re: 86 Order Setting Deadline/Hearing,, filed by State of Missouri, State of Texas (Thompson, William) (Entered: 07/27/2021)
7/27/21	92	NOTICE of *Defendants' Proposed Findings of Fact and Conclusions of Law* re: 86 Order Setting Deadline/Hearing,, filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States

DATE	DOCKET NUMBER	PROCEEDINGS
		Immigration and Customs Enforcement, United States of America (Darrow, Joseph) (Entered: 07/27/2021)
7/27/21	93	SUPPLEMENTAL Brief/Memorandum in Support filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America re 86 Order Setting Deadline/Hearing,, *Defendant's Supplemental Brief on Appropriate Remedy* (Darrow, Joseph) Modified title on 7/28/2021 (daa). (Entered: 07/27/2021)
8/13/21	94	Memorandum Opinion and Order (Ordered by Judge Matthew J. Kacsmaryk on 8/13/2021) (vls) (Entered: 08/13/2021)
8/13/21	95	JUDGMENT—On an equal date herewith, the Court entered findings of facts and conclusions of law in accordance with Fed. R. Civ. P. 52. The Court found

DATE	DOCKET NUMBER	PROCEEDINGS
		Plaintiffs' APA and statutory claims meritorious while declining to rule on Plaintiffs' other claims. Accordingly, the Court VACATED and REMANDED the June 1 Memorandum and entered a PERMANENT INJUNCTION against Defendants. (Ordered by Judge Matthew J. Kacsmaryk on 8/13/2021) (vls) (Entered: 08/13/2021)
8/16/21	96	NOTICE OF APPEAL as to 95 Judgment, 94 Memorandum Opinion and Order to the Fifth Circuit by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. IMPORTANT ACTION REQUIRED: Provide an elec-

DATE	DOCKET NUMBER	PROCEEDINGS
		tronic copy of any exhibit you offered during a hearing or trial that was admitted into evidence to the clerk of the district court within 14 days of the date of this notice. Copies must be transmitted as PDF attachments through ECF by all ECF Users or delivered to the clerk on a CD by all non-ECF Users. See detailed instructions here. (Exception: This requirement does not apply to a pro se prisoner litigant.) Please note that if original exhibits are in your possession, you must maintain them through final disposition of the case. (Darrow, Joseph) (Entered: 08/16/2021)
8/16/21	97	USCA Case Number 21-10806 in USCA5 for 96 Notice of Appeal filed by Joseph R Biden, Jr, Tracy Renaud, United States Customs and Border Protection, Alejandro Mayorkas, United States of America, United States Immigration and Customs Enforcement, United States Citizenship and Immigration Services, Tae Johnson, Troy Miller, United States Department of Homeland Security. (awc) (Entered: 08/16/2021)

DATE	DOCKET NUMBER	PROCEEDINGS
8/16/21	98	Emergency MOTION to Stay re 95 Judgment, 94 Memorandum Opinion and Order *Emergency Motion to Stay Court's Order Pending Appeal* filed by Joseph R Biden, Jr, Tae Johnson, Alejandro Mayorkas, Troy Miller, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement, United States of America with Brief/ Memorandum in Support. (Attachments: # 1 Exhibit(s) A—Declaration of David Shahoulian, # 2 Exhibit(s) B—Declaration of Daniel Weiss, # 3 Exhibit(s) C—Declaration of Ricardo Zuniga, # 4 Proposed Order) (Darrow, Joseph) (Entered: 08/16/2021)
8/17/21	99	RESPONSE filed by State of Missouri, State of Texas re: 98 Emergency MOTION to Stay re 95 Judgment, 94 Memorandum Opinion and Order *Emergency Motion to Stay Court's Order Pending Appeal* (Thompson, William) (Entered: 08/17/2021)

DATE	DOCKET NUMBER	PROCEEDINGS
8/17/21	100	Defendants' Emergency Motion to Stay Court's Order Pending Appeal (ECF No. 98) is DENIED. See FED. R. APP. P. 8(a)(1). re: 98 Motion to Stay (Ordered by Judge Matthew J. Kacsmaryk on 8/17/2021) (awc) (Entered: 08/17/2021)
		* * * * *
8/20/21	103	Notice of Filing of Official Electronic Transcript of Consolidated Hearing on Plaintiffs' Motion for Preliminary Injunction and Trial on the Merits held on 7/22/2021 before Judge Matthew J. Kacsmaryk. Court Reporter Stacy Morrison, Telephone number 806-672-6219. Parties are notified of their duty to review the transcript. A copy may be purchased from the court reporter or viewed at the clerk's office. If the transcript contains personal identifiers that must be redacted under MO 61, Fed. R. Civ. P. 5.2 or Fed. R. Crim. P. 49.1, or if the transcript contains the name of a minor child victim or a minor child witness that must be redacted under 18 U.S.C. § 3509, file a Redaction Request—Transcript within

DATE	DOCKET NUMBER	PROCEEDINGS
		21 days. If no action is taken, the entire transcript will be made available through PACER without redaction after 90 calendar days. The clerk will mail a copy of this notice to parties not electronically noticed. (195 pages) Redaction Request due 9/10/2021. Redacted Transcript Deadline set for 9/20/2021. Release of Transcript Restriction set for 11/18/2021. (smm) (Entered: 08/20/2021)
8/23/21	104	Record on Appeal for USCA5 21-10806 (related to 96 appeal): Record consisting of: 1 ECF electronic record on appeal (eROA) is CERTIFIED, 1 Volume(s) electronic transcript. **PLEASE NOTE THE FOLLOWING**: Licensed attorneys must have filed an appearance in the USCA5 case and be registered for electronic filing in the USCA5 to access the paginated eROA in the USCA5 ECF system. (Take these steps immediately if you have not already done so. Once you have filed the notice of appearance and/or USCA5 ECF registration, it may take up to 3

DATE	DOCKET NUMBER	PROCEEDINGS
		business days for the circuit to notify the district clerk that we may grant you access to the eROA in the USCA5 ECF system.) To access the paginated record, log in to the USCA5 ECF system, and under the Utilities menu, select Electronic Record on Appeal. Pro se litigants may request a copy of the record by contacting the appeals deputy in advance to arrange delivery. (awc) (Entered: 08/23/2021)

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 21-10806

STATE OF TEXAS; STATE OF MISSOURI,
PLAINTIFFS-APPELLEES

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA; UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, ACTING COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION; UNITED STATES CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; UR M. JADDOU, DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, DEFENDANTS-APPELLANTS

DOCKET ENTRIES

DATE	**PROCEEDINGS**
8/16/21	US CIVIL CASE docketed. NOA filed by Appellants Mr. Joseph R. Biden, Jr., Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Ale-

DATE	PROCEEDINGS
	jandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, DHS, ICE and USA [21-10806] (MVM) [Entered: 08/16/2021 12:58 PM]

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DATE	PROCEEDINGS
8/17/21	OPPOSED MOTION for stay pending appeal [9645525-2] Ruling is requested by: 08/19/2021, to stay order of the Northern District of Texas dated 08/13/2021 [9645525-3], stay district court proceedings for at least 7 days [9645525-4]. Date of service: 08/17/2021 [21-10806] REVIEWED AND/OR EDITED—The original text prior to review appeared as follows: OPPOSED MOTION filed by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA for stay pending appeal [9645525-2] Ruling is requested by: 08/19/2021. Date of service: 08/17/2021 via

DATE	PROCEEDINGS
	email—Attorney for Appellants: Darrow, Reuveni, Stoltz, Ward; Attorney for Appellees: Sauer, Thompson; US mail—Attorney for Appellant: Darrow [21-10806] (Brian Christopher Ward) [Entered: 08/17/2021 04:53 PM]
8/17/21	EXHIBITS IN SUPPORT of Motion for stay pending appeal [9645525-2] Date of Service: 08/17/2021 [21-10806] REVIEWED AND/OR EDITED—The original text prior to review appeared as follows: RECORD EXCERPTS FILED by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services and United States Customs and Border Protection. Date of service: 08/17/2021 via email—Attorney for Appellants: Darrow, Reuveni, Stoltz, Ward; Attorney for Appellees: Sauer, Thompson; US mail—Attorney for Appellant: Darrow [21-10806] (Brian Christopher Ward) [Entered: 08/17/2021 05:13 PM]
8/17/21	COURT DIRECTIVE ISSUED requesting a response to the Motion for stay pending appeal filed by Appellants USA, DHS, ICE,

DATE	PROCEEDINGS
	United States Customs and Border Protection, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Ms. Tracy Renaud, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Joseph R. Biden, Jr. and United States Citizenship and Immigration Services in 21-10806 [9645525-2], Motion to stay order filed by Appellants USA, DHS, ICE, United States Customs and Border Protection, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Ms. Tracy Renaud, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Joseph R. Biden, Jr. and United States Citizenship and Immigration Services in 21-10806 [9645525-3], Motion for extraordinary relief filed by Appellants USA, DHS, ICE, United States Customs and Border Protection, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Ms. Tracy Renaud, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Joseph R. Biden, Jr. and United States Citizenship and Immigration Services in 21-10806 [9645525-4] Response/Opposition

DATE	PROCEEDINGS
	due on 08/18/2021. [21-10806] (CBW) [Entered: 08/17/2021 06:42 PM]

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DATE	PROCEEDINGS
8/18/21	SUFFICIENT AMICUS CURIAE BRIEF FILED by American Civil Liberties Union and American Civil Liberties Union of Texas. Consent is Not Necessary as a Motion has been Granted. Sufficient Brief deadline satisfied [21-10806] REVIEWED AND/OR EDITED—The original text prior to review appeared as follows: AMICUS CURIAE BRIEF FILED by American Civil Liberties Union and American Civil Liberties Union of Texas. Consent is Not Necessary as a Motion has been Granted. Brief NOT Sufficient as it requires an Appearance Form from counsel signing the brief. Additionally the Brief requires title does not agree the caption of the case. Instructions to Attorney: PLEASE READ THE ATTACHED NOTICE FOR INSTRUCTIONS ON HOW TO REMEDY THE DEFAULT. Sufficient Brief due on 09/01/2021 for Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Texas. [21-10806] (MVM) [Entered: 08/18/2021 12:48 PM]
8/18/21	SUFFICIENT AMICUS CURIAE BRIEF FILED by American Immigration Council, American Immigration Lawyers Association,

DATE	PROCEEDINGS
	Catholic Legal Immigration Network, Incorporated, Center for Gender & Refugee Studies, Human Rights First, Justice Action Center, National Immigration Law Center, Round Table of Former Immigration Judges and Southern Poverty Law Center. Consent is Not Necessary as a Motion has been Granted.
	Sufficient Brief deadline satisfied [21-10806] REVIEWED AND/OR EDITED—The original text prior to review appeared as follows: AMICUS CURIAE BRIEF FILED by American Immigration Council, American Immigration Lawyers Association, Catholic Legal Immigration Network, Incorporated, Center for Gender & Refugee Studies, Human Rights First, Justice Action Center, National Immigration Law Center, Round Table of Former Immigration Judges and Southern Poverty Law Center. Consent is Not Necessary as a Motion has been Granted. Brief NOT Sufficient as it requires an Appearance Form from counsel signing the brief. Additionally the Brief requires title does not agree with the caption of the case. Instructions to Attorney: PLEASE READ THE ATTACHED NOTICE FOR INSTRUCTIONS ON HOW TO REMEDY THE DEFAULT. Sufficient Brief due on 09/01/2021 for Amici Curiae American Immigration Council, American Immigration Lawyers Association, Cath-

DATE	PROCEEDINGS
	olic Legal Immigration Network, Incorporated, Center for Gender & Refugee Studies, Human Rights First, Justice Action Center, National Immigration Law Center, Round Table of Former Immigration Judges and Southern Poverty Law Center. [21-10806] (MVM) [Entered: 08/18/2021 12:56 PM]

* * * * *

8/18/21	RESPONSE/OPPOSITION [9646618-1] to the Motion for stay pending appeal filed by Appellants USA, DHS, ICE, United States Customs and Border Protection, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Ms. Tracy Renaud, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Joseph R. Biden, Jr. and United States Citizenship and Immigration Services in 21-10806 [9645525-2] Date of Service: 08/18/2021. [21-10806] REVIEWED AND/OR EDITED—The original text prior to review appeared as follows: RESPONSE/OPPOSITION filed by State of Texas [9646618-1] to the Motion for stay pending appeal filed by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas,

DATE	PROCEEDINGS
	Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA [9645525-2], Motion to stay order filed by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA [9645525-3], Motion for extraordinary relief filed by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA [9645525-4] Date of Service: 08/18/2021 via email—Attorney for Amici Curiae: Bookey, Wofsy; Attorney for Appellees: Osete, Sauer, Stone, Thompson; Attorney for Appellants: Reuveni, Stoltz, Ward;

DATE	PROCEEDINGS
	US mail—Attorney for Appellant: Darrow. [21-10806] (Judd Edward Stone II) [Entered: 08/18/2021 04:41 PM]
8/18/21	SUFFICIENT AMICUS CURIAE BRIEF FILED by State of Alabama, State of Arizona, State of Arkansas, State of Florida, State of Georgia, State of Indiana, State of Kansas, State of Kentucky, State of Louisiana, State of Mississippi, State of Montana, State of Ohio, State of Oklahoma, State of South Carolina and State of West Virginia. The Consent is Included in the Brief. Sufficient Brief deadline satisfied [21-10806] REVIEWED AND/OR EDITED—The original text prior to review appeared as follows: AMICUS CURIAE BRIEF FILED by State of West Virginia, State of South Carolina, State of Oklahoma, State of Ohio, State of Montana, State of Mississippi, State of Louisiana, State of Kentucky, State of Kansas, State of Georgia, State of Florida, State of Arkansas, State of Arizona, State of Alabama and State of Indiana. Consent is Not Necessary as Amicus is a Government Entity. Additionally the Brief requires the caption must be an exact match to the court's official caption. Sufficient Brief due on 08/19/2021 for Amici Curiae State of Indiana, State of Alabama, State of Arizona, State of Arkansas, State of Florida, State of Georgia, State of

DATE	PROCEEDINGS
	Kansas, State of Kentucky, State of Louisiana, State of Mississippi, State of Montana, State of Ohio, State of Oklahoma, State of South Carolina and State of West Virginia. [21-10806] REVIEWED AND/OR EDITED —The original text prior to review appeared as follows: AMICUS CURIAE BRIEF FILED by States of Indiana, Alabama, Arizona, Arkansas, Florida, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia. Date of service: 08/18/2021 via email—Attorney for Amici Curiae: Bookey, Wofsy; Attorney for Appellees: Osete, Sauer, Stone, Thompson; Attorney for Appellants: Reuveni, Stoltz, Ward; US mail—Attorney for Appellant: Darrow [21-10806] (Thomas Molnar Fisher) [Entered: 08/18/2021 04:46 PM]

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8/19/21	REPLY filed by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA [9646959-1] to the Response/Opposition filed

DATE	PROCEEDINGS
	by Appellee State of Texas [9646618-2], to the Motion filed by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA [9645525-2], to the Motion filed by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA [9645525-3], to the Motion filed by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA [9645525-4].

DATE	PROCEEDINGS
	Date of Service: 08/19/2021 via email—Attorney for Amici Curiae: Bookey, Fisher, Wofsy; Attorney for Appellants: Darrow, Reuveni, Stoltz, Ward; Attorney for Appellees: Osete, Sauer, Stone, Thompson; US mail—Attorney for Appellant: Darrow. [21-10806] (Brian Christopher Ward) [Entered: 08/19/2021 09:44 AM]

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8/19/21	NON DISPOSITIVE PUBLISHED OPINION FILED. Judge: JWE, Judge: ASO, Judge: CTW; denying Motion for stay pending appeal filed by Appellants USA, DHS, ICE, United States Customs and Border Protection, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Ms. Tracy Renaud, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Joseph R. Biden, Jr. and United States Citizenship and Immigration Services [9645525-2]; denying Motion to stay order filed by Appellants USA, DHS, ICE, United States Customs and Border Protection, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Ms. Tracy Renaud, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr.

DATE	PROCEEDINGS
	Joseph R. Biden, Jr. and United States Citizenship and Immigration Services [9645525-3]; denying Motion for administrative stay of seven days filed by Appellants USA, DHS, ICE, United States Customs and Border Protection, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Ms. Tracy Renaud, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Joseph R. Biden, Jr. and United States Citizenship and Immigration Services [9645525-4]; expediting the appeal [9647709-3] [21-10806] (CBW) [Entered: 08/19/2021 09:58 PM]
	* * * * *
8/23/21	ELECTRONIC RECORD ON APPEAL REQUESTED from District Court for 2:21-CV-67. Electronic ROA due on 08/26/2021. [21-10806] (LLL) [Entered: 08/23/2021 08:34 AM]
	* * * * *
8/23/21	DOCUMENT filed. Order of the Supreme Court staying the injunction issued by the District Court until 8/24/2021. [21-10806] (LLL) [Entered: 08/23/2021 01:19 PM]
8/23/21	ELECTRONIC RECORD ON APPEAL FILED. Admitted Exhibits on File in District Court? No. Video/Audio Exhibits on

DATE	PROCEEDINGS
	File in District Court? No Electronic ROA deadline satisfied. [21-10806] (DDL) [Entered: 08/23/2021 02:12 PM]

* * * * *

8/25/21	DOCUMENT filed. Supreme Court Order of 8/24/2021 denying the request for stay of the District Court's injunction. [21-10806] (LLL) [Entered: 08/25/2021 08:26 AM]

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9/20/21	APPELLANT'S BRIEF FILED # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Paper Copies of Brief due on 09/27/2021 for Appellants Joseph R. Biden Jr., Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement and United States of America. [21-10806] REVIEWED AND/OR EDITED—The original text prior to review appeared as follows: APPELLANT'S BRIEF FILED by Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D.

DATE	PROCEEDINGS
	Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA. Date of service: 09/20/2021 via email—Attorney for Amici Curiae: Bookey, Fisher, Wofsy; Attorney for Appellants: Darrow, Reuveni, Stoltz, Ward; Attorney for Appellees: Osete, Pettit, Sauer, Stone, Thompson, Wilson [21-10806] (Brian Christopher Ward) [Entered: 09/20/2021 07:56 PM]
9/20/21	RECORD EXCERPTS FILED. # of Copies Provided: 0 Paper Copies of Record Excerpts due on 09/27/2021 for Appellants Joseph R. Biden Jr., Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement and United States of America. [21-10806]

DATE	PROCEEDINGS
	REVIEWED AND/ OR EDITED—The original text prior to review appeared as follows: RECORD EXCERPTS FILED by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA. Date of service: 09/20/2021 via email—Attorney for Amici Curiae: Bookey, Fisher, Wofsy; Attorney for Appellants: Darrow, Reuveni, Stoltz, Ward; Attorney for Appellees: Osete, Pettit, Sauer, Stone, Thompson, Wilson [21-10806] (Joseph Anton Darrow) [Entered: 09/20/2021 08:02 PM]
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9/27/21	AMICUS CURIAE BRIEF FILED by Childrens Defense Fund, First Focus on Children, Center for The Human Rights of Children at Loyola University Chicago School of Law, Angry Tias And Abuelas of the Rio Grande Valley, Save The Children Action Network, Save The Children Federation, Incorporated, Kids in Need of Defense and Young Center for Immigrant Children's

DATE	PROCEEDINGS
	Rights. The Consent is Included in the Brief. # of Copies Provided: 0
	Paper Copies of Brief due on 10/04/2021 for Amici Curiae Young Center for Immigrant Children's Rights, Kids in Need of Defense, Save The Children Federation, Incorporated, Save The Children Action Network, Angry Tias And Abuelas of the Rio Grande Valley, Center for The Human Rights of Children at Loyola University Chicago School of Law, First Focus on Children and Childrens Defense Fund. [21-10806]
	REVIEWED AND/OR EDITED—The original text prior to review appeared as follows: AMICUS CURIAE BRIEF FILED by Young Center for Immigrant Children's Rights, et al.. Date of service: 09/27/2021 via email—Attorney for Amici Curiae: Bookey, Fisher, Wofsy; Attorney for Appellants: Darrow, Reuveni, Stoltz, Ward; Attorney for Appellees: Osete, Pettit, Sauer, Stone, Thompson, Wilson [21-10806] (Alan J. Stone) [Entered: 09/27/2021 04:11 PM]
	* * * * *
9/27/21	AMICUS CURIAE BRIEF FILED by American Civil Liberties Union and American Civil Liberties Union of Texas. The Consent is Included in the Brief. # of Copies Provided: 0

DATE	PROCEEDINGS
	Paper Copies of Brief due on 10/04/2021 for Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Texas. [21-10806]
	REVIEWED AND/OR EDITED—The original text prior to review appeared as follows: AMICUS CURIAE BRIEF FILED by American Civil Liberties Union and American Civil Liberties Union of Texas. Date of service: 09/27/2021 via email—Attorney for Amici Curiae: Bookey, Fisher, Stone, Wofsy; Attorney for Appellants: Darrow, Reuveni, Stoltz, Ward; Attorney for Appellees: Osete, Pettit, Sauer, Stone, Thompson, Wilson [21-10806] (Cody Wofsy) [Entered: 09/27/2021 06:41 PM]
	* * * * *
9/29/21	OPPOSED MOTION filed by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA to stay further proceedings in this court. Reason: to hold appeal in abeyance pending administrative action regarding

DATE	PROCEEDINGS
	the Migrant Protection Protocols and to hold briefing deadlines in abeyance pending consideration of this motion. Date of service: 09/29/2021 via email—Attorney for Amici Curiae: Bookey, Fisher, Stone, Wofsy; Attorney for Appellants: Darrow, Reuveni, Stoltz, Ward; Attorney for Appellees: Osete, Pettit, Sauer, Stone, Thompson, Wilson [21-10806] (Erez Reuveni) [Entered: 09/29/2021 07:27 PM]

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DATE	PROCEEDINGS
9/30/21	AMICUS CURIAE BRIEF FILED by American Immigration Council, American Immigration Lawyers Association, Catholic Legal Immigration Network, Incorporated, Center for Gender & Refugee Studies, Human Rights First, Justice Action Center, Law School Clinics, National Immigration Law Center, Non-Profit Organizations, Round Table of Former Immigration Judges and Southern Poverty Law Center. Consent is Not Necessary as a Motion has been Granted. # of Copies Provided: 0 Paper Copies of Brief due on 10/05/2021 for Amici Curiae American Immigration Council, American Immigration Lawyers Association, Catholic Legal Immigration Network, Incorporated, Center for Gender & Refugee Studies, Human Rights First, Justice Action Center, Law School Clinics, National Immigration Law Center, Non-Profit Organizations,

DATE	PROCEEDINGS
	Round Table of Former Immigration Judges and Southern Poverty Law Center. [21-10806] (LLL) [Entered: 09/30/2021 01:57 PM]
	* * * * *
10/4/21	RESPONSE/OPPOSITION [9680440-1] to the Motion to stay further proceedings in this court [9677663-2] [9678497-2] Response/ Opposition deadline satisfied. [21-10806] REVIEWED AND/OR EDITED—The original text prior to review appeared as follows: RESPONSE/OPPOSITION filed by State of Texas [9680440-1] to the Motion to stay further proceedings in this court filed by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA [9677663-2] Date of Service: 10/04/2021 via email—Attorney for Amici Curiae: Bookey, Fisher, Stone, Wofsy; Attorney for Appellants: Darrow, Reuveni, Stoltz, Ward; Attorney for Appellees: Osete, Pettit, Sauer, Stone, Thompson, Wilson. [21-10806] (Benjamin D. Wilson) [Entered: 10/04/2021 11:52 AM]

DATE	PROCEEDINGS
10/4/21	COURT ORDER denying Motion to stay further proceedings in this court filed by Appellants USA, DHS, ICE, United States Customs and Border Protection, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Ms. Tracy Renaud, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Joseph R. Biden, Jr. and United States Citizenship and Immigration Services [9677663-2] [21-10806] (LLL) [Entered: 10/04/2021 03:22 PM]

* * * * *

10/12/21	APPELLEE'S BRIEF FILED. # of Copies Provided: 0 E/Res's Brief deadline satisfied. Paper Copies of Brief due on 10/18/2021 for Appellees State of Missouri and State of Texas. [21-10806]
	REVIEWED AND/OR EDITED—The original text prior to review appeared as follows: APPELLEE'S BRIEF FILED by State of Texas. Date of service: 10/12/2021 via email—Attorney for Amici Curiae: Bookey, Fisher, Stone, Wofsy; Attorney for Appellants: Darrow, Reuveni, Stoltz, Ward; Attorney for Appellees: Osete, Pettit, Sauer, Stone, Thompson, Wilson [21-10806] (Judd Edward Stone II) [Entered: 10/12/2021 10:31 PM]

DATE	PROCEEDINGS

* * * * *

10/19/21 AMICUS CURIAE BRIEF FILED by Immigration Reform Law Institute. Consent is Not Necessary as a Motion has been Granted. # of Copies Provided: 0

Paper Copies of Brief due on 10/25/2021 for Amicus Curiae Immigration Reform Law Institute. [21-10806] (LLL) [Entered: 10/19/2021 03:01 PM]

* * * * *

10/19/21 AMICUS CURIAE BRIEF FILED by State of Utah, State of Alabama, State of Arizona, State of Arkansas, State of Florida, State of Georgia, State of Indiana, State of Kansas, State of Kentucky, State of Louisiana, State of Mississippi, State of Montana, State of Ohio, State of Oklahoma, State of South Carolina and State of West Virginia. Consent is Not Necessary as Amicus is a Government Entity.

# of Copies Provided: 0

Paper Copies of Brief due on 10/25/2021 for Amici Curiae State of Utah, State of Alabama, State of Arizona, State of Arkansas, State of Florida, State of Georgia, State of Indiana, State of Kansas, State of Kentucky, State of Louisiana, State of Mississippi, State of Montana, State of Ohio, State of Oklahoma,

DATE	PROCEEDINGS
	State of South Carolina and State of West Virginia. [21-10806]
	REVIEWED AND/OR EDITED—The original text prior to review appeared as follows: AMICUS CURIAE BRIEF FILED by Thomas M. Fisher. Date of service: 10/19/2021 via email—Attorney for Amici Curiae: Bookey, Crapo, Fisher, Stone, Wofsy; Attorney for Appellants: Darrow, Reuveni, Stoltz, Ward; Attorney for Appellees: Osete, Pettit, Sauer, Stone, Thompson, Wilson [21-10806] (Thomas Molnar Fisher) [Entered: 10/19/2021 03:22 PM]
10/19/21	APPELLANT'S REPLY BRIEF FILED # of Copies Provided: 0
	Reply Brief deadline satisfied. Paper Copies of Brief due on 10/25/2021 for Appellants Joseph R. Biden Jr., Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection, United States Department of Homeland Security, United States Immigration and Customs Enforcement and United States of America. [21-10806]

DATE	PROCEEDINGS
	REVIEWED AND/ OR EDITED—The original text prior to review appeared as follows: APPELLANT'S REPLY BRIEF FILED by Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA. Date of service: 10/19/2021 via email—Attorney for Amici Curiae: Bookey, Crapo, Fisher, Stone, Wofsy; Attorney for Appellants: Darrow, Reuveni, Stoltz, Ward; Attorney for Appellees: Osete, Pettit, Sauer, Stone, Thompson, Wilson [21-10806] (Brian Christopher Ward) [Entered: 10/19/2021 07:56 PM]
	* * * * *
10/29/21	OPPOSED MOTION to vacate the decision of the district court [9701240-2], to remand case to the District Court, for limited remand [9701240-4]. [21-10806]
	REVIEWED AND/ OR EDITED—The original text prior to review appeared as follows: OPPOSED MOTION filed by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration

DATE	PROCEEDINGS
	and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA to vacate the decision of the district court [9701240-2], to remand case to the to the district court, following vacatur of the judgment and permanent injunction by this Court. Date of service: 10/29/2021 via email—Attorney for Amici Curiae: Bookey, Crapo, Fisher, Stone, Wofsy; Attorney for Appellants: Darrow, Reuveni, Stoltz, Ward; Attorney for Appellees: Osete, Pettit, Sauer, Stone, Thompson, Wilson [21-10806] (Erez Reuveni) [Entered: 10/29/2021 03:12 PM]
10/29/21	COURT DIRECTIVE ISSUED requesting a response to the Motion to vacate the decision of the district court [9701240-2], Motion to remand case [9701240-3], Motion for limited remand in 21-10806 [9701240-4] Response/ Opposition due on 11/01/2021 by 12PM CST. [21-10806] (LLL) [Entered: 10/29/2021 04:43 PM]
11/1/21	RESPONSE/OPPOSITION [9702017-1] to the Motion to vacate the decision of the district court filed by Appellants USA, DHS, ICE, United States Customs and Border Protection, Mr. Alejandro Mayorkas, Secretary,

DATE	PROCEEDINGS
	U.S. Department of Homeland Security, Ms. Tracy Renaud, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Joseph R. Biden, Jr. and United States Citizenship and Immigration Services in 21-10806 [9701240-2], Motion to remand case filed by Appellants USA, DHS, ICE, United States Customs and Border Protection, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Ms. Tracy Renaud, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Joseph R. Biden, Jr. and United States Citizenship and Immigration Services in 21-10806 [9701240-3], Motion for extraordinary relief filed by Appellants USA, DHS, ICE, United States Customs and Border Protection, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Ms. Tracy Renaud, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Joseph R. Biden, Jr. and United States Citizenship and Immigration Services in 21-10806 [9701240-4] [9701397-2] Response/ Opposition deadline satisfied. [21-10806]

DATE	PROCEEDINGS
	REVIEWED AND/OR EDITED— The original text prior to review appeared as follows: RESPONSE/OPPOSITION filed by State of Texas [9702017-1] to the Motion filed by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA [9701240-2], Motion filed by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA [9701240-3], Motion filed by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy

DATE	PROCEEDINGS
	Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA [9701240-4] Date of Service: 11/01/2021 via email—Attorney for Amici Curiae: Bookey, Crapo, Fisher, Stone, Wofsy; Attorney for Appellants: Darrow, Reuveni, Stoltz, Ward; Attorney for Appellees: Osete, Pettit, Sauer, Stone, Thompson, Wilson. [21-10806] (Benjamin D. Wilson) [Entered: 11/01/2021 11:49 AM]

* * * * *

11/1/21	AMENDED COURT ORDER carrying with the case Motion to vacate the decision of the district court filed by Appellants USA, DHS, ICE, United States Customs and Border Protection, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Ms. Tracy Renaud, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Joseph R. Biden, Jr. and United States Citizenship and Immigration Services [9701240-2]; carrying with the case Motion to remand case filed by Appellants USA, DHS, ICE, United States Customs and Border Protection, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Ms. Tracy Renaud, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Mr. Tae D. Johnson, Acting Director,

DATE	PROCEEDINGS
	U.S. Immigration and Customs Enforcement, Mr. Joseph R. Biden, Jr. and United States Citizenship and Immigration Services [9701240-3]; carrying with the case Motion for limited remand filed by Appellants USA, DHS, ICE, United States Customs and Border Protection, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Ms. Tracy Renaud, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Joseph R. Biden, Jr. and United States Citizenship and Immigration Services [9701240-4] [21-10806] (LLL) [Entered: 11/01/2021 02:50 PM]
11/1/21	REPLY filed by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Ur M. Jaddou, Director of U.S. Citizenship and Immigration Services, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA [9702554-1] to the Motion to vacate the decision of the district court filed by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director,

DATE	PROCEEDINGS
	U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA [9701240-2], to the Motion to remand case filed by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA [9701240-3], to the Motion for extraordinary relief filed by Appellants Mr. Joseph R. Biden, Jr., DHS, ICE, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Ms. Tracy Renaud, United States Citizenship and Immigration Services, United States Customs and Border Protection and USA [9701240-4], to the Response/Opposition filed by Appellees State of Texas and State of Missouri [9702017-2].

DATE	PROCEEDINGS
	Date of Service: 11/01/2021 via email—Attorney for Amici Curiae: Bookey, Crapo, Fisher, Stone, Wofsy; Attorney for Appellants: Darrow, Reuveni, Stoltz, Ward; Attorney for Appellees: Osete, Pettit, Sauer, Stone, Thompson, Wilson. [21-10806] (Erez Reuveni) [Entered: 11/01/2021 06:29 PM]
11/2/21	ORAL ARGUMENT HEARD before Judges Barksdale, Engelhardt, Oldham. Arguing Person Information Updated for: Brian Christopher Ward arguing for Appellant Joseph R. Biden, Jr., Appellant Director of U.S. Citizenship and Immigration Services Jaddou, Ur M., Appellant Acting Director Johnson, U.S. Immigration and Customs Enforcement, Appellant Secretary Mayorkas, U.S. Department of Homeland Security, Appellant Acting Commissioner Miller, U.S. Customs and Border Protection, Appellant United States Citizenship and Immigration Services, Appellant United States Customs and Border Protection, Appellant United States Department of Homeland Security, Appellant United States Immigration and Customs Enforcement; Arguing Person Information Updated for: Benjamin D. Wilson arguing for Appellee State of Texas [21-10806] (PFT) [Entered: 11/02/2021 02:55 PM]
12/13/21	PUBLISHED OPINION FILED. [21-10806 Affirmed] Judge: RHB, Judge: KDE, Judge: ASO. Mandate issue date is

DATE	PROCEEDINGS
	02/04/2022; denying Motion to vacate the decision of the district court filed by Appellants USA, DHS, ICE, United States Customs and Border Protection, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Ms. Tracy Renaud, Mr. Troy Miller, Acting Commissioner, U.S Customs and Border Protection, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Joseph R. Biden, Jr. and United States Citizenship and Immigration Services [9701240-2]; denying Motion to remand case filed by Appellants USA, DHS, ICE, United States Customs and Border Protection, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Ms. Tracy Renaud, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Joseph R. Biden, Jr. and United States Citizenship and Immigration Services [9701240-3]; denying Motion for limited remand filed by Appellants USA, DHS, ICE, United States Customs and Border Protection, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Ms. Tracy Renaud, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Joseph R. Biden, Jr. and United

DATE	PROCEEDINGS
	States Citizenship and Immigration Services [9701240-4] [21-10806] (This opinion includes URL material that is archived by the Fifth Circuit Court of Appeals Library, and made available at http://www.lb5.uscourts.gov/ArchivedURLS/.) (NFD) [Entered: 12/13/2021 08:16 PM]
12/13/21	JUDGMENT ENTERED AND FILED. Costs Taxed Against: Each Party Bear Its Own Costs on Appeal. [21-10806] (NFD) [Entered: 12/14/2021 01:10 PM]
12/21/21	TECHNICAL REVISION MADE TO OPINION. [9733213-2] [21-10806] (NFD) [Entered: 12/21/2021 02:50 PM]
12/30/21	SUPREME COURT NOTICE that petition for writ of certiorari [9745385-2] was filed by Appellants Mr. Joseph R. Biden, Jr., Ur M. Jaddou, Director of U.S. Citizenship and Immigration Services, Mr. Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, Mr. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Mr. Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, United States Citizenship and Immigration Services, United States Customs and Border Protection, DHS, ICE and USA on 12/29/2021. Supreme Court Number: 21-954. [21-10806] (SMC) [Entered: 12/30/2021 02:38 PM]

* * * * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Case No. 2:21-cv-00067-Z

THE STATE OF TEXAS AND THE STATE OF MISSOURI,
PLAINTIFFS

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS
PRESIDENT OF THE UNITED STATES OF AMERICA,
ET AL., DEFENDANTS

Filed: May 14, 2021

APPENDIX IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
DECLARATION OF RYAN D. WALTERS

U.S. Customs and Border Protection Custody and Transfer Statistics FY2021

EXHIBIT B-4

Custody and Transfer Statistics FY2021

Fiscal Year 2021 runs from October 1, 2020 to September 30, 2021

Collapse All

Office of Field Operations – Dispositions and Transfers

OFO Monthly Southwest Border Credible Fear Inadmissibles by Disposition

Disposition	Oct-20	Nov-20	Dec-20	Jan-21	Feb-21	Mar-21	Apr-21
Expedited Removal - Credible Fear (ERCF)[1]	63	94	111	133	117	56	77
Notice to Appear (NTA)[2,7]	22	36	74	93	200	795	2,027
Notice to Appear (NTA) - Person Released	0	0	0	0	0	0	0
Notice to Appear (NTA) - Person Detained	0	0	0	0	0	0	0
Visa Waiver Program (VWP)-Removal - Limited Review[3]	0	0	0	0	0	0	0
Visa Waiver Program (VWP)-Refusal - Limited Review[3]	0	0	0	0	0	0	0
Stowaway - Limited Review[3]	0	0	0	0	0	0	0
Total Credible Fear Inadmissibles	85	130	185	226	317	851	2,104

Title 8 Inadmissibles

Field Office	Oct-20	Nov-20	Dec-20	Jan-21	Feb-21	Mar-21	Apr-21
El Paso	163	196	229	229	257	283	521
Laredo	417	369	347	351	360	561	659
San Diego	325	373	490	695	827	1,148	1,972
Tucson	97	70	66	83	92	143	261
Total	1,002	1,008	1,132	1,358	1,536	2,135	3,413

OFO Monthly Southwest Border Credible Fear Inadmissibles by Program

	Oct-20	Nov-20	Dec-20	Jan-21	Feb-21	Mar-21	Apr-21
Migrant Protection Protocols (MPP)[4] - Initial returns	3	9	8	9	0	0	0
Asylum Cooperative Agreement (ACA)[5] Program - Expedited Removal - Credible Fear (ERCF)	0	0	0	0	0	0	0
ACA - Notice to Appear (NTA)	0	0	0	0	0	0	0
Humanitarian Asylum Review Process (HARP)[6] Program -Expedited Removal - Credible Fear (ERCF)	0	0	0	0	0	0	0
HARP - Notice to Appear	0	0	0	0	0	0	0

OFO Monthly Southwest Border Credible Fear by Transfer Destination

Destination	Oct-20	Nov-20	Dec-20	Jan-21	Feb-21	Mar-21	Apr-21
Federal/State/Local Facility	10	11	18	20	15	23	54
ICE/ERO	62	105	130	187	235	455	1,491
ICE/HSI	3	0	0	0	0	0	6
OFO	0	0	0	0	0	0	0
Return to Foreign	2	7	12	11	0	0	0
USBP	5	5	0	0	7	16	32
Total	82	128	160	218	257	494	1,583

[1] *Includes subjects who claimed credible fear in Office of Field Operations (OFO) custody at a port of entry. OFO refers all such claims to USCIS. Credible fear may be claimed at any time prior to removal.*

[2] *Office of Field Operations has the discretion to process arriving noncitizens for expedited removal or notice to appear in removal proceedings or other disposition. In the event of NTA disposition, applicants for admission have up to one year to seek asylum and while proceeding before the immigration judge.*

[3] *The term "limited review" refers to the process of an immigration judge considering prior administrative adjudicated claims of US citizenship, Lawful Permanent Residence, Asylum or Refugee status. The immigration judge considers only the claim to such benefit and not the underlying inadmissibility or removal ground that may apply in the noncitizen's case.*

[4] *Migrant Protection Protocols (MPP) - An exercise of the Department of Homeland Security's (DHS) express statutory authority under the Immigration and Nationality Act (INA) to return certain applicants for admission, or those who enter illegally between the ports of entry, who are subject to removal proceedings under INA Section 240 Removal Proceedings to Mexico pending removal proceedings. Individuals processed for MPP are released from detained immigration docket while awaiting their removal proceedings and like all asylum seekers have up to one year after initiation of removal proceedings to claim fear and file form I589 to have their claims heard by an Asylum Officer or Immigration Judge.*

[5] *Asylum Cooperative Agreement (ACA) - CBP, in coordination with ICE Enforcement Removal Operations (ERO), and USCIS, have executed ACAs to facilitate the transfer of noncitizens to a third country where they will have access to full and fair procedures for determining their protection claims, based on the ACAs. Currently, Guatemala is the only ACA participant.*

Humanitarian Asylum Review Process (HARP) - Developed by Customs and Border Protection (CBP), in coordination with ICE, USCIS, and EOIR to promptly address credible fear claims of amenable Mexican nationals.

[7] *Initial disposition of Expedited Removal is converted to a Notice to Appear in full removal proceedings after a preliminary finding by Asylum Officer, Supervisor or Immigration Judge of credible fear; Custody status is most likely released on recognizance or "Order of Recognizance" pending discretion of an asylum grant. Legal status while out of custody is parole until asylum is granted. Continued detention of a migrant who has more likely than not demonstrated credible fear is not in the interest of resource allocation or justice.*

Office of Field Operations - In Custody

Field Operations - Southwest Border In Custody[1]

Detention Capacity	Oct-20	Nov-20	Dec-20	Jan-21	Feb-21	Mar-21	Apr-21
1005	39 (3.88%)	49 (4.88%)	53 (5.27%)	55 (5.47%)	64 (6.37%)	107 (10.6%)	195 (19.4%)

[1] *Represents an estimate of each cell's code occupancy limit, as outlined in technical design standards when constructed, multiplied by the total number of cells for all ports of entry within each field office. This number does not account for the unique circumstances that may limit the occupancy of a given cell (e.g., high risk, nursing/pregnant, transgender, unaccompanied minor, etc.) nor does it reflect operational limitations that affect a port's capacity to detain. CBP's capacity to detain individuals in its short-term facilities depends on many factors, including: demographics of the individual in custody; medical or other needs of individuals in custody; ability of ICE ERO (or, if an unaccompanied child, the U.S. Department of Health and Human Services) to transfer individuals out of CBP custody; and OFO's available resources to safely process and hold individuals.*

[2] *Represents the average number of travelers in custody on a daily basis averaged over the 30 day period, at all Southwest Border Field Office locations. Travelers include inadmissible individuals, lawful permanent residents, asylees, refugees, and United States Citizens who are being detained to verify wants, warrants, criminal, administrative or other judicial process.*

Office of Field Operations - Title 8, 19 and 42

OFO Southwest Border T8, T19, T42

Category	Oct-20	Nov-20	Dec-20	Jan-21	Feb-21	Mar-21	Apr-21
Title 8	1,002	1,008	1,132	1,358	1,536	2,135	3,413
Title 19	7,198	6,937	6,917	5,447	5,251	6,826	9,332
Title 42	1,899	1,942	1,748	1,775	1,947	2,003	1,751

OFO Southwest Border T8, T19, T42

Category	Oct-20	Nov-20	Dec-20	Jan-21	Feb-21	Mar-21	Apr-21
Title 8	1,002	1,008	1,132	1,358	1,536	2,135	3,413

Category	Oct-20	Nov-20	Dec-20	Jan-21	Feb-21	Mar-21	Apr-21
Title 19	7,198	6,937	6,917	5,447	5,251	6,826	9,332
Title 42	1,899	1,942	1,748	1,775	1,947	2,003	1,751

U.S. Border Patrol - Dispositions and Transfers

USBP Monthly Southwest Border Apprehensions by Processing Disposition

The processing disposition decision related to each apprehension is made on a case-by-case basis. The processing dispositions below are representative of the time data was aggregated. As dispositions are subject to change throughout the immigration process, the data does not necessarily reflect final dispositions or removals.

Processing Disposition	Oct-20	Nov-20	Dec-20	Jan-21	Feb-21	Mar-21	Apr-21
Expedited Removal (ER)	1,248	1,449	1,642	2,286	3,637	6,416	10,669
PACR, HARP, ACA[1]	0	2	0	6	2	13	25
Notice To Appear/Order of Recognizance, I-385 – Released[2]	20	9	18	1,317	8,797	26,282	26,233
Reinstatement of Prior Removal	1,533	1,418	1,430	1,274	1,126	1,488	1,697
Voluntary Return	169	964	1,736	1,815	1,857	2,387	2,268
Warrant/Notice To Appear (NTA) - Detained	2,092	2,766	4,184	5,151	9,639	24,610	20,762
MPP[1]	796	1,106	1,347	717	30	0	0
Other[3]	186	172	189	217	232	919	1,843
Total Title 8 Apprehensions	6,044	7,886	10,546	12,783	25,320	62,115	63,497

[1] *Subjects enrolled in multiple programs are only counted once based on the following order: PACR, ACA, HARP, MPP.*

[2] *Includes individuals released with a Notice to Appear/Order of Recognizance (NTA/OR) with an order to appear for immigration proceedings and individuals who are processed, not admitted, and released without an NTA as a matter of discretion.*

[3] *Processing dispositions may include subjects that do not yet have a final disposition at the time the data was collected or subjects processed under the visa waiver program, turned over to, paroled, etc.*

USBP Monthly Southwest Border Apprehensions by Transfer Destination

Following processing, U.S. Border Patrol arranges transfer of individuals to the appropriate entity based on disposition and other factors such as criminal charges. The transfer destinations below are representative of the time data was aggregated. The data does not reflect subsequent transfer destinations after subjects leave Border Patrol custody and are subject to change if an individual returns to U.S. Border Patrol custody during the same event.

Transfer Destination	Oct-20	Nov-20	Dec-20	Jan-21	Feb-21	Mar-21	Apr-21
Humanitarian Release	19	9	18	1,321	8,798	26,103	26,098
Federal[1]	3,491	4,077	5,746	7,443	13,518	30,993	30,747
Federal - Northern Triangle Repatriation Flights	20	7	0	26	11	8	1
Federal - Mexican Repatriation Flights	499	894	566	528	187	205	164
Port of Entry (Non-MPP)	920	1,377	2,411	2,150	2,100	2,825	3,042
Port of Entry (MPP)	796	1,106	1,347	717	30	0	0
State and Local Law Enforcement Agencies	184	229	315	443	525	1,166	727
Other[2]	114	186	143	151	151	475	1,485
Total Title 8 Transfers	6,043	7,885	10,546	12,779	25,320	61,775	62,264

[1] *Manifested as turned over to other Federal agencies, to include Immigration and Customs Enforcement, Health and Human Services, U.S. Marshals, etc.*
[2] *Includes subjects that have not been transferred out of USBP custody at the time the data was collected or subjects manifested as transferred to hospital, paroled, etc.*

U.S. Border Patrol - In Custody

USBP Average Daily Subjects In Custody by Southwest Border Sector

U.S. Border Patrol facilities, such as stations and central processing centers, provide short-term holding capacity for the processing and transfer of individuals encountered by agents. Maximum facility capacity along the Southwest border is approximately 11,200, which assumes a homogenous population and full operating status at all facilities. Actual capacity fluctuates constantly based on characteristics of in-custody population, to include demographics, gender, criminality, etc.

Sector	Oct-20	Nov-20	Dec-20	Jan-21	Feb-21	Mar-21	Apr-21
Big Bend	10	16	19	22	43	68	40
Del Rio	379	78	91	174	367	625	816
El Centro	34	35	35	36	53	204	424
El Paso	72	74	123	107	231	913	476
Laredo	113	113	73	72	95	263	334
Rio Grande	178	176	120	158	878	3,779	2,883
San Diego	55	62	57	107	153	503	1,139
Tucson	70	72	98	87	186	490	305
Yuma	8	11	17	28	160	488	785
Total	919	637	633	791	2,164	7,331	7,202

Pathways and Programs Definitions

Migrant Protection Protocols (MPP)

The Migrant Protection Protocols (MPP) is an exercise of the Department of Homeland Security's express statutory authority under the Immigration and Nationality Act (INA) to return certain applicants for admission, or those who enter illegally between the ports of entry, who are subject to removal proceedings under INA Section 240 Removal Proceedings to Mexico pending removal proceedings.

Prompt Asylum Claim Review (PACR)

The Prompt Asylum Claim Review (PACR) pathway was developed by U.S. Border Patrol (USBP), in coordination with U.S. Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), and the Executive Office for Immigration Review (EOIR) to promptly address credible fear claims of amenable individuals.

Asylum Cooperative Agreement (ACA)

U.S. Customs and Border Protection (CBP), in coordination with U.S. Immigration and Customs Enforcement (ICE) Enforcement Removal Operations (ERO), and U.S. Citizenship and Immigration Services (USCIS), have executed Asylum Cooperative Agreements (ACAs) to facilitate the transfer of individuals to a third country where they will have access to full and fair procedures for determining their protection claims, based on the ACAs.

Humanitarian Asylum Review Process (HARP)

The Humanitarian Asylum Review Process (HARP), was developed by U.S. Customs and Border Protection (CBP), in coordination with U.S. Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), and the Executive Office for

Immigration Review (EOIR) to promptly address credible fear claims of amenable Mexican nationals.

Electronic Nationality Verification

Under the Electronic Nationality Verification (ENV) program U.S. Customs and Border Protection (CBP), in coordination with U.S. Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations (ERO), remove eligible noncitizens with a final order of removal to their native countries.

Interior Repatriation Initiative (IRI)

Under the Interior Repatriation Initiative (IRI), U.S. Customs and Border Protection (CBP), in coordination with U.S. Immigration and Customs Enforcement (ICE) Enforcement Removal Operations (ERO) and the Mexican Ministry of the Interior, remove eligible noncitizens from Mexico to the interior of Mexico.

Tags:
Statistics (https://www.cbp.gov/tags/statistics) [1]

Source URL: https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics

Links
[1] https://www.cbp.gov/tags/statistics

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

2:21-CV-067-Z

THE STATE OF TEXAS, ET AL., PLAINTIFFS

v.

JOSEPH R. BIDEN, JR. ET AL., DEFENDANTS

[Filed: May 21, 2021]

ORDER

Before the Court are the parties' proposed briefing schedules, ECF Nos. 35 & 36. Also, before the Court are Defendants' Motion to Transfer, Plaintiffs' Motion for Preliminary Injunction, and Defendants' Motion to Stay. To assist in the efficient resolution of these motions, the Court enters the following scheduling order:

Defendants filed their Motion to Stay on May 17th. The Court granted the accompanied Motion to Expedite. *See* ECF No. 34. Accordingly, Plaintiffs have been ordered to file a response on May 24th and Defendants have been ordered to file a reply on May 28th. *Id.*

Defendants' Motion to Stay was predicated on the argument that the Motion to Transfer should be decided *before* briefing and discovery commenced on Plaintiff's Motion for Preliminary Injunction. Currently, Plaintiffs' response to the Motion to Transfer is due on May 24th. *See* N.D. TEX. L.R. 7.1(e). In accordance with

Defendants' desire to expeditiously dispose of these procedural motions, Defendants are hereby ORDERED to file their reply on **May 28th, 2021**. *See* N.D. TEX. L.R. 7.1(f).

After reviewing the parties' submitted briefing schedules regarding Plaintiffs' Motion for Preliminary Injunction, the parties are hereby ORDERED to adhere to the following schedule:

- Defendants shall produce the administrative record by **Monday, May 31, 2021**.
- Defendants shall file their response by **Friday, June 4, 2021**. The response shall be no longer than 40 pages. *Cf* N.D. TEX. L.R. 7.2(c).
- The parties shall meet, confer, and file a *joint* statement regarding the position of the parties on the necessity of expedited discovery and consolidation of trial under Fed. R. Civ. P. 65(a)(2) by **Wednesday, June 9, 2021**. If necessary, the parties shall propose a briefing schedule for resolving any remaining disputes.
- Plaintiffs shall file their reply by **Friday, June 18, 2021**. The reply shall be no longer than 25 pages. *Cf* N.D. TEX. L.R. 7.2(c).
- Plaintiffs' Unopposed Motion for Leave to Exceed Page Limits (ECF No. 29) is **GRANTED**.

If necessary, the Court will amend this scheduling order dependent upon the Court's rulings on the pending Motions to stay and transfer the case. The Court will also issue an order, if necessary, scheduling a hearing on the Motion for Preliminary Injunction upon the receipt of all briefing required by this order.

SO ORDERED.

May [21], 2021. /s/ MATTHEW J. KACSMARYK
MATTHEW J. KACSMARYK
United State District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Case No. 2:21-cv-00067-Z

THE STATE OF TEXAS AND THE STATE OF MISSOURI, PLAINTIFFS

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Filed: June 3, 2021

FIRST AMENDED COMPLAINT[1]

1. In the first several hours following President Biden's inauguration, the incoming Administration discontinued implementing the successful Migrant Protection Protocols ("MPP"). These regulations required individuals who both lacked a legal basis to be present in the United States and who had passed through Mexico en route to the United States to remain in Mexico pending adjudication of their immigration claims. Prior to the MPP, individuals passing through Mexico could enter the United States, raise asylum claims, expect to be released into the United States in violation of statutory requirements mandating their detention, and

[1] On June 3, 2021, Defendants advised through written correspondence that they "do not oppose amendment" of Plaintiffs' Complaint. *See* FRCP 15(a)(2).

stay in the U.S. for years pending the resolution of their claims—even though most were ultimately rejected in court. MPP changed the incentives for economic migrants with weak asylum claims, and therefore reduced the flow of aliens—including aliens who are victims of human trafficking—to the southern border.

2. This lawsuit challenges the Administration's unexplained and inexplicable two-sentence statement suspending the MPP, as well as its latest memorandum permanently terminating MPP. The result of these arbitrary and capricious actions has been a huge surge of Central American migrants, including thousands of unaccompanied minors, passing through Mexico in order to advance meritless asylum claims at the U.S. border.

3. This migrant surge has inflicted serious costs on Texas as organized crime and drug cartels prey on migrant communities and children through human trafficking, violence, extortion, sexual assault, and exploitation. These crimes directly affect Texas and its border communities, especially given Texas's strong focus on combating human trafficking both at the border and throughout the State. The additional costs of housing, educating, and providing healthcare and other social services for trafficking victims or illegal aliens further burden Texas and its taxpayers.

4. The effects of unlawful immigration do not stop at the southern border. Indeed, "[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States[,]" which "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). With its intersection of major interstate highway routes, Missouri is a major destination and hub for human

trafficking. Missouri's ongoing fight against human trafficking—including the exploitation and trafficking of vulnerable migrants—likewise provides it with justiciable interests that fall within the zone of interests of federal statutes on immigration-related policy. Indeed, irresponsible border-security policies that invite and encourage human traffickers to exploit vulnerable border-crossing victims irreparably injure Missouri and other States.

5. Recently, Texas's and Missouri's interests in combating human trafficking have become more urgent. By dismantling the MPP, the Administration has directly caused a massive uptick in illegal immigration through Central America, Mexico, and to the U.S. southern border.

6. MPP is an exercise of DHS's express authority under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, to return those aliens temporarily to Mexico during the pendency of their removal proceedings. *See* 8 U.S.C. § 1225(b)(2)(C). The Secretary of Homeland Security implemented MPP to manage the large influx of aliens arriving on the southern border with no lawful basis for admission. MPP proved to be enormously effective: it enabled DHS to avoid detaining or releasing into the United States more than 71,000 migrants during removal proceedings, and curtailed the number of aliens approaching or attempting to cross the southern border.[2] The program served as an indispen-

[2] *See, e.g.*, TRAC Immigration, *Details on MPP (Remain in Mexico) Deportation Proceedings*, https://trac.syr.edu/phptools/immigration/mpp/.

sable tool in the United States' efforts, working cooperatively with the governments of Mexico and other countries, to address the migration crisis by diminishing incentives for illegal immigration, weakening cartels and human smugglers, and enabling DHS to better focus its resources on legitimate asylum claims.

7. Nonetheless, the Biden Administration cast aside congressionally enacted immigration laws and discontinued MPP on its first day in office. In a peremptory two-sentence, three-line memorandum, the Acting Secretary of Homeland Security issued a directive, effective January 21, 2021, that DHS would "suspend new enrollments in [MPP], pending further review of the program." Exhibit A ("January 20 Memorandum"). This memorandum provided no analysis or reasoned justification for this abrupt suspension. In doing so, the Biden Administration ignored the governing legal authority and basic requirements set forth in the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, 5 U.S.C. § 701 *et seq.*

8. The Biden Administration's suspension "takes off the table one of the few congressionally authorized measures available to process" the vast numbers of migrants arriving at the southern border on a daily basis. *Innovation L. Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019) (per curiam). Before MPP, U.S. officials encountered an average of approximately 2,000 inadmissible aliens at the southern border each day, and the rate at which those aliens claimed fear of return to their home countries surged exponentially.

9. That huge influx imposes enormous, avoidable burdens on the United States' immigration system. Most

asylum claims are meritless. For example, the Executive Office for Immigration Review ("EOIR") reported that between FY 2008 and FY 2019, only 14 percent of aliens who claimed credible fear were granted asylum.[3] Alongside the fact that immigration courts were faced with a backlog of over 768,000 cases at the end of FY 2018—a number that since has grown—it is clear the asylum system was and continues to be manipulated by aliens presenting at the border.[4] Further, though federal law mandates that aliens awaiting asylum hearings "shall" be detained, in fact DHS does not detain the vast majority of such asylum applicants, but releases them into the United States, where many simply abscond.

10. MPP played a critical role in addressing this crisis. By returning migrants to Mexico to await their asylum proceedings—in cooperation with the Mexican Government, which has permitted these aliens to remain in Mexico—MPP eased the strain on the United States' immigration-detention system and reduced the ability of inadmissible aliens to abscond into the United States. Between FY 2008 and FY 2019, 32 percent of aliens referred to EOIR absconded into the United States and were ordered removed in absentia.[5]

11. MPP also discouraged aliens from attempting illegal entry or making meritless asylum claims in the

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[3] *See* Executive Office for Immigration Review Adjudication Statistics, *Credible Fear and Asylum Process: Fiscal Year (FY) 2008—FY 2019* (Oct. 23, 2019), https://www.justice.gov/eoir/file/1216991/download.

[4] *See* TRAC Immigration, *Immigration Court Backlog Tool*, https://trac.syr.edu/phptools/immigration/court_backlog/.

[5] *See Credible Fear and Asylum Process, supra*, at n.2

hope of staying inside the Untied States, thereby permitting the government to better focus its resources on individuals who legitimately qualify for relief or protection from removal. In February 2020, for example, the number of aliens either apprehended or deemed inadmissible at the southern border was down roughly 40,000 from February 2019.[6] The Biden Administration's termination of the MPP has imposed severe and ongoing burdens on Texas and Missouri because the government will not process into the MPP the tens of thousands of aliens who are resuming attempts to cross the southern border with no legal basis for admission, and the government will process the tens of thousands of aliens already admitted into the MPP into the United States.

12. Additionally, the Biden Administration's suspension threatens damage to the bilateral relationship between the United States and Mexico. Migration has been the subject of substantial discussion between the two countries and is a key topic of ongoing concern in their relationship.[7] The unchecked flow of third-country migrants through Mexico to the United States strains both countries' resources and produces significant public safety risks—not only to the citizens of Mexico and the United States, but also to the migrants themselves, who are often targeted by criminals for human

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[6] U.S. Customs & Border Protection, *Southwest Border Migration FY 2020*, https://go.usa.gov/xdhSh (last visited Apr. 9, 2020).

[7] *See, e.g.*, U.S. Department of Homeland Security, *Assessment of the Migrant Protection Protocols (MPP)* (Oct. 28, 2019), https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf; Declaration of Ambassador Christopher Landau, No. 19-15716, Doc. 92-3, ¶ 3 (9th Cir.).

trafficking, violence, and extortion. MPP played a key role in joint efforts to address the crisis, but the suspension of MPP upsets those efforts and undermines Mexican confidence in U.S. foreign policy commitments. And like Texas and Missouri, the Mexican government intends to "crack down on migrant trafficking."[8] But the suspension of MPP can only significantly delay those enforcement efforts given the constant flow of migrants.

13. Texas contains more than half of the border between the United States and Mexico, and a large share of individuals crossing into the United States to claim asylum arrive through the Texas-Mexico border. Likewise, human traffickers and their victims frequently arrive in Texas and either settle there, travel to one of Texas's major cities, or travel along Texas's state highways to proceed further into the United States.

14. Missouri is a destination and transit state for many human traffickers, including human traffickers of migrants from Central American countries who have crossed the border illegally. This is mainly due to the state's substantial transportation infrastructure and major population centers. Indeed, St. Louis and Kansas City are major human-trafficking hubs connected by Interstate 70.

15. As a direct result of the discontinuance of the MPP, and the corresponding increase in human-trafficking incidents involving vulnerable Central American migrants,

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[8] Mark Stevenson et al., *Biden tries to reset relationship with Mexican president*, ASSOCIATED PRESS (Mar. 1, 2021), https://apnews.com/article/biden-obrador-us-mexico-migration-issues-edb25cf298b7c9a83d15ff4f6c7ea95f.

both Texas and Missouri will be forced to spend significantly more resources in combating human trafficking. Thus, the Biden Administration's unlawful suspension of the MPP will cause both States immediate and irreparable harm if it is not enjoined.

16. Moreover, the influx of unlawful immigrants with meritless claims of asylum will result in additional unlawful migrants entering and remaining in Texas and Missouri, thus forcing both States to expend more taxpayer resources on health care, education, social services, and similar services for such migrants. There is no monetary remedy for these increased costs and thus they constitute irreparable injury to the State of Texas, the State of Missouri, and their taxpayers.

17. Because suspension of the MPP is invalid, it must be enjoined in its entirety. *See, e.g.*, *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action."); *Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (unlawful agency regulations are vacated); *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 848 (D.C. Cir. 1987) ("The APA requires us to vacate the agency's decision if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]' "). Indeed, federal law contemplates a "comprehensive and unified" immigration policy. *Arizona*, 567 U.S. at 401. As the Fifth Circuit has held, "[t]he Constitution requires an uniform Rule of Naturalization; Congress has instructed that the immigration laws of the United States should be enforced vigorously and uniformly; and the Supreme Court has described immigration policy as a comprehensive and unified system." *Texas v. United States*, 809

F.3d 134, 187-88 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016) (per curiam). Thus, "a fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy." *Washington v. Trump*, 847 F.3d 1151, 1166-67 (9th Cir. 2017) (per curiam); *see also Texas v. United States*, No. 6:21-CV-00003, 2021 WL 247877, at *8 (S.D. Tex. Jan. 26, 2021) (enjoining government from executing 100-day moratorium on the removal of aliens everywhere in the United States).

18. Following the Biden Administration's suspension of new enrollments into the MPP—and, therefore, discontinued implementation of the program—in the January 20 Memorandum, Texas and Missouri ("Plaintiff States") filed this lawsuit on April 13, 2021, challenging the suspension as: (1) arbitrary and capricious agency action for a lack of reasoned decisionmaking, for a failure to consider state reliance interests, for a failure to consider alternative approaches to suspension, and for not stating a basis for the suspension; (2) a violation of notice-and-consultation requirements contained in an Agreement between DHS and Texas; (3) a violation of 8 U.S.C. § 1225, including DHS's obligation to detain migrants awaiting asylum hearings in the United States; and (4) a violation of the Take Care Clause of the United States Constitution. *See* ECF 1 at 31-39. 2021 WL 247877, at *8 (S.D. Tex. Jan. 26, 2021) (enjoining government from executing 100-day moratorium on the removal of aliens everywhere in the United States).

19. The Original Complaint requested, in relevant part, that the January 20 Memorandum suspending new enrollments into the MPP be declared unlawful and set aside and that Defendants be enjoined "nationwide from

enforcing or implementing the January 20 Memorandum suspending new enrollments into the MPP[.]" ECF 1 at 39.

20. Exactly one month after filing the Original Complaint, Plaintiff States moved for a preliminary injunction demonstrating that they were likely to succeed on the merits of their claims, that they would suffer irreparable harm absent an injunction due to significant, unrecoverable financial costs that would increase following the suspension of the MPP, and that the equities and public interest overwhelmingly favored an injunction due to the ongoing humanitarian crisis at the Southern border. *See* ECF 30 at 15-37. 21. After Plaintiff States filed their motion for a preliminary injunction, this Court entered a Scheduling Order: (1) requiring Defendants to produce the administrative record by May 31, 2021; (2) requiring Defendants to file their response to Plaintiff States' motion for a preliminary injunction by June 4, 2021; (3) requiring the parties to file, by June 9, 2021, a joint statement regarding whether expedited discovery and consolidation of trial under Fed. R. Civ. P. 65(a)(2) were appropriate; and (4) requiring Plaintiff States to file their reply brief by Friday June 18, 2021. *See* ECF 37 at 1-2.

21. After Plaintiff States filed their motion for a preliminary injunction, this Court entered a Scheduling Order: (1) requiring Defendants to file their response to Plaintiff States' motion for a preliminary injunction by June 4, 2021; (3) requiring the parties to file, by June 9, 2021, a joint statement regarding whether expedited discovery and consolidation of trial under Fed. R. Civ. P. 65(a)(2) were appropriate; and (4) requiring Plaintiff

States to file their reply brief by Friday June 18, 2021. *See* ECF 37 at 1-2.

22. On May 31, 2021, Defendants filed the administrative record, which consisted only of the two-sentence January 20 Memorandum. *See* ECF 45 at 4.

23. Less than 24 hours later, on June 1, 2021, DHS published a memorandum purportedly terminating the MPP and rescinding the January 20 Memorandum. *See* Exhibit C ("June 1 Memorandum").

24. In essence, DHS simply reaffirmed in the June 1 Memorandum what it previously did in the January 20 Memorandum: it completely discontinued implementing MPP.

25. The June 1 Memorandum cannot and does not cure the defects in the January 20 Memorandum. DHS's new justification is woefully insufficient to justify DHS's agency action under the APA, as it overlooks numerous important aspects of the problem, fails to consider important State reliance interests, disregards DHS's statutory obligations, and continues to violate the Take Care Clause, among other reasons. And this belated justification only comes after Plaintiff States filed suit against Defendants and moved for a preliminary injunction, and after Defendants filed a thin administrative record that merely consists of the January 20 Memorandum.

26. While the June 1 Memorandum does not announce or adopt any new policy, it broadcasts (yet again) to human traffickers, smugglers, and organized crime that the Southern border is open for business. It threatens immediately to exacerbate the ongoing irreparable

injury experienced by Plaintiff States from the discontinuation of MPP.

PARTIES

27. Plaintiffs incorporate by reference all preceding paragraphs.

28. Plaintiff State of Texas is a sovereign State of the United States of America.

29. Defendants' unlawful discontinuance of MPP injures Texas. MPP reduced both the number of illegal aliens attempting to come to Texas and the percentage of illegal aliens released into Texas and the rest of the United States. Discontinuing MPP has increased and will increase the number of illegal aliens attempting to come to Texas and the percentage of illegal aliens released into Texas and the rest of the United States. That harms Texas in multiple ways.

30. Discontinuing MPP will cause Texas to "incur significant costs in issuing driver's licenses." *Texas*, 809 F.3d at 155. Texas law subsidizes driver's licenses, including for noncitizens who have "documentation issued by the appropriate United States agency that authorizes [them] to be in the United States." *Id.* (quoting Tex. Transp. Code § 521.142(a)). Aliens paroled into the United States, rather than enrolled in MPP, will be eligible for subsidized driver's licenses.[9] By ena-

[9] Tex. Dep't of Public Safety, *Verifying Lawful Presence* 4 (Rev. 7-13), https://www.dps.texas.gov/sites/default/files/documents/driver license/documents/verifying lawfulpresesnce.pdf (listing "Parolees" as eligible for driver's license).

bling more aliens to secure subsidized licenses, discounting MPP will impose significant financial harm on the State of Texas. *See Texas*, 809 F.3d at 155.

31. Texas spends significant amounts of money providing services to illegal aliens. Those services include education services and healthcare, as well as many other social services broadly available in Texas. Federal law requires Texas to include illegal aliens in some of these programs. Discounting MPP will injure Texas by increasing the number of illegal aliens receiving such services at Texas's expense.

32. The State funds multiple healthcare programs that cover illegal aliens. The provision of these services —utilized by illegal aliens—results in millions of dollars of expenditures per year. These services include the Emergency Medicaid program, the Texas Family Violence Program, and the Texas Children's Health Insurance Program.

33. The Emergency Medicaid program provides health coverage for low-income children, families, seniors and the disabled. Federal law requires Texas to include illegal aliens in its Emergency Medicaid program. The program costs the State tens of millions of dollars annually.

34. The Texas Family Violence Program provides emergency shelter and supportive services to victims and their children in the State of Texas. Texas spends over a million dollars per year on the Texas Family Violence Program for services to illegal aliens.

35. The Texas's Children's Health Insurance Program offers low-cost health coverage for children from birth through age 18. Texas spends tens of millions of

dollars each year on CHIP expenditures for illegal aliens.

36. Further, Texas faces the costs of uncompensated care provided by state public hospital districts to illegal aliens which results in expenditures of hundreds of millions of dollars per year.

37. Aliens and the children of those aliens receive education benefits from the State at significant taxpayer expense. Defendants' failure to detain criminal aliens increases education expenditures by the State of Texas each year for children of those aliens.

38. DHS itself has previously recognized "that Texas, like other States, is directly and concretely affected by changes to DHS rules and policies that have the effect of easing, relaxing, or limiting immigration enforcement." Exhibit B § II (Agreement between Department of Homeland Security and the State of Texas). DHS agrees that "rules, policies, procedures, and decisions that could result in significant increases to the number of people residing in a community" "result in concrete injuries to Texas." *Id.* 39. Plaintiff State of Missouri is a sovereign State of the United States of America.

40. There is a well-documented and tragic connection between human trafficking in the Midwest and unlawful immigration from the southern border. Indeed, data makes it readily apparent that trafficking on the southern border is a contributing factor to overall rates of human trafficking in the United States—and such cross-border human trafficking activity directly affects the

overall prevalence of human trafficking within Missouri.[10] The prevalence of human trafficking in Missouri directly affects Missouri financially.

41. Because "[h]uman trafficking is a form of modern slavery that occurs in every state, including Missouri[,]"[11] the Attorney General of Missouri has created a Human Trafficking Task Force that is designed and structured to identify, respond to, investigate, and ultimately eradicate human trafficking in Missouri.[12]

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[10] *See generally* U.S. Department of State, *Trafficking in Persons Report* (20th ed., June 2020), https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf; *U.S.-Mexico Bilateral Human Trafficking Enforcement Initiative*, U.S. DEPARTMENT OF JUSTICE, https://www.justice.gov/humantrafficking/special-initiatives#bilateral (last visited Mar. 30, 2021) ("Mexico is the country of origin of the largest number of foreign-born human trafficking victims identified in the United States."); Polaris Project, *Fighting Human Trafficking Across the U.S.–Mexico Border* (2018), https://polarisproject.org/wp-content/uploads/2016/10/Consejo-NHTH-Statistics-2018.pdf ("Every day, powerful criminal networks and individual traffickers on both sides of the border recruit people for labor or sexual exploitation."); U.S. Customs and Border Protection, *CBP Releases Fiscal Year 2020 Southwest Border Migration and Enforcement Statistics* (Oct. 14, 2020), https://www.cbp.gov/newsroom/national-media-release/cbp-releases-fiscal-year-2020-southwest-border-migration-and; United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons* (2018), https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP_2018_BOOK_web_small.pdf.

[11] *Missouri*, NATIONAL HUMAN TRAFFICKING HOTLINE, https://humantraffickinghotline.org/state/missouri (last visited Apr. 11, 2021).

[12] *Human Trafficking Task Force*, OFFICE OF THE MISSOURI ATTORNEY GENERAL, https://ago.mo.gov/home/human-trafficking/task-force (last visited Mar. 29, 2021).

42. While one case of human trafficking in Missouri is tragic enough, Missouri has seen higher numbers just in the last few years. For example, of the 233 human trafficking cases reported in Missouri to the Human Trafficking Hotline in 2019, 21 were foreign nationals.[13] Of the 179 human trafficking cases reported in Missouri to the Human Trafficking Hotline in 2018, 18 were foreign nationals.[14] And of the 146 human trafficking cases reported in Missouri to the Human Trafficking Hotline in 2017, 17 were foreign nationals.[15]

43. Missouri annually expends funds on the Human Trafficking Task Force and Human Trafficking Hotline to combat human trafficking. Those amounts will increase should DHS be allowed to discontinue implementation of the MPP.

44. When DHS fails to implement the MPP and comply with federal law, Missouri faces other significant costs. Aside from the higher costs associated with fighting human trafficking, the Administration's decision to end MPP—and therefore allow more unlawfully present aliens to enter and remain in Missouri—requires Missouri to increase taxpayer expenditures for social and educational services for such aliens, resulting in irreparable injury.

45. The Biden Administration's unlawful discontinuance of the MPP will require Missouri to increase funding for its Human Trafficking Task Force, which will have to expend substantially more resources in order to

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[13] *Missouri*, *supra*, at n.10.

[14] *Id.*

[15] *Id.*

combat a substantial increase in human trafficking efforts that arise out of the mass-migration surge.

46. While the costs of combating human trafficking will vary from state to state, Texas and Missouri will inevitably face these costs. For example, a report from 2016 concluded that Texas spends approximately $6.6 billion in lifetime expenditures on minor and youth sex trafficking victims, and that traffickers exploit approximately $600 million annually from victims of labor trafficking in Texas (i.e., lost wages), which necessarily results in corresponding lost tax revenue to the State.[16] Missouri faces comparable costs. Other States likewise suffer these costs proportional to their sizes and populations of trafficking victims.

47. Defendants are officials of the United States government and United States governmental agencies responsible for the issuance and implementation of the challenged discontinuance of the MPP.

48. Defendant Joseph R. Biden, Jr., is the President of the United States of America. He is sued in his official capacity.

49. Defendant United States Department of Homeland Security is a federal cabinet agency responsible for implementing and enforcing certain immigration-related statutes, policies, and directives, including the discontinuance of MPP. DHS is a Department of the Executive Branch of the United States Government and is an agency within the meaning of 5 U.S.C. § 551(1).

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[16] The University of Texas at Austin, School of Social Work: Institute on Domestic Violence and Sexual Assault, *Human Trafficking by the Numbers* (2016), https://globalinitiative.net/wp-content/uploads/2018/01/Human-trafficking-by-the-numbers.pdf.

DHS oversees Defendants' Office of Strategy, Policy, and Plans, United States Citizenship and Immigration Services, United States Customs and Border Protection, and United States Immigration and Customs Enforcement.

50. Defendant Alejandro N. Mayorkas is the Secretary of Homeland Security and the head of DHS. He authored the June 1 Memorandum. He is sued in his official capacity.

51. Defendant Kelli Ann Burriesci is the Acting Under Secretary for the Office of Strategy, Policy, and Plans. She received the June 1 Memorandum. She is sued in her official capacity.

52. Defendant Troy A. Miller is the Acting Commissioner of the United States Customs and Border Protection. He received the January 20 Memorandum and the June 1 Memorandum. He is sued in an official capacity.

53. Defendant Tae D. Johnson is the Acting Director of the United States Immigration and Customs Enforcement. He received the January 20 Memorandum and the June 1 Memorandum. He is sued in his official capacity.

54. Defendant Tracy L. Renaud is the Acting Director of the United States Citizenship and Immigration Services. She received the June 1 Memorandum. She is sued in her official capacity.

JURISDICTION AND VENUE

55. Plaintiffs incorporate by reference all preceding paragraphs.

56. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1361, and 2201(a). This action arises under the Constitution (art. II, §§ 1, 3), 5 U.S.C. §§ 702-703, and other federal statutes.

57. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b)(2) and 1391(e). Defendants are United States agencies or officers sued in their official capacities. The State of Texas is a resident of this judicial district and a substantial part of the events or omissions giving rise to this complaint occurred and continue to occur within the Northern District of Texas.

58. Texas and Missouri bring this action to redress harms to their sovereign interests, quasi-sovereign interests, proprietary interests, and interests as *parens patriae*; and to vindicate their interests under 5 U.S.C. § 702. Plaintiffs' ongoing fight against human trafficking —including the exploitation and trafficking of vulnerable migrants—provides them with justiciable interests that fall within the zone of interests of federal statutes on immigration-related policy. The injury to Texas's and Missouri's fiscal interests from the increase in unlawful migrants entering and remaining in Texas and Missouri provides them with redressable injuries in this case as well.

59. This Court is authorized to award the requested declaratory and injunctive relief under 5 U.S.C. § 706, 28 U.S.C. §§ 1361, 2201, and 2202, and its inherent equitable powers.

BACKGROUND

60. Plaintiffs incorporate by reference all preceding paragraphs.

Legal Framework

61. Section 1225 of Title 8 of the United States Code establishes procedures for DHS to process aliens who are "applicant[s] for admission" to the United States, whether they arrive at a port of entry or cross the border unlawfully. 8 U.S.C. § 1225(a)(1).[17]

62. An immigration officer must first inspect the alien to determine whether he is entitled to be admitted. 8 U.S.C. § 1225(a)(3); *see Jennings v. Rodriguez*, 138 S. Ct. 830, 836-37 (2018).

63. Section 1225(b)(2)(A) provides that, if an immigration officer "determines" that an "applicant for admission" is "not clearly and beyond a doubt entitled to be admitted," then the alien "shall be detained for a proceeding under section 1229a of this title" to determine whether he will be removed from the United States. 8 U.S.C. § 1225(b)(2)(A); *see also id.* § 1225(b)(1)(B)(ii), (b)(1)(B)(iii)(IV); *In re M-S-*, 27 I. & N. Dec. 509, 510 (A.G. 2019). Section 1229a, in turn, sets out the procedures for a "full" removal proceeding, which involves a hearing before an immigration judge with potential review by the Board of Immigration Appeals. *See* 8 U.S.C. § 1229a; 8 C.F.R. § 1003.1. In a full removal proceeding, the government may charge the alien with any applicable ground of inadmissibility, and the alien may seek asylum or any other form of relief or protection from removal to his home country. *See* 8 U.S.C. § 1229a(a)(2), (c)(4).

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[17] Section 1225 refers to the Attorney General, but those functions have been transferred to the Secretary of Homeland Security. *See Department of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1965 n.3 (2020).

64. As an alternative to a full removal proceeding, an immigration officer may also determine whether an applicant for admission is eligible for, and should be placed in, the expedited removal process described in Section 1225(b)(1), which is designed to remove certain aliens quickly using specialized procedures. *See Jennings*, 138 S. Ct. at 837; *M-S-*, 27 I. & N. Dec. at 510. An alien is generally eligible for expedited removal when an officer "determines" that he engaged in fraud, made a willful misrepresentation in an attempt to gain admission or another immigration benefit, or lacks any valid entry documents. 8 U.S.C. § 1225(b)(1)(A)(i); *see* 8 U.S.C. § 1182(a)(6)(C), (7).

65. An alien subject to expedited removal will be "removed from the United States without further hearing or review," unless he expresses an intention to apply for asylum or a fear of persecution or torture. 8 U.S.C. § 1225(b)(1)(A)(i); *see* 8 C.F.R. § 235.3(b)(4). An alien who does so is referred to an asylum officer to determine whether he has a "credible fear of persecution" or torture; if so, he "*shall* be detained for further consideration of the application for asylum." 8 U.S.C. § 1225(b)(1)(B)(ii) (emphasis added); *see* 8 U.S.C. § 1225(b)(1)(A)(ii), (b)(1)(B)(iii)(IV); 8 C.F.R. § 235.3(b)(4); *see also Jennings*, 138 S. Ct. at 842 (observing that aliens in expedited removal are subject to mandatory detention). By regulation, the government has provided that an alien found to have a credible fear will be placed in a Section 1229a full removal proceeding. *See* 8 C.F.R. § 208.30(f); *M-S-*, 27 I. & N. Dec. at 512.

66. When DHS places an applicant for admission into a full removal proceeding under Section 1229a, the alien

is subject to mandatory detention during that proceeding, *see* 8 U.S.C. § 1225(b)(2)(A), except that certain aliens may be temporarily released on parole "for urgent humanitarian reasons or significant public benefit," 8 U.S.C. § 1182(d)(5)(A). *See Jennings*, 138 S. Ct. at 837.

67. But Congress has also provided in the alternative that, "[i]n the case of an alien described in [Section 1225(b)(2)(A)] who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, [DHS] may return the alien to that territory pending a proceeding under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(C). This contiguous-territory-return authority enables DHS to avoid keeping aliens arriving on land from Mexico or Canada in the United States during their full removal proceedings, and instead to temporarily return those aliens to the foreign territory from which they just arrived pending those proceedings.

Factual Background

68. Plaintiffs incorporate by reference all preceding paragraphs.

69. In 2018, the United States faced a surge of hundreds of thousands of migrants, many from the Northern Triangle countries of Central America (Honduras, El Salvador, and Guatemala), attempting to cross through Mexico to enter the United States despite having no lawful basis for admission. *See, e.g.*, 83 Fed. Reg. 55,934, 55,944-55,945 (Nov. 9, 2018). By the fall of 2018, U.S. officials encountered an average of approximately 2,000 inadmissible aliens per day at the border. *Id.* at 55,935. This surge created a humanitarian, public safety, and security crisis on the southern border.

70. Many of these inadmissible aliens were enticed to make the dangerous journey north by smugglers and human traffickers, who promoted the belief that, if the migrants simply claimed fear of return to their home country once they reached the United States (especially when traveling with children), they could gain release into the United States, even though their asylum claims overwhelmingly lacked merit.

71. In fiscal year 2018, approximately 97,192 aliens in expedited removal were referred for a credible-fear interview because they expressed a fear of persecution or torture in their home country or else an intention to apply for relief or protection from removal (as compared to approximately 5,000 aliens referred in fiscal year 2008), and 65% of those were from Northern Triangle countries. 83 Fed. Reg. at 55,945.

72. Yet among Northern Triangle aliens who claimed fear and were referred for a Section 1229a proceeding, and whose cases were completed in fiscal year 2018, they filed an asylum application only about 54 percent of the time, and they were granted asylum in only about nine percent of cases. *Id.* at 55,946. In 38 percent of cases, those aliens did not even appear for immigration proceedings. *Id.* Before MPP, detention-capacity constraints or court orders forced DHS to release tens of thousands of aliens into the United States, where many disappeared. *See id.* at 55,935, 55,946.

73. Amid this crisis, the Secretary of Homeland Security announced MPP in December 2018.[18] The Secretary explained that DHS would exercise its statutory authority in 8 U.S.C. § 1225(b)(2)(C) to "return[] to Mexico" certain aliens "arriving in or entering the United States from Mexico" "illegally or without proper docu-

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[18] *See, e.g.*, U.S. Department of Homeland Security, *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration* (Dec. 20, 2018), https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration; *see also* 84 Fed. Reg. 6811 (Feb. 28, 2019); U.S. Immigration and Customs Enforcement, *Implementation of the Migrant Protection Protocols* (Feb. 12, 2019), https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ICE-Policy-Memorandum-11088-1.pdf; U.S. Immigration and Customs Enforcement, *Migrant Protection Protocols Guidance* (Feb. 12, 2019), https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ERO-MPP-Implementation-Memo.pdf; U.S. Customs and Border Protection, *MPP Guiding Principles* (Jan. 28, 2019), https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf; U.S. Customs and Border Protection, *Implementation of the Migrant Protection Protocols* (Jan. 28, 2019); U.S. Customs and Border Protection, *Guidance on Migrant Protection Protocols* (Jan. 28, 2019); U.S. Citizenship and Immigration Services, *Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols* (Jan. 28, 2019), https://www.uscis.gov/sites/default/files/document/memos/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf; U.S. Department of Homeland Security, *Policy Guidance for Implementation of the Migrant Protection Protocols* (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf; *Migrant Protection Protocols*, U.S. DEPARTMENT OF HOMELAND SECURITY, https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols (last visited Mar. 29, 2021).

mentation," "for the duration of their immigration proceedings."[19] MPP aimed "to bring the illegal immigration crisis under control" by, among other things, alleviating crushing burdens on the U.S. immigration detention system and reducing "one of the key incentives" for illegal immigration: the ability of aliens to "stay in our country" during immigration proceedings "even if they do not actually have a valid claim to asylum," and in many cases to "skip their court dates" and simply "disappear into the United States."[20]

74. MPP excluded several categories of aliens: "[u]naccompanied alien children"; "[c]itizens or nationals of Mexico"; "[a]liens processed for expedited removal"; "[a]liens in special circumstances" (such as returning lawful permanent residents or aliens with known physical or mental health issues); and "[o]ther aliens at the discretion of the Port Director."[21] Even when an alien was eligible for MPP, the policy did not mandate return: "[o]fficers, with appropriate supervisory review, retain discretion to process aliens for MPP or under other procedures (e.g., expedited removal), on a case-by-case basis."[22]

75. The Secretary also directed that MPP would be implemented consistent with non-refoulement principles —*i.e.*, DHS would avoid sending an alien to a country where he will more likely than not be persecuted on account of a protected ground (race, religion, nationality,

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[19] *Nielsen Announces Historic Action to Confront Illegal Immigration*, *supra*, at n.17.

[20] *Id.*

[21] *MPP Guiding Principles*, *supra*, at n.17.

[22] *Id.*

membership in a particular social group, or political opinion) or tortured.[23] "If an alien who is potentially amenable to MPP affirmatively states that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico, whether before or after they are processed for MPP or other disposition, that alien will be referred to a [U.S. Citizenship and Immigration Services] asylum officer for screening . . . [to] assess whether it is more likely than not that the alien will face" persecution on account of a protected ground, or torture, in Mexico.[24] If so, then "the alien may not be" returned to Mexico.[25] The screening interview is "non-adversarial" and is conducted "separate and apart from the general public," and officers are required to ensure that the alien "understand[s]" both "the interview process" and "that he or she may be subject to return to Mexico."[26]

76. If an alien is eligible for MPP and an immigration officer "determines" that MPP should be applied, the alien "will be issued a[] Notice to Appear (NTA) and placed into Section [1229a full] removal proceedings," and then "transferred to await proceedings in Mexico."[27] The alien is directed to return to a port of entry on the appointed date for immigration proceedings.[28]

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[23] *Policy Guidance for Implementation of the Migrant Protection Protocols*, *supra*, at n.17.

[24] *MPP Guiding Principles*, *supra*, at n.17.

[25] *Id.*

[26] *Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols*, *supra*, at n.17.

[27] *MPP Guiding Principles*, *supra*, at n.17.

[28] *Id.*

77. The Secretary further explained that the Government of Mexico has committed to "authorize the temporary entrance" of third-country nationals who are returned pending U.S. immigration proceedings; to "ensure" that returned migrants "have all the rights and freedoms recognized in the Constitution [of Mexico], the international treaties to which Mexico is a party, and its Migration Law"; to accord the migrants "equal treatment with no discrimination whatsoever and due respect . . . paid to their human rights"; to permit the migrants "to apply for a work permit for paid employment"; and to coordinate "access without interference to information and legal services" for them.[29]

78. DHS began processing aliens under MPP on January 28, 2019, first at a single port of entry and gradually expanding across the southern border. MPP proved to be extremely effective at reducing the strain on the United States' immigration-detention capacity and improving the efficient resolution of asylum applications.[30] DHS reported that it had applied MPP to more than 60,000 aliens who would otherwise have needed to be detained in the United States or else released into the interior, and the EOIR reported that immigration judges had issued more than 32,000 orders of removal. The program had also become a crucial component of the United States' diplomatic efforts in coordination with

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[29] *Policy Guidance for Implementation of the Migrant Protection Protocols*, *supra*, at n.17.

[30] *Assessment of the Migrant Protection Protocols (MPP)*, *supra*, at n.6.

the governments of Mexico and other countries to deter illegal immigration.[31]

79. The MPP, however, functionally came to an end on January 20, 2021, when the Biden Administration immediately suspended new enrollments into the program through a two-sentence memorandum. The Biden Administration stated that it intends to "rebuild fair and effective asylum procedures that respect human rights,"[32] yet the sudden shift in immigration-related policy and enforcement has led to a crisis on the southern border—as acknowledged by the White House Press Secretary.[33]

80. For example, "[t]housands more migrants from Latin America have pushed their way toward Mexico[,]" many of whom "have told journalists that they are making their way north because they expect it to be easier to enter the U.S. under the Biden administration."[34] Earlier this year, Border Patrol reported that "the number of migrants apprehended at the border in the month of January reached nearly 78,000, up from 36,679 in January 2020. Single adult Mexican citizens accounted for

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[31] *Id.*

[32] U.S. Department of Homeland Security, *Review of and Interim Revision of Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf.

[33] Sarah Kolinovsky, *White House Press Secretary Slips Up, Calls Border Migrant Surge a 'Crisis'*, ABC NEWS (Mar. 18, 2021), https://abcnews.go.com/Politics/white-house-press-secretary-slips-calls-border-migrant/story?id=76540202.

[34] Jaclyn Diaz, *Biden Suspends Deportations, Stops 'Remain In Mexico' Policy*, NPR (Jan. 21, 2021), https://www.npr.org/sections/president-biden-takes-office/2021/01/21/959074750/biden-suspends-deportations-stops-remain-in-mexico-policy.

more than 37,000 CBP encounters, a 119 percent increase from this time last year, according to the agency."[35] "The Biden administration's undoing of Trump's border policies has prompted a flood of Central American and Mexican illegal migrants at the US border, including thousands of unescorted children. Central Americans looking for refuge from the Northern Triangle countries—El Salvador, Honduras and Guatemala —have taken these policy moves, as well as the overwhelmingly more welcoming tone from Democrats, as a sign that this president is inviting them to cross the border."[36] More recently, the President of Mexico blamed President Biden for the migrant surge.[37]

81. Like Texas and Missouri, the Mexican government intends to "crack down on migrant trafficking."[38] But discontinuing MPP can only impede those enforcement efforts given the constant flow of migrants. During the Trump Administration, "[t]he hardening of U.S. and Mexican immigration policies . . . 'complicated' the business" of "handling the income from smuggling migrants across a 375-mile stretch of the U.S.-Mexico border."[39] Just one territory "nets an average of $1

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[35] Emily Jacobs, *Biden administration opens another tent city to detain surge of illegal migrants*, NEW YORK POST (Feb. 11, 2021), https://nypost.com/2021/02/11/biden-admini-opens-tent-city-to-detain-illegal-migrants/.

[36] Emily Jacobs, *Mexican President Andrés Manuel López Obrador Blames Migrant Crisis on Biden*, NEW YORK POST (Mar. 24, 2021), https://nypost.com/2021/03/24/mexican-president-obrador-blames-migrant-crisis-on-biden/.

[37] *See id.*

[38] Stevenson et al., *supra*, at n.7.

[39] Maria Verza & Christopher Sherman, *What crackdown? Migrant smuggling business adapts, thrives*, ASSOCIATED PRESS

million per month. But that's just a tiny piece of a multi-billion-dollar business that the United Nations Office on Drugs and Crime estimates involves $4 billion annually. The Mexican government has calculated it could be as high as $6 billion."[40] Indeed, "[a] migrant rarely crosses the U.S. border without paying someone."[41]

82. The Biden Administration's discontinuance of the MPP has greatly exacerbated the crisis at the southern border. Indeed, "Mexico's government is worried the new U.S. administration's asylum policies are stoking illegal immigration and creating business for organized crime[.]"[42] Moreover, "[p]reviously unreported details in the internal assessments, based on testimonies and intelligence gathering, state that gangs are diversifying methods of smuggling and winning clients as they eye U.S. measures that will 'incentivize migration.'"[43] "One Mexican official familiar with migration developments, who spoke on condition of anonymity, said organized crime began changing its modus operandi 'from the day Biden took office' and now exhibited 'unprece-

(Dec. 19, 2019), https://apnews.com/article/202a751ac3873a802b5da8c04c69f2fd.

[40] *Id.*

[41] *Id*

[42] Dave Graham, *Exclusive: 'Migrant president' Biden Stirs Mexican Angst Over Boom Time for Gangs*, REUTERS (Mar. 10, 2021), https://www.reuters.com/article/us-usa-immigration-mexico-exclusive/exclusive-migrant-president-biden-stirs-mexican-angst-over-boom-time-for-gangs-idUSKBN2B21D8.

[43] *Id.*

dented' levels of sophistication. 'Migrants have become a commodity,' the official said, arguing they were now as valuable as drugs for the gangs."[44]

83. "[A]s in previous years, migrants are being told to bring along children to make it easier to apply for asylum."[45] Tragically, drug cartels in Mexico "are using helpless children as decoys to smuggle their members into the US" and "making a killing off the border crisis, jacking up their fees to smuggle the growing flood of people into the country—and now 'making more money on humans than they are on the drug side[.]' "[46] "[T]he cartels also are further exploiting the disastrous situation by splitting up kids from their wannabe immigrant parents, then having members pose as the children's relatives to cross the border[.]"[47] As a former U.S. marshal in El Paso explained, "Mexican drug cartels are taking advantage of the recent influx of migrants, using it as an opportunity to 'make money' " because "it's more cost effective to be involved in human smuggling that it is to be in drug trafficking."[48] And "human smuggling often also turns into human trafficking[.]"[49]

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[44] *Id.*

[45] *Id.*

[46] Gabrielle Fonrouge, *Mexican drug cartels using kids as decoys in to smuggle its members into US: sheriff*, NEW YORK POST (Mar. 22, 2021), https://nypost.com/2021/03/22/mexican-drug-cartels-use-kids-as-decoys-to-smuggle-members-into-us/.

[47] *Id.*

[48] Briana Chavez, *El Paso's former U.S. Marshal says Mexican cartels 'make money' from migrant influx*, KVIA (Mar. 18, 2021), https://kvia.com/news/border/2021/03/18/el-pasos-former-u-s-marshal-says-mexican-cartels-make-money-from-migrant-influx/.

[49] *Id.*

84. Recently sources advised that "notorious drug gangs . . . are seizing upon [the Biden Administration's] reforms to ratchet up human trafficking operations."[50] Indeed, the "mass-migration surge along the U.S. southern border has so overwhelmed Mexican cartel-associated smugglers that they are requiring their customers to wear numbered, colored, and labeled wristbands to denote payment and help them manage their swelling human inventory."[51] However, if migrants "'don't pay their debt then the cartel has the information about where they're going, but more importantly, they have the information on their families in home countries. . . . 'From there, they can start the threats and hold them accountable through debt bondage, a form of human trafficking. Either pay or we're going to come after your family.'"[52]

85. Cooperation and coordination between federal and state officials are essential to the effective enforcement of federal immigration law—including in preventing human trafficking and the surge of violent crimes associated with cartel smuggling.

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[50] Ben Ashford, *EXCLUSIVE: 'People are the new dope.' Mexican cartels are seizing on Biden's lax border policies to run multimillion-dollar human trafficking scheme and are using families as DECOYS to smuggle single adults and drugs from elsewhere*, DAILY MAIL (Mar. 22, 2021), https://www.dailymail.co.uk/news/article-9367713/Mexican-cartels-ratchet-human-trafficking-operations-amid-Bidens-relaxed-immigration-policy.html.

[51] Todd Bensman, *Overwhelmed Mexican Alien-Smuggling Cartels Use Wristband System to Bring Order to Business*, CENTER FOR IMMIGRATION STUDIES (Mar. 2, 2021), https://cis.org/Bensman/Overwhelmed-Mexican-AlienSmuggling-Cartels-Use-Wristband-System-Bring-Order-Business.

[52] *Id.*

86. To promote such cooperation and coordination, Texas and DHS entered into a mutually beneficial agreement. *See* Ex. B (hereinafter, the "Agreement"). The Agreement establishes a binding and enforceable commitment between DHS and Texas. *Id.* § II.

87. The Agreement provides that "Texas will provide information and assistance to help DHS perform its border security, legal immigration, immigration enforcement, and national security missions in exchange for DHS's commitment to consult Texas and consider its views before taking" certain administrative actions. Ex. B § II.

88. For example, DHS must "[c]onsult with Texas before taking any action or making any decision that could reduce immigration enforcement" or "increase the number of removable or inadmissible aliens in the United States." Ex. B § III.A.2. That "includes policies, practices, or procedures which have as their purpose or effect":

- "reducing, redirecting, reprioritizing, relaxing, lessening, eliminating, or in any way modifying immigration enforcement";
- "pausing or decreasing the number of returns or removals of removable or inadmissible aliens from the country"; or
- "increasing or declining to decrease the number of lawful, removable, or inadmissible aliens residing in the United States."

Ex. B § III.A.2.a, c, f.

89. The termination of MPP is an administrative action and decision that reduces immigration enforcement. It likewise increases the number of removable or inadmissible aliens in the United States.

90. The termination of MPP does so by removing a lawful means by which the Executive may prevent aliens without a clear basis for admission into the United States from absconding into the country pending appropriate removal proceedings. As noted above, 8 U.S.C. § 1225(b)(1)(B)(iii)(IV), entitled "Mandatory Detention," states that aliens awaiting asylum hearings "shall be detained pending a final determination of credible fear of persecution," but Defendants routinely fail to detain them. *See also id.* § 1225(b)(1)(B)(ii), (b)(2)(A).

91. To enable this consultation process, the Agreement requires DHS to "[p]rovide Texas with 180 days' written notice of any proposed action" subject to the consultation requirement. Ex. B § III.A.3. That gives Texas "an opportunity to consult and comment on the proposed action." *Id.* After Texas submits its views, "DHS will in good faith consider Texas's input and provide a detailed written explanation of the reasoning behind any decision to reject Texas's input before taking any action" covered by the consultation requirement. *Id.*

92. The Agreement authorizes adjudication of disputes about the Agreement "in a United States District Court located in Texas." Ex. B § VIII.

93. To the extent DHS fails to comply with its obligations, the Agreement expressly provides for injunctive relief. It would "be impossible to measure in money the damage that would be suffered if the parties fail[ed]

to comply with" the Agreement. Ex. B § VI. "[I]n the event of any such failure, an aggrieved party [would] be irreparably damaged and [would] not have an adequate remedy at law." *Id.* "Any such party shall, therefore, be entitled (in addition to any other remedy to which it may be entitled in law or in equity) to injunctive relief, including specific performance, to enforce such obligations, and if any action should be brought in equity to enforce any of the provisions of this Agreement, none of the parties hereto shall raise the defense that there is an adequate remedy at law." *Id.*

94. The Agreement provides mechanisms by which it can be modified or terminated. *See* Ex. B §§ XIV-XV. DHS purported to terminate the Agreement "effective immediately" by letter on February 2, 2021, but it did not provide the requisite 180 days' notice required for termination under the terms of the Agreement. Texas therefore treats DHS's letter as notice of intent to terminate, which will become effective after 180 days (*i.e.*, on August 1, 2021). The Texas Agreement remains binding until then.

CLAIMS

COUNT I

(Arbitrary and Capricious Agency Action—Lack of Reasoned Decision-Making)

95. Plaintiffs incorporate by reference all preceding paragraphs and incorporate each paragraph of each count as applicable to each other count.

96. The APA prohibits agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

97. The discontinuance of the MPP constitutes final agency action reviewable under the APA. *See* 5 U.S.C. § 701. Defendants cannot identify any "clear and convincing evidence of legislative intention to preclude review" of Defendants' discontinuance of the MPP. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986).

98. Federal administrative agencies are required to engage in "reasoned decision-making." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (quotation marks omitted). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Id.* Put differently, "agency action is lawful only if it rests 'on a consideration of the relevant factors.'" *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

99. DHS has previously recognized the importance of the MPP. The discontinuance of the MPP represents a sharp departure from DHS's previous policy. In a two-sentence memorandum published on January 20, DHS suspended the carefully crafted and assessed MPP program created during the prior Administration. DHS provided no reasoning, much less sufficient reasoning, for the immediate suspension of new enrollments into the program. The current Administration failed to consider the benefits of the MPP program (and the costs of not having it), as detailed by the prior Administration. Failing to consider important costs of a new policy renders that policy arbitrary and capricious. *See Michigan*, 135 S. Ct. at 2706 ("[A]gency action is

lawful only if it rests 'on a consideration of the relevant factors.'").

100. Then, in the June 1 Memorandum, DHS attempted to shore up its earlier decision. DHS's belated justification in the June 1 Memorandum was made only after Plaintiff States filed suit against Defendants and moved for a preliminary injunction, and after Defendants filed a thin administrative record that merely consists of the January 20 Memorandum.

101. The June 1 Memorandum is still arbitrary and capricious, and woefully insufficient to justify DHS's action. As the June 1 Memorandum itself reveals, DHS still failed to consider many important aspects of the problem before it. For example, DHS routinely fails to detain illegal immigrants in the interior, notwithstanding its statutory obligation to do so under 8 U.S.C. § 1225, and this is not mentioned at all in the June 1 Memorandum. While DHS stated in the June 1 Memorandum that the United States is a "nation of laws" where its "immigration laws . . . will be enforced," that statement is contradicted by the fact that discontinuing MPP will result in systematic violation of the detention requirements in Section 1225. Nowhere in the June 1 Memorandum does DHS address that aspect of the problem, or acknowledge that, before MPP, detention-capacity constraints or court orders forced DHS to release tens of thousands of aliens into the United States, where many disappeared. Nor does the June 1 Memorandum acknowledge the role of MPP in permitting DHS to avoid violating its statutory detention obligations under Section 1225.

102. As an additional example, although the June 1 Memorandum refers to the impact of COVID-19 on the

cost of maintaining MPP facilities, it fails to consider the public health risks and impact of admitting tens of thousands of potentially COVID-19 positive migrants into the United States, another important part of the problem left unaddressed by DHS. While the June 1 Memorandum states that DHS has considered "the potential impact to DHS operations" if CDC's Title 42 restrictions are lifted, it does not state that DHS has given any consideration to the public health risks in border states and the United States' interior from releasing new waves of potentially COVID-19 positive migrants into communities.

103. In addition, while the June 1 Memorandum discusses the impact of the closure of immigration courts due to COVID-19—i.e., from March 2020 to April 2021—it does not state that they remain closed, so this cannot be a relevant consideration to discontinue the MPP prospectively. Immigration courts were not the only places that experienced delays and costs because of COVID-19 shutdowns during that period, so this consideration does not (and cannot) reflect poorly on the success of MPP, particularly when it was successfully implemented well before the COVID-19 pandemic.

104. Furthermore, one of the most important points in favor of MPP was that it discouraged Northern Triangle migrants from making the dangerous trek across Mexico in the first place. The prior Administration touted MPP's success on this critical point. But the June 1 Memorandum does not consider or discuss this point, and it certainly provides no data to dispute the prior Administration's assessment the MPP deterred and discouraged Northern Triangle migrants from mak-

ing the dangerous trek in the first place (and thus making themselves vulnerable to cartels and human traffickers).

105. Even more, while the June 1 Memorandum discusses how the MPP failed to expeditiously process applicants for asylum waiting in Mexico, it merely talks about how this "raises questions," not any policy conclusions. And DHS fails to consider more limited alternatives, such as accelerating the process for processing migrants. In fact, the June 1 Memorandum talks about planning to accelerate consideration of asylum applications, including the "Dedicated Docket," but DHS fails to consider that as a more limited alternative to discontinuing MPP outright. Although the June 1 Memorandum lists the alternatives DHS considered—"maintaining the status quo" and "resuming new enrollments in the program"—nothing else was considered according to that Memorandum.

106. The June 1 Memorandum is also arbitrary and capricious for failure to consider additional important aspects of the problem, failure to engage in reasoned decision-making, and failure to provide an adequate explanation for agency action, on other grounds as well.

COUNT II
(Arbitrary and Capricious Agency Action—Failure to Consider State Reliance Interests)

107. Even had DHS considered the costs and benefits to the United States from the MPP, DHS was also obligated to consider the costs of ending the MPP to the States. It transparently failed to do so, having made its decision without seeking input from Texas and Missouri and without inquiring about the costs Texas and

Missouri bear from illegal immigration. DHS ignored the harms that discontinuing the MPP will cause, such as increased costs to states, which "bear[] many of the consequences of unlawful immigration." *Arizona*, 567 U.S. at 397. Certainly, the January 20 Memorandum did not analyze those costs. This, too, was arbitrary and capricious. *See Michigan*, 135 S. Ct. at 2706.

108. DHS particularly failed to consider whether "there was 'legitimate reliance' on the" prior administration's method of using the MPP as an indispensable tool in bilateral efforts to address the migration crisis by diminishing incentives for illegal immigration, weakening cartels and human smugglers, and enabling DHS to better focus its resources on legitimate asylum claims. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1913 (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996)). That was arbitrary and capricious; where, as here, "an agency changes course . . . it must 'be cognizant that longstanding policies may have engendered serious reliance interest that must be taken into account.'" *Id.* (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting another source)).

109. The June 1 Memorandum's belated justification is still arbitrary and capricious.

110. Indeed, DHS still failed to consider State reliance interests, as there is no mention of such interests in the June 1 Memorandum. On information and belief, DHS did not seek any input from States—including Plaintiff States—before adopting the June 1 Memorandum, and gave them no opportunity for comment or input. Instead, Plaintiff States found out about the June

1 Memorandum from DHS's litigation counsel after the memorandum was issued.

111. The June 1 Memorandum discusses the impact on "border communities," but it cites only "interagency and nongovernmental partners," "nongovernmental organizations," and "local communities," and not States like Plaintiff States. This strongly indicates that DHS did not consider the States' reliance interests.

112. Because the June 1 Memorandum reflects no consideration of the States' interests in enforcement of immigration policy, it is arbitrary and capricious.

COUNT III
(Arbitrary and Capricious Agency Action—Failure to Consider Alternative Approaches)

113. But even had the Administration considered the States' costs as well—and it did not—it failed to consider whether it could achieve its (unstated) goals through a less-burdensome or less-sweeping means. This too rendered its resulting decision arbitrary and capricious.

114. The January 20 Memorandum failed to consider alternative approaches that would allow at least some additional enrollments to continue, and that would have accordingly imposed less-significant burdens on the States. The Supreme Court recently held that a DHS immigration action was arbitrary and capricious because it was issued "'without any consideration whatsoever' of a [more limited] policy." *Regents of the Univ. of Cal.*, 140 S. Ct. at 1912 (quoting *State Farm*, 463 U.S. at 51). The January 20 Memorandum categorically suspends *all* new enrollments into the MPP.

115. By omitting any analysis of continuing at least some enrollments into the MPP, DHS "failed to consider

important aspects of the problem" before it. *Id.* at 1910 (alterations and citation omitted).

116. The June 1 Memorandum, likewise, fails to meaningfully consider more limited policies than complete discontinuation of MPP.

117. In fact, the June 1 Memorandum makes clear that DHS did not give meaningful consideration to more limited policies than complete termination of MPP. Though the Memorandum recites that the Secretary "considered various alternatives," the only alternatives actually identified are "maintaining the status quo [*i.e.*, no enrollments at all] or resuming new enrollments into the program." Ex. C at 5. No other more limited policy is identified as considered in the June 1 Memorandum.

118. On information and belief, Defendants did not give any meaningful consideration to more limited policies before terminating the program. Indeed, the June 1 Memorandum states that "termination is most consistent with the Administration's broader policy objectives," *id.* at 6, indicating that no more limited policies were given serious consideration.

COUNT IV

(Arbitrary and Capricious Agency Action—No Stated Basis for Agency Action)

119. Even if there were some way to explain or justify DHS's decision, it would be irrelevant because DHS did not provide any such explanation or justification in the January 20 Memorandum. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

Because DHS failed to provide *any* grounds for its decision, it is precluded from asserting new grounds before this Court—and therefore its termination of the MPP is necessarily arbitrary.

120. Further, by suspending new enrollees into the MPP program, DHS is precluded from complying with the congressionally-enacted statutory framework detailed above and provides a key incentive for illegal immigration: the ability of aliens to remain in the United States during immigration proceedings even if they do not have a valid asylum claim and in many instances never appear for court dates and simply disappear into the United States.

121. Because DHS does not sufficiently explain its sudden departure from implementing the MPP program, the January 20 Memorandum suspending new enrollees into the MPP is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A).

122. Each of these numerous flaws renders DHS's decision legally invalid. Yet that invalid suspension will cause Texas and Missouri irreparable injury that cannot be remedied adequately at law. Texas and Missouri are therefore entitled to injunctive relief to enforce DHS's obligations under the applicable law.

123. And DHS's explanation for discontinuing the MPP in the June 1 Memorandum cannot justify the January 20 Memorandum because it constitutes impermissible post hoc rationalization that should be given no consideration. *See Regents of the Univ. of Cal.*, 140 S. Ct. at 1908-10. Thus, it fails to cure the inadequacy of explanation in the January 20 Memorandum.

COUNT V
(Failure to Provide Notice to, and Consult with, Texas)

124. DHS discontinued MPP without following the notice-and-consultation requirements contained in the Agreement.

125. The Agreement is currently in effect and remains so until August 1, 2021.

126. Discontinuing MPP is therefore "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and "without observance of procedure required by law." 5 U.S.C. §§ 706(2)(A), (D).

127. Discontinuing MPP exceeds the authority DHS can delegate to Acting Secretary Pekoske, Secretary Mayorkas, and anyone charged with discontinuing implementation of the MPP and is therefore *ultra vires*.

128. As a result of the discontinuance of the MPP, Texas "will be irreparably damaged and will not have an adequate remedy at law." Ex. A § VI. Texas is therefore "entitled . . . to injunctive relief . . . to enforce [DHS's] obligations" under the Agreement. *Id.* § VI.

COUNT VI
(Violation of Section 1225)

129. The APA prohibits agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C).

130. Federal law directs the Executive to detain virtually all aliens applying for admission into the United

States. The Executive "shall . . . detain[]" any alien who is not "clearly and beyond a doubt entitled to be admitted" pending removal proceedings. 8 U.S.C. § 1225(b)(2)(A). In lieu of detention, a second subparagraph of the same section permits the Executive, for aliens "arriving on land . . . from a foreign territory contiguous to the United States," to optionally "return the alien to that territory pending" removal proceedings. 8 U.S.C. § 1225(b)(2)(C). These provisions give the Executive an exclusive choice for aliens not "clearly and beyond a doubt entitled to be admitted" who "arriv[e] on land . . . from a foreign territory contiguous to the United States:" either detain the alien pending removal proceedings, or otherwise return him to the country from which he arrived pending removal proceedings.

131. Though it could create such capacity if it chose to do so, the Executive presently lacks the capacity to detain the vast majority of the tens of thousands of aliens arriving on land from Mexico, a foreign territory contiguous to the United States, who are not clearly and beyond a doubt entitled to admission to the United States. Through MPP, the Executive was capable of addressing this dilemma by electing to return aliens not clearly and beyond a doubt entitled to admission to Mexico pending removal proceedings.

132. Discontinuing the MPP will necessarily cause the Executive to fail to meet its statutory obligations to detain or otherwise return aliens pending removal proceedings. Because the Executive cannot detain many of these aliens, tens of thousands will instead abscond into the United States and fail to show up for statutorily required removal proceedings. 83 Fed. Reg. 55,946.

133. This release provides a key incentive for illegal immigration: the ability of aliens to remain in the United States during immigration proceedings even if they do not have a valid asylum claim and in many instances never appear for court dates and simply disappear into the United States—notwithstanding that these aliens have no legal entitlement to enter the country, much less remain in it.

134. The June 1 Memorandum confirms that Defendants will unlawfully prioritize alternatives to detention, unlawfully fail to detain illegal aliens, and unlawfully release illegal aliens into the interior of the United States, notwithstanding section 1225's directives and the ability to avoid these statutory violations through MPP.

135. Discontinuing MPP therefore violates 8 U.S.C. § 1225.

COUNT VII
(Failure to Take Care that the Laws be Faithfully Executed)

136. The Constitution requires the President to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

137. This constitutional limitation is binding on agencies and officers exercising executive power. *See* U.S. CONST. art. II, § 1, cl. 1 (vesting "[t]he executive Power" in the President).

138. Discontinuing MPP violates the Executive's Take Care Clause obligations in two ways: first, by placing the Executive in a position where it will necessarily violate a statutory framework obligating it to detain or otherwise return aliens, and second, by predictably allowing (and encouraging) more aliens to illegally

enter into the United States and violate immigration-law requirements once released into the interior.

139. The June 1 Memorandum confirms that Defendants will unlawfully prioritize alternatives to detention, and unlawfully fail to detain illegal immigrants, and unlawfully release illegal aliens into the interior of the United States, notwithstanding section 1225's directives and the ability to avoid these statutory violations through MPP.

140. Unconstitutional agency action or inaction violates the APA. *See* 5 U.S.C. § 706.

141. This constitutional violation is also actionable independent of the APA. Federal courts have long exercised the power to enjoin federal officers from violating the Constitution, pursuant to their inherent equitable powers. *See Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327-28 (2015) (discussing "a long history of judicial review of illegal executive action, tracing back to England").

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

a. Hold unlawful and set aside Defendants' discontinuance of the MPP—whether through the January 20 Memorandum, the June 1 Memorandum, or both;

b. Declare that Defendants' discontinuance of the MPP—whether through the January 20 Memorandum, the June 1 Memorandum, or both—is unlawful;

c. Issue preliminary and permanent injunctive relief enjoining Defendants nationwide from enforcing or implementing the discontinuance of the MPP—whether

through the January 20 Memorandum, the June 1 Memorandum, or both;

d. Issue preliminary and permanent injunctive relief requiring Defendants nationwide to continue implementing the MPP, including, without limitation, resuming enrollments into the program;

e. Issue preliminary and permanent injunctive relief requiring Defendants nationwide to enforce or implement the MPP;

f. Award Texas and Missouri the costs of this action and reasonable attorney's fees; and

g. Award such other and further relief as the Court deems equitable and just.

Dated: June 3, 2021 Respectfully submitted.

ERIC S. SCHMITT
Attorney General of Missouri

/s/ D. JOHN SAUER
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Counsel for Plaintiff State of Texas

Memorandum

Subject:	**Date:**
Implementation of Expedited Removal	[Mar. 31, 1997]

To:

Management Team
Regional Directors
District Directors (incl. foreign)
Officers-in-Charge (incl. foreign)
Chief Patrol Agents
Asylum Office Directors
Service Center Directors
Port Directors
ODTF Glynco
ODTF Artesia

From:

Office of the Deputy Commissioner

The expedited removal provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) became effective April 1, 1997. These provisions provide immigration officers the exclusive authority to order removed from the United States, without further hearing or review, arriving aliens who attempt entry by fraud or who arrive without proper documents. A proposed rule was published on January 3, and interim implementing regulations were published in the Federal Register on March 6, to be effective April 1.

From February 27-March 5, the Training Division conducted a train-the-trainier session at Jekyll Island, Georgia, to train almost 300 Immigration and Naturalization Service (INS) trainers in many of the provisions of IIRIRA, including expedited removal. All Service Officers are to have received this training by April 1.

In addition to the interim regulations, the Service has completed a draft of the Inspector's Field Manual (IFM), the first in a series of officer field manuals that will eventually replace the Service Operations Instructions. Each of these field manuals will eventually be carried on INSERTS, the INS Easy Research and Transmittal System. Several advance chapters of the IFM particularly affected by IDURA are being distributed to field offices for use in implementing these new provisions. Chapter 17.15 of the IFM contains the expedited removal provisions.

The expedited removal provisions present a tremendous challenge and responsibility to INS officers, and will be the subject of close scrutiny by Congress, the Department of Justice, advocacy groups, and others. Every officer must adhere strictly to required procedures to ensure that the rights of aliens are protected, particularly those who express a fear of persecution, at the same time ensuring that aliens who clearly seek to violate the immigration laws are quickly removed from the United States in a professional, fair, and objective manner.

Although the general expedited removal procedures are contained in Chapter 17.15 or the IFM and the IIRIRA training materials. Following are additional instructions relating to implementation of these provisions.

1. Arriving alien, who are inadmissible under section 212(a)(6)(C) or (7) are subject to expedited removal under section 235(b)(1) of the new Act. If 212(a)(6)(C) and 212(a)(7) are the only charges lodged, the alien must be processed under expedited removal and may not be referred for an immigration hearing under section 240. If additional charges are lodged, the alien may be referred for a section 240 hearing, but this should only occur in extraordinary circumstances. Generally speaking, if an alien is inadmissible under 212(a)(6)(C) or (7), additional charges should not be brought and the alien should be placed in expedited removal. Aliens charged with grounds other than 212(a)(6)(C) or (7) should be referred for a hearing under section 240.
2. Any immigration officer issuing an expedited removal order and any designated supervisory officer concurring on an expedited removal order must have completed Phase I of the official 96 Act Training Program prepared by the Training Division.
3. All expedited oval orders require supervisory approval before service upon the alien. By regulation, this approval authority is not to be delegated below the level of a second line supervisor. Each district may determine at what level this review authority should be delegated. All districts must report the names and titles of designated approving officials through channels to the Headquarters Office of Field Operations no later than April 1.
4. When an unaccompanied minor or mentally incompetent alien appears to be subject to expedited removal, and the case cannot be resolved under existing guidelines by granting a waiver, deferring the

inspection, or by other discretionary means, an expedited removal order may be issued, but the order must by reviewed by the district director or the deputy district director, or person officially acting in that capacity, before the alien is removed from the United States.

5. The Service retains the discretion to permit withdrawal application for admission in lieu of issuing an expedited removal order. Provisions for withdrawal are now contained in both statute and regulation, with specific guidance in the IFM and should be followed by all officers with authority to permit withdrawals. As an example, in cases where a lack of proper documents is the result of inadvertent error, misinformation, or where no fraud was intended (e.g. an expired nonimmigrant visa). Service officers may consider, on a case-by-case basis and at the discretion of the Service, any appropriate waivers, withdrawal of application for admission, or deferred inspection to resolve the ground of inadmissibility rather than issuing an expedited removal order.

6. Numerous Service forms have been revised or newly created to conform with IIRIRA. The revised forms are listed in 8 CFR 299.1 and 299.5 of the interim regulations. A separate IIRIRA wire details the list of forms and how to obtain them. Districts may request these forms from the Service Forms Centers. In addition, the forms are being incorporated in electronic format into numerous automated forms-generation systems.

7. When recording answers to the closing questions on Form I-867B, Jurat for Record or Sworn Statement in Proceedings under Section 235(b)(1) of the Act.

If the alien indicates an intention to apply for asylum or a fear of harm or concern about returning home, the inspector should ask enough follow-up questions to ascertain the general nature of the fear or concern. If the alien indicates an intention to apply for asylum or a fear of persecution, the alien should be referred to an asylum officer. Inspectors should consider verbal as well as non-verbal cues given by the alien. If an alien asserts a fear or concern which clearly unrelated to an intention to seek asylum or a fear of persecution, then the case should not be referred to an asylum officer. In determining whether to refer the alien, inspectors should not make eligibility determinations or weigh the strength of the claims, nor should they make credibility determinations concerning the alien's statements. The inspector should err on the side of caution and apply the criteria generously, referring to the asylum officer any questionable cases, including cases which might raise a question about whether the alien faces persecution. Immigration officers processing aliens for expedited removal may contact the asylum office point(s) of contact when necessary to obtain guidance on questionable cases involving an expression of fear or a potential asylum claim.

8. It is the responsibility of the referring officer to provide the alien being referred for a credible fear interview with both a Form M-444, Information about Credible Fear Interview, and a list of free legal services, as provided in 8 CFR parts 3 and 292.

9. Credible fear interviews will normally take place at Service or contract detention facilities. Each port-

of-entry and detention facility will be provided with a point or points of contact at the asylum office having responsibility for that geographical area. It is the responsibility of the detention or deportation officer to notify the appropriate Asylum office point of contact when an alien subject to the expedited removal process requires a credible fear interview, and is being detained in Service custody pending this interview. That officer should also provide any additional information or requirement of the alien, such as whether the alien requires an interpreter or other special requests or considerations. When aliens are detained in non-Service facilities or at remote locations, the referring officer must notify the appropriate Asylum Office. If the alien is subsequently transferred to another detention site, the detention or deportation officer must ensure that the appropriate Asylum Office has been notified.

10. Normally, the credible fear interview will not take place sooner than 48 hours after the alien arrives at the detention facility. If the alien requests that the interview be conducted sooner, the referring officer, or any other officer to whom the alien makes the request, should immediately convey that information to the appropriate Asylum office.

11. Aliens placed into expedited removal proceedings must be detained until removed from the United States. Parole may be authorized only for medical emergencies or for a legitimate law enforcement objective. Once an alien has established credible fear of persecution or is otherwise referred (as provided by regulation) for a full removal proceeding under

section 240, release of the alien may be considered under normal parole criteria.

12. If there is insufficient detention space to detain an alien in expedited removal who is arriving at a land port-of-entry and who claims a fear of persecution, that alien may be required to wait in Canada or Mexico pending a final determination his or her claim. This option should be taken only as a last resort and should only be used for aliens who claim a fear of persecution that is unrelated to Canada or Mexico. Aliens who make false claims to U.S. Citizenship, or false or unverified claims to lawful permanent resident, asylee, or refugee status, and aliens who claim a fear of persecution that is related to Canada or Mexico must be detained. Aliens arriving at a land border port-of-entry who do not claim lawful status in the United States or a fear of persecution should normally be processed immediately and either returned to Canada or Mexico or detained until removed. These aliens should not be required to wait in Canada or Mexico pending issuance of an expedited removal order.

13. Every case in which an expedited removal order is issued must be entered into the Deportable Alien Control System (DACS). Entry of data for those aliens detained by the Service will be handled by the Detention and Deportation section responsible for the detention facility. Entry of data for aliens not requiring detention who are removed directly from the port-of-entry is the responsibility of the Inspections section. A separate memorandum issued by the Office of Field Operations on March 18 details the procedures for entry of data into DACS for

expedited removal cases. Cases initiated at the port-of-entry and referred for removal proceedings under section 240 will continue to be entered into DACS by Detention and Deportation.

14. The expedited removal process will be the subject of extensive inquiry and will require appropriate tracking of specific case data. A separate memorandum regarding tracking of expedited removal cases at port-of-entry explains how this data collection will be accomplished.

15. Unless an "A" number already exists for an alien placed into expedited removal, an "A" number must be assigned to every expedited removal case at the port-of-entry in order to ensure proper tracking of the case from the onset.

16. New codes are being considered for entry of expedited removal cases into the Central Index System (CIS). Field offices will be notified once these codes are finalized. Entry of cases into CIS should be accomplished as quickly as possible in accordance with district policy. To ensure prompt data entry, "A" files for expedited removal cases should be separated from other files and flagged as expedited removal cases.

17. New codes are also being created to designate expedited removal cases in the National Automated Immigration Lookout System (NAILS) and the Interagency Border Inspection System (IBIS). The new IBIS disposition codes have recently been posted in the IBIS Daily News. Field offices will be notified as new codes are finalized.

18. The Inspections Workload Report, Form G-22.1 is being revised to include data relating to expedited removal cases, and is expected to be available October 1.

19. The expedited removal provisions are not applicable in preclearance or preinspection operations. If the Service wishes to proceed with expedited removal of an alien inspected during an en route inspection of a vessel, action on the case will be deferred until the vessel has arrived in the United States. The alien may then be processed as an expedited removal case.

20. Port directors are responsible for ensuring that all U.S. Customs officers who are cross-designated to perform immigration inspections are adequately trained in the expedited removal provisions. Customs officers shall not issue expedited orders or removal, even in ports where there is only a Customs officer on duty. Such cases must be referred to an INS officer if a decision is made to pursue expedited removal.

Questions regarding this memorandum may be addressed to Linda Loveless, Office of Inspections, at (202) 616-7489, Patrice Ward, Office of Inspections, at (202) 514-0964; Charlie Fillinger, Office of Asylum, at (202) 305-2666; Kelly Ryan, Office of General Counsel, at (202) 514-3211, and Ken Elwood, Office of Field Operations, at (202) 307-1983.

/s/ CHRIS SALE
CHRIS SALE
Deputy Commissioner

U.S. Department of Justice
Immigration and Naturalization Service

HQOPS (DDP) 50/10-C

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

[Oct 7, 1998]

MEMORANDUM FOR REGIONAL DIRECTORS

FROM: /s/ MICHAEL A. PEARSON
MICHAEL A. PEARSON
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Detention Guidelines Effective October 9, 1998

As you know, the Immigration and Naturalization (INS) supported a legislative proposal for extension of the Transition Period Custody Rules (TPCR). This extension will allow us to continue the exercise of discretion in custody determinations. However, we expect that it will be some time before this discretion is granted with the result that as of October 9, 1998, TPCR discretionary authority will no longer be in effect. Attached with this memorandum are the detention guidelines which will be in effect as of October 9.

I recognize that 100 percent compliance with these guidelines will be virtually impossible to achieve immediately. Furthermore, 100 percent adherence to the guidelines would have major impacts on other program operations which are critical to the overall INS mission. We have met with Congressional staff to advise them of the impacts on our operations resulting from the expiration of TPCR. We have been advised that we may get future Congressional support for some type of discretionary relief from mandatory detention, but only if we can document and demonstrate that a maximum effort to comply with the detention mandates has been made. Shortly, we will provide you with guidance concerning additional data that we will need to collect and provide to Congress.

At this time, I am directing that, to the extent possible, you adhere to the detention scheme outlined in the attached and work toward utilizing 80 percent of your bedspace for mandatory detention cases. In the event that District Director, Chief Patrol Agent, or Officer In Charge makes a custody determination which is not in keeping with the guidelines (e.g., a Category 1 case is released to make detention space for a Category 2 or 3), the reasons for the decision must be clearly documented in writing and placed in the alien's file. At any time the mandatory detention occupancy falls below 80 percent of available bedspace, the responsible field manager must notify the Regional Director.

In the event that your District Directors have released someone prior to October 9, who is now subject to detention, nothing in this memorandum should be construed as requiring their rearrest/detention. How-

ever, if conditions have changed or circumstances warrant, nothing should preclude you from exercising your authority to rearrest and detain.

Additionally, each Regional Director is directed to prepare a written monthly summary of custody determinations made by field offices within your respective jurisdictions which are inconsistent with the attached detention guidelines. The monthly summaries will be used to justify our need for continued discretion in detention decisions in our ongoing discussions with the Department of Justice, the Administration, and the Congress. The first monthly summary will be for the month ending October 31. Regions should forward the summaries to this office not later than 1 week after the end of the month.

Attachment

U.S. Department of Justice
Immigration and Naturalization Service

HQOPS (DDP) 50/10-C

425 I Street NW
Washington, DC 20536

[Oct 7, 1998]

INS DETENTION USE POLICY
October 9, 1998

I. INTRODUCTION

This policy governs the detention of aliens and supersedes, the Detention Use Policy issued July 14, 1997. The purpose of this policy is to revise the detention priorities of the Immigration and Naturalization Service (INS) in light of the expiration of the Transition Period Custody Rules (TPCR). Section 236(c) of the Immigration and Nationality Act (INA) is now in full force and effect. With the expiration of the TPCR, certain portions of 8 C.F.R. § 3.19 and § 236.1, as noted in these sections, no longer apply.

Under this policy, the four categories of alien detention are: (1) required (with limited exceptions), (2) high priority, (3) medium priority, and (4) lower priority. Aliens in category 1—required detention—must be detained, with a few exceptions. Aliens in categories 2, 3, and 4 may be detained depending on the availability of detention space and the facts of each case. Aliens in

category 2 should be detained before aliens in categories 3 or 4, and aliens in category 3 should be detained before aliens in category 4. The District Director or Sector Chief retains the discretion, however, to do otherwise if the facts of a given case require.

These instructions do not apply to the detention and release of juveniles, which is covered in other INS policies.

II. DEFINITIONS

- *Required detention*: Detention of certain classes of aliens required by the INA or applicable regulations. With few exceptions, aliens subject to required detention must be detained and are not eligible for release.
- *Discretionary detention*: Detention of aliens authorized but not required by the INA or applicable regulations. All aliens in proceedings are subject to discretionary detention unless they fit into one of the categories covered by required detention. Aliens subject to discretionary detention are eligible to be considered individually for release.
- *Final order of removal*: Final removal order issued by an immigration officer, an immigration judge (IJ), the Board of Immigration Appeals, or a Federal judge to an alien placed in proceedings on or after April 1, 1997. INS officers should consult District counsel on issues regarding the finality of removal orders.
- *Final order of deportation or exclusion*: Final deportation or exclusion order issued by an immigration officer, an immigration judge, the Board of Immigration Appeals, or a Federal judge to an alien

placed in proceedings before April 1, 1997. INS officers should consult District counsel on issues regarding the finality of deportation or exclusion orders.

III. DETENTION CATEGORIES

A. Arriving Aliens: Expedited Removal under INA § 235.

Category 1: Required detention (with exceptions)

- Aliens in Expedited Removal. Arriving aliens at Ports-of-Entry who are inadmissible under INA § 212(a)(6)(C) or 212(a)(7) are subject to expedited removal proceedings pursuant to INA § 235(b)(1). Any alien placed into expedited removal must be detained until removed from the United States and may not be released from detention unless (1) parole is required to meet a medical emergency or legitimate law enforcement objective, or (2) the alien is referred for a full removal proceeding under § 240 (for example, upon a finding of "credible fear of persecution"). Although parole is discretionary in all cases where it is available, it is INS policy to favor release of aliens found to have a credible fear of persecution, provided that they do not pose a risk of flight or danger to the community. See INA §§ 235(b)(1), 8 C.F.R. § 235.3.

  Aliens who are ordered removed under expedited removal and who make an unverified claim to United States citizenship, or to lawful permanent resident, refugee, or asylee status, are referred to an IJ for a status review under 8 C.F.R. § 235.3(b)(5)(iv). Such aliens must be detained

pending this review, unless parole is required to meet a medical emergency or legitimate law enforcement objective.

If there is insufficient detention space to detain an alien in expedited removal who arrived at a land border Port-of-Entry and claims a fear of persecution unrelated to Canada or Mexico, that alien may be required to wait in Canada or Mexico pending a final determination of his or her asylum claim. If an alien expresses a fear of persecution related to Canada or Mexico, the alien must be detained for proceedings and may not be required to wait in that country for a determination of the claim.

Aliens subject to expedited removal who arrive at a land border Port-of-Entry, but do not claim lawful status in the United States or a fear of persecution, should be processed immediately and detained until removed. These aliens should not be required to wait in Mexico or Canada pending the issuance of an expedited removal order.

The INS may permit an alien in expedited removal to withdraw his or her application for admission.

Note that the INS maintains approximately 1,100 User Fee beds, which are funded by the User Fee Account. The INS can only use these beds for aliens arrested in support of airport operations.

B. Aliens in Proceedings: INA § 240 (Removal), § 238 (Expedited Removal of Criminal Aliens), Former

INA § 236 (Exclusion), and Former INA § 242 (Deportation).

1. Category 1: Required detention (with exceptions)

- *Aliens subject to required detention in removal and deportation proceedings.* Pursuant to INA § 236(c), the INS must take into custody all aliens who are chargeable as terrorists, and virtually all aliens who are chargeable as criminals, upon their release from criminal incarceration or custody. § 236(c) does not apply to the following groups of aliens who are removable as criminals: (a) aliens who are removable under § 237 for a single crime involving moral turpitude, if they were sentenced to less than a year, (b) aliens who are removable under § 237 for a conviction for high-speed flight from an immigration checkpoint (18 U.S.C. § 758); and (c) aliens who are removable under § 237 for crimes relating to domestic violence, stalking, and the abuse or neglect of children.

  § 236(c) applies to aliens in both removal proceedings under § 240 and deportation proceedings under former § 242. Therefore, under § 236(c) the INS must continue to detain aliens who are described in that section (by their § 237 equivalents) if (a) they were previously taken into custody while in deportation proceedings (i.e., charged under § 241 in proceedings commenced prior to April 1, 1997) and (b) they are still in custody upon the expiration of the TPCR. Note that current § 236(c) does not apply to

aliens in exclusion proceedings under former § 236.

Once in INS custody, the alien may be released during proceedings only if the Attorney General determines that it is necessary to protect a witness, a person cooperating with an investigation, or a family member of such a person. To be considered for release in the exercise of discretion, the alien must also demonstrate that release would not pose a danger to persons or property and that the alien does not pose a flight risk. See the requirements set forth at INA § 236(c)(2).

- *Aliens with aggravated felony convictions in exclusion proceedings.* The INS must detain any alien in exclusion proceedings under for § 236 (i.e., charged under § 212 in proceedings commenced prior to April 1, 1997) who has been convicted of an aggravated felony, as currently defined under INA § 101(a)(43). The INS may not parole such an alien during exclusion proceedings. Note that the expiration of the TPCR has no effect on these aliens since the TPCR did not apply to them.

2. Category 2: High Priority

- Aliens removable on security and related grounds, if not subject to required detention.
- Other criminal aliens not subject to required detention.
- Aliens who are a danger to the community or a flight risk, if not subject to required detention.

- Aliens whose detention is essential for border enforcement but are not subject to required detention.
- Aliens engaged in alien smuggling, if not subject to required detention.

3. Category 3: Medium Priority

- Inadmissible, non-criminal arriving aliens who are not in expedited removal proceedings and are not subject to required detention.
- Aliens who have committed fraud before the INS, if not subject to required detention.
- Aliens apprehended at the worksite who have committed fraud in obtaining employment, if not subject to required detention.

4 Category 4: Low Priority

- Other removable aliens, if not subject to required detention.
- Aliens originally placed in expedited removal who have been referred for a full removal proceeding under § 240 upon a finding of a "credible fear of persecution." See the discussion at section A.1 above regarding the INS policy favoring release.

C. Aliens with Final Orders of Removal, Deportation, or Exclusion.

1. Category 1: Required detention (with exceptions)

- *All aliens who have final orders of removal and all aliens who have final orders of deportation*

and are subject to required detention. This category includes all aliens ordered removed under revised § 240, whether or not they are terrorists or criminals, and all criminal aliens ordered removed under revised § 238. It also includes all terrorist and criminal aliens ordered deported under former § 242 if subject to required detention under § 236(c).

Revised INA § 241(a) requires the INS to remove within 90 days any of the aliens in this category. The alien may not be released during this 90-day period. See INA § 241(a)(2).

Aliens whom INS is unable to remove within 90 days should be released under an order of supervision. See INA § 241(a)(3). However, the INS may continue to detain certain aliens, including, among others, those who are inadmissible on any ground; deportable or removable on criminal or security grounds; dangerous; or flight risks. See INA § 241(a)(6).

- *Aliens with final orders under expedited removal.* The INS must detain aliens who have been issued final orders under expedited removal (revised § 235(b)(1)) on grounds of being inadmissible under INA § 212(A)(6)(C) or § 212(a)(7). Pending immediate removal, the INS must detain such an alien. However, the INS may stay the removal of such an alien if removal is not practicable or proper, or if the alien is needed to testify in a criminal prosecution. See INA § 241(c)(2).

- Aliens convicted of aggravated felonies with final orders of execution. The INS must continue to detain until removal any alien with a final order of exclusion (i.e., charged under section 212 in proceedings commenced prior to April 1, 1997) who has been convicted of an aggravated felony, as currently defined under INA § 101(a)(43). The INS may not parole such an alien unless the alien is determined to be unremovable pursuant to old INA § 236(a)(2) and the alien meets the criteria for release under that provision. See former INA § 236(a) (as designated prior to April 1, 1997) and the Mariel Cuban parole regulations at 8 C.F.R. §§ 212.12 and 212.13.

Category 2: High Priority

- *Aliens with final orders of deportation (if not terrorists or criminals subject to required detention under § 236(c) and § 241(a)) or exclusion (if not aggravated felons).* Aliens placed into proceedings prior to April 1, 1997, who were or are ordered deported or excluded, are only subject to required
- detention if terrorists or convicted of certain crimes. See part C.1 above. Otherwise, they are subject to discretionary detention and, once they have a final order of deportation or exclusion, their detention should ordinarily be a high priority.

  Please note that the 6-month rule of former INA § 242(c) and (d), which regards detention and release, continues to apply to these non-terrorist

and non-criminal aliens with final orders of deportation. Non-aggravated felon aliens with final orders of exclusion may be paroled from custody in the discretion of the INS.

IV. GENERAL DIRECTIONS

A. Category 1

- Aliens subject to required detention shall have first priority for all available[53] INS detention space.
- With the exceptions noted above, category 1 aliens shall be detained.
- Each Region should ensure that it maintains sufficient non-criminal detention space to provide basic support for its full spectrum of law enforcement objectives. However, with the exception of this basic level of non-criminal detention space, each Region, District, and Sector must seek to comply with the detention priorities outlined above.

  If a category 1 alien comes into INS custody but no detention space is available locally, the responsible office should pursue the following options in rank order:

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[53] Available detention space means space that is both available and suitable for the detention of the alien in question. For example, an alien terrorist subject to required detention would have first priority for all INS beds suitable for the detention of terrorists. No alien should be detained in an INS bed unsuitable for that alien's detention (regardless of the detention category).

1) acquire additional detention space locally, securing funds from the Region if necessary;

2) transfer the alien to another INS District or Region where space or funding is available;

3) release an alien in local INS custody who is not subject to required detention (i.e., an alien in category 2, 3, or 4) to make space for the category 1 alien; or

4) release an alien in INS custody in another District who is not subject to required detention (i.e., an alien in category 2, 3, or 4) to make space for the category 1 alien.

- If a category 1 alien comes into INS custody when all INS criminal beds nationwide (i.e., beds not reserved for juveniles, User Fee operations, or non-criminal detention) are occupied by other category 1 aliens and there are no additional detention funds available, the responsible office should contact its Reginal Director to arrange for the release of a lower-priority category 1 alien in order to permit the detention of a higher-priority category 1 alien.

- INA § 236(c) does not require the INS to arrest any alien who is described in that section but was released from criminal incarceration or custody previously. However, if the INS later encounters such an alien in a non-custodial setting and elects to initiate immigration proceedings, the alien is subject to required detention.

  - INA § 236(c) does not require the INS to re-arrest any alien who is described in that section

but was released from INS custody under the TPCR.

However, the INS may re-arrest such an alien under INA § 236(b) if conditions have changed or if circumstances otherwise warrant.

B. Categories 2, 3, and 4

- Aliens in categories 2, 3, or 4 should generally be detained according to rank, higher priorities before lower priorities. Exceptions to this general rule may be made as follows:

  1) The District Director or Sector Chief may make an exception in individual cases if local circumstances require.

  2) The Regional Director, with the concurrence of the Executive Associate Commissioner for Field Operations, may make an exception to accommodate special regional enforcement initiatives.

  3) The Executive Associate Commissioner for Field Operations may make an exception to accommodate special national enforcement initiatives or to address an emergency.

C. Juvenile Aliens

- This Detention Use Policy does not apply to juvenile aliens or juvenile detention space. Please refer to the instructions for the detention and release of juvenile aliens issued previously.

June 10, 2005 IPP 05 1562

MEMORANDUM FOR: DIRECTORS FIELD OPERATIONS
DIRECTOR, PRECLEARANCE OPERATIONS

FROM: Assistant Commissioner
Office of Field Operations

SUBJECT: Treatment of Cuban Asylum Seekers at Land Border Ports of Entry

This memorandum amends current policy with respect to Cubans who arrive at land border ports of entry and seek asylum, and provides that such aliens should be placed in proceedings pursuant to section 240 of the Immigration and Nationality Act (INA) rather than in expedited removal proceedings. To that extent, it revises the procedures set forth in a January 29, 2002 memorandum issued by the former Immigration and Naturalization Services (INS) and entitled "Aliens Seeking Asylum at Land Border Ports-of-Entry". The revision brings the treatment of Cubans arriving at land border ports of entry in line with that of Cubans arriving at airports, by sea, or between ports of entry at specified locations.

The differential treatment of Cubans dates back to the passage of the Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966). Under the Cuban Adjustment Act of 1966, natives or citizens of Cuba are eligible for adjustment of status to lawful permanent resident provided they meet the following criteria. First, a native or citizen of Cuba must be inspected and admitted or paroled into the United States. Second, he or

she must apply for adjustment of status and be eligible for admission as an immigrant. Finally, a native or citizen of Cuba must be physically present in the United States for one year prior to submitting an application for adjustment of status.

Natives or citizens of Cuba do not have to be refugees in order to qualify for legal permanent resident status under the Cuban Adjustment Act of 1966. See Matter of Mason, 12 I&N Dec. 699 (BIA 1968). In other words, the refugee status of natives or citizens of Cuba has been determined to be irrelevant to the eligibility for adjustment. See General Counsel Opinion 91-85 (July 24, 1991). However, as a practical matter, natives or citizens of Cuba often seek asylum at land border ports of entry in order to obtain parole and to document their physical presence in the United States.

The January 29, 2002 memorandum established procedures for the processing of third-country nationals who present themselves at land border ports of entry and seek asylum in the United States. It instructed immigration inspectors to treat all such aliens as applicants for admission. Furthermore, the memorandum instructed them to place asylum-seekers at land border ports of entry into expedited removal proceedings and to detain them pending a final determination of credible fear in accordance with section 235(b) of the INA.

Accordingly, immigration inspectors placed all Cubans found to be inadmissible under section 212(a)(6)(C) or (7) of the INA at land border ports of entry into expedited removal proceedings, referred them for a credible fear interview, and detained them pending a final determination. Most Cubans interviewed by asylum officers were determined to have credible fear of persecution or

torture, placed in section 240 proceedings, and paroled until the date of their removal hearing before an immigration judge. With regard to natives and citizens of Cuba, this policy has resulted in an inefficient use of detention space at land border ports of entry.

This memorandum amends the policy of the former INS in that it addresses circumstances in which expedited removal may not be appropriate for aliens eligible for relief under the Cuban Adjustment Act. Natives or citizens of Cuba who arrive at land border ports of entry should now be processed for section 240 proceedings without lodging additional charges as required by 8 CFR § 235.3 for aliens of other nationalities. They may apply for adjustment of status under the Cuban Adjustment Act in section 240 proceedings or pursue their claim of asylum before the immigration judge. See Matter of Artigas, 23 I&N Dec. 99 (BIA 2001) (holding that an Immigration Judge has jurisdiction to adjudicate an application for adjustment of status under the Cuban Adjustment Act).

A native or citizen of Cuba may be paroled from the land border port of entry while awaiting section 240 proceedings provided three conditions have been met: (1) CBP has firmly established the identity of the alien; (2) CBP has conducted all available background checks; and (3) CBP determines that the alien does not pose a terrorist or criminal threat to the United States. Except in exceptional circumstances, a CBP Officers should not parole a native or citizen of Cuba into the United States for the sole purpose of applying for adjustment under the Cuban Adjustment Act without initiating section 240 proceedings.

Pursuant to section 235(b)(2)(C) of the INA, a native or citizen of Cuba may also be returned to contiguous territory pending section 240 proceedings. A CBP Officer should consider this option only if: (1) the alien can not demonstrate eligibility for the exercise of parole discretion; (2) the alien must has valid immigration status in Canada or Mexico; (3) Canadian or Mexican border officials express a willingness to accept the returning alien; and (4) the alien's claim of fear of persecution or torture does not related to Canada or Mexico.

The attached field guidance contains detailed instructions regarding the processing of natives or citizens of Cuba at land border ports of entry. In addition, it lays out procedures developed in the January 2002 memorandum for handling the withdrawal of an application for admission in lieu of initiating expedited removal proceedings.

If you have any questions, please contact Linda Loveless, Director, Immigration Policy, at (202) 344-1438.

/S/ William S. Heffelfinger III for

Jayson P. Ahern

ATTACHMENT

Chapter 17.15(a) of the Inspector's Field Manual is revised to read as follows:

(5) Aliens seeking asylum at land border ports of entry.

Section 235(b) of the INA does not provide for an affirmative asylum application process at a port of entry. Therefore, an officer should consider an alien who arrives at a land border port-of entry and seeks asylum to be an applicant for admission by operation of law. The alien will most likely be inadmissible under section 212(a)(7)(A)(i) of the INA as an intending immigrant without proper documentation or under section 212(a)(6)(C) of the INA as an immigration violator with fraudulent documents. As a result, he or she will be subject to expedited removal proceedings.

Except as noted below, the alien, if otherwise subject, should be placed in expedited removal proceedings, referred for a credible fear interview, and detained pending a final determination of a credible fear of persecution or torture. See INA § 235(b)(1)(B)(iii)(IV); 8 CFR § 235.3(b)(4)(ii). Once it has been determined that an alien has a credible fear of persecution or torture, DHS may continue to detain the alien or parole the alien from custody, as appropriate.

(6) Cuban asylum seekers at land border ports-of-entry

Natives or citizens of Cuba arriving at land border ports of entry, whose immediate removal from the United States is highly unlikely, should be placed directly into section 240 proceedings in lieu of expedited removal, without lodging additional charges. These aliens may

be paroled directly from the port of entry while awaiting removal proceedings if identity is firmly established, all available background checks are conducted, and the alien does not pose any terrorist or criminal threat. Pursuant to section 235(b)(2)(C) of the INA, they may also be returned to contiguous territory pending removal proceedings under section 240 of the INA. This option should only be considered if the alien is not eligible for the exercise of parole discretion, the alien has valid status in Canada or Mexico, Canadian or Mexican border officials are willing to accept the alien back, and the claim of fear of persecution is unrelated to Canada or Mexico.

An officer should not parole a native or citizen of Cuba from a land border port of entry for the sole purpose of allowing the alien to apply for adjustment under the Cuban Adjustment Act of 1966, Pub. L. 89-732, 80 Stat. 1161 (1966), without initiating section 240 proceedings. The Cuban Adjustment Act (CAA) provides that any native or citizen of Cuba who has been admitted or paroled into the United States, *and who is otherwise admissible as an immigrant*, may adjust status to that of a lawful permanent resident after being physically present in the United States for at least one year. It does not, however, require an officer to parole a native or citizen of Cuba at a port of entry without regard to public safety. Therefore, an officer should grant parole to a native or citizen of Cuba only if the alien does not pose a criminal or terrorist threat to the United States.

Chapter 17.15(c) of the Inspector's Field Manual is revised to read as follows:

(c) Withdrawal of application for admission in lieu of an expedited removal order.

DHS has the discretion to allow an inadmissible alien to voluntarily withdraw his or her application for admission and to depart the United States in accordance with section 235(a)(4) of the INA. This discretion applies to aliens subject to expedited removal, and should be applied carefully and consistently, since an officer's decision to allow withdrawal or issue a removal order is final. Officers should keep in mind that an order of expedited removal carries with it all the penalties of an order of removal issued by an immigration judge (including a bar to reentry of at least 5 years following removal pursuant to section 212(a)(9)(A)(i)).

Follow the guidelines contained in Chapter 17.2 to determine whether an alien's withdrawal of an application for admission or asylum claim best serves the interest of justice. An officer's decision to permit withdrawal of an application for admission must be properly documented by means of a Form I-275, Withdrawal of Application for Admission/ Consular Notification, to include the facts surrounding the voluntary withdrawal and the withdrawal of the asylum claim. In addition, an officer should prepare a new sworn statement, or an addendum to the original sworn statement on Form I-867A&B, covering the facts pertaining to the alien's withdrawal of the asylum claim.

An alien may not be pressured into withdrawing his or her application for admission or asylum claim under any circumstances. An officer must provide adequate interpretation to ensure that the alien understands the expedited removal process and the effects of withdrawing an application for admission or an asylum claim. Furthermore, an asylum officer must be consulted before an alien who has expressed a fear of return to his or her home country may be permitted to withdraw an asylum claim.

If an officer permits an alien to withdraw his or her application for admission and elects to return the alien to Canada or Mexico, the Form I-275 should indicate the alien's status in Canada or Mexico and the basis for determination of that status. This determination may be based on contacts with Canadian or Mexican authorities, stamps the alien's passport, or other available documentation. The narrative on Form I-275 should also indicate that the alien has not expressed concern about returning to Canada or Mexico.

If the alien expresses any concern or reluctance about returning to Canada or Mexico and wishes to pursue the asylum claim in the United States, the officer should advise the alien that he or she will be placed in the expedited removal process, unless subject to section 240 proceedings by statute, regulation, or policy, and will be detained pending the credible fear determination. The alien should not be given the Form I-589, Application for Asylum and for Withholding of Removal, nor should an affirmative asylum interview be scheduled at the port of entry.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture

DISTRIBUTION	**ICE**
DIRECTIVE NO.:	**11002.1**
ISSUE DATE:	**December 8, 2009**
EFFECTIVE DATE:	**January 4, 2010**
SUPERSEDES:	**See section 3.**
FEA NUMBER:	**601-05**

1. **PURPOSE**. The Purpose of this ICE policy directive is to ensure transparent, consistent and considered ICE parole determinations for arriving aliens seeking asylum in the United States. This directive provides guidance to Detention and Removal Operations (DRO) Field Office personnel for exercising their discretion to consider the parole of arriving aliens processed under the expedited removal provisions of section 235 of the Immigration and Nationality Act (INA) who have been found to have a "credible fear" of persecution or torture by U.S. Citizenship and Immigration Services (USCIS) or an immigration judge of the Executive Office for Immigration Review. This directive establishes a quality assurance process that includes record-keeping requirements to ensure accountability and compliance with the procedures set forth herein.

1.1. This directive does not apply to aliens in DRO custody under INA § 236. This directive applies only to arriving aliens who have been found by USCIS or an immigration judge to have a credible fear of persecution or torture.

2. **AUTHORITIES/REFERENCES**.

2.1. INA §§ 208, 212(d)(5), 235(b), and 241(b)(3); 8 U.S.C. §§ 1158, 1182(d)(5), 1225(b), and 1231(b)(3); 8 C.F.R. §§ 1.1(q), 208.30(e)-(f), 212.5 and 235.3.

2.2. Department of Homeland Security Delegation Number 7030.2, "Delegation of Authority to the Assistant Secretary for the Bureau of Immigration and Custom Enforcement" (Nov. 13, 2004).

2.3. ICE Delegations of Authority to the Directors, Detention and Removal and Investigations and to Field Office Directors, Special Agents in Charge and Certain Other Officers of the Bureau of Immigration and Customs Enforcement, No. 0001 (June 6, 2003).

3. **SUPERSEDED POLICIES AND GUIDANCE**. The following ICE directive is hereby superseded:

3.1. ICE Policy Directive No. 7-1-0, "Parole of Arriving Aliens Found to Have a 'Credible Fear" of Persecution or Torture" (Nov. 6, 2007).

4. **BACKGROUND**.

4.1. Arriving aliens processed under the expedited removal provisions of INA § 235(b) may pursue asylum and related forms of protection from removal if they successfully demonstrate to USCIS or an immigration judge a credible fear of persecution or torture.

4.2. Arriving aliens who establish a credible fear of persecution or torture are to be detained for further consideration of the application for asylum. INA § 235(b)(1)(B)(ii). Such aliens, however, may be paroled on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit," provided the aliens present neither a security risk nor a risk of

absconding. 8 C.F.R. § 212.5(b); *see also* 8 C.F.R. § 235.3(c) (providing that aliens referred for INA § 240 removal proceedings, including those who have a credible fear of persecution or torture, may be paroled under § 212.5(b) standards).

4.3. The applicable regulations describe five categories of aliens who may meet the parole standards based on a case-by-case determination, provided they do not present a flight risk or security risk: (1) aliens who have serious medical conditions, where continued detention would not be appropriate; (2) women who have been medically certified as pregnant; (3) certain juveniles; (4) aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; and (5) aliens whose continued detention is not in the public interest. *See* 8 C.F.R. § 212.5(b). *But compare* 8 C.F.R. § 235.3(b)(4)(ii) (stating that arriving aliens who have not been determined to have a credible fear will not be paroled unless parole is necessary in light of a "medical emergency or is necessary for a legitimate law enforcement objective").

4.4. While the first four of these categories are largely self-explanatory, the term "public interest" is open to considerable interpretation. This directive explains how the term is to be interpreted by DRO when it decides whether to parole arriving aliens determined to have a credible fear. The directive also mandates uniform record-keeping and review requirements for such decisions. Parole remains an inherently discretionary determination entrusted to the agency; this directive serves to guide the exercise of that discretion.

5. **DEFINTIONS**:

5.1. **Arriving Alien**. For purposes of this directive, "arriving alien" has the same definition as provided for in 8 C.F.R. § 1.1(q) and 1001.1(q).

5.2. **Credible Fear**. For purposes of this directive, with respect to an alien processed under the INA § 235(b) "expedited removal" provisions, "credible fear" means a finding by USCIS or an immigration judge that, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the interviewing USCIS officer or immigration judge, there is a significant possibility that alien could establish eligibility for asylum under INA § 208, withholding of removal under INA § 241(b)(3), or protection from removal under the Convention Against Torture.

5.3. **Parole**. For purposes of this directive, "parole" is an administrative measure used by ICE to temporarily authorize the release from immigration detention of an inadmissible arriving alien found to have a credible fear of persecution or torture, without lawfully admitting the alien. Parole does not constitute a lawful admission or a determination of admissibility, *see* INA §§ 212(d)(5)(A), 101(a)(13)(B), and reasonable conditions may be imposed on the parole, *see* 8 C.F.R. § 212.5(d). By statute, parole may be used, in the discretion of ICE and under such conditions as ICE may prescribe, only for urgent humanitarian reasons or for significant public benefit. As interpreted by regulation, "urgent humanitarian reasons" and "significant public benefit" include the five categories set forth in 8 C.F.R. § 212.5(b) and listed in paragraph 4.3 of this directive, including the general

category of "aliens whose continued detention is not in the public interest."

6. **POLICY**.

6.1. As soon as practicable following a credible fear determination by USCIS for an arriving alien detained by DRO, DRO shall provide the alien with the attached *Parole Advisal and Scheduling Notification*. This form informs the alien that he or she will be interviewed for potential parole from DRO custody and notifies the alien of the date of the scheduled interview and the deadline for submitting any documentary material supporting his or her eligibility for parole. The contents of the notification shall be explained to such aliens in a language they understand. In determining whether detained arriving aliens found to have a credible fear should be paroled from custody, DRO shall proceed in accordance with the terms of this directive.

6.2. Each alien's eligibility for parole should be considered and analyzed on its own merits and based on the fats of the individual alien's case. However, when an arriving alien found to have a credible fear establishes to the satisfaction of DRO his or her identity and that he or she presents neither a flight risk nor danger to the community, DRO should, absent additional factors (as described in paragraph 8.3 of this directive), parole the alien on the basis that his or her continued detention is not in the public interest. DRO Field Offices shall uniformly document their parole decision-making processes using the attached *Record of Determination/Parole Determination Worksheet*.

6.3. Consistent with the terms of this directive, DRO shall maintain national and local statistics on parole determinations and have a quality assurance process in place to monitor parole decision-making, as provided for in sections 7 and 8 of this directive.

6.4. In conducting parole determinations for arriving aliens in custody after they are found to have a credible fear of persecution or torture, DRO shall follow the procedures set forth in section 8 of this directive.

6.5. DRO shall provide every alien subject to this directive with written notification of the parole decision, including a brief explanation of the reasons for any decision to deny parole. When DRO denies parole under this directive, it should also advise the alien that he or she may request redetermination of this decision based upon changed circumstances or additional evidence relevant to the alien's identity, security risk, or risk of absconding. DRO shall ensure reasonable access to translation or interpreter services if notification is provided to the alien in a language other than his or her native language and the alien cannot communicate effectively in that language.

6.6 Written notifications of parole decisions shall be provided to aliens subject to this directive and, if represented, their representative within seven days of the date an alien is initially interviewed for parole or the date the alien requests a parole redetermination, absent reasonable justification for delay in providing such notification.

6.7. A decision to grant or deny parole shall be prepared by a DRO officer assigned such duties within his or

her respective DRO Field Office. The decision shall pass through at least one level of supervisory review, and concurrence must be finally approved by the Field Office Director (FOD), Deputy (DFOD), or Assistant FOD (AFOD), where authorized by the FOD.

7. **RESPONSIBLITIES**.

7.1. The **DRO Director** is responsible for the overall management of the parole decision-making process for arriving aliens in DRO custody following determinations that they have a credible fear of persecution or torture.

7.2. The **DRO Assistant Director for Operations** is responsible for:

1) Ensuring considered, consistent DRO parole decision-making and recordkeeping nationwide in cases of arriving aliens found to have a credible fear;

2) Overseeing monthly tracking of parole statistics by all DRO Field Offices for such cases; and

3) Overseeing an effective national quality assurance program that monitors the Field Offices to ensure compliance with this directive.

7.3. **DRO Field Office Directors** are responsible for:

1) Implementing this policy and quality assurance processes;

2) Maintaining a log of parole adjudications for credible fear cases within their respective geographic areas of responsibility, including copies of the *Record of Determination/Parole Determination Worksheet*;

3) Providing monthly statistical reports on parole decisions for arriving aliens found to have a credible fear;

4) Making the final decision to grant or deny parole for arriving aliens found to have a credible fear within their respective areas of responsibility or, alternatively, delegating such responsibility to the DFODs or AFODs (in which case, FODs nevertheless retain overall responsibility for their office's compliance with this directive regardless of delegating signatory responsibility to DFODs or AFODs); and

5) Ensuring that DRO field personnel within their respective areas of responsibility who will be assigned to make parole determinations are familiar with this directive and corresponding legal authorities.

7.3. **DRO Deputy Field Office Directors** are responsible for reviewing, and forwarding for their respective FODs' approval, parole decisions prepared by their subordinates in the cases of arriving aliens found to have a credible fear of persecution or torture. Alternatively, DFODs delegated responsibility under paragraph 7.3 of this directive are responsible for discharging final decision-making authority over parole determinations in such cases within their respective areas of responsibility.

7.5. **Assistant Field Office Directors** are responsible for reviewing, and forwarding for their respective DFODs' or FODs' approval, parole decisions prepared by their subordinates in the cases of arriving aliens found to have a credible fear of persecution or

torture. Alternatively, AFODs delegated responsibility under paragraph 7.3 of this directive are responsible for discharging final decision-making authority over parole determinations in such cases within their respective areas of responsibility.

7.6. As applicable, **DRO field personnel** so assigned by their local chains-of-command are responsible for providing detained arriving aliens found to have a credible fear with the attached *Parole Advisal and Scheduling Notification* and for fully and accurately completing the attached *Record of Determination/ Parole Determination Worksheet* in accordance with this directive and corresponding legal authorities.

8. **PROCEDURES**.

8.1. As soon as practicable following a finding that an arriving alien has a credible fear, the DRO Field Office with custody of the alien shall provide the attached *Parole Advisal and Scheduling Notification* to the alien and explain the contents of the notification to the alien in a language he or she understands, through an interpreter if necessary. The Field Office will complete the relevant portions of the notification, indicating the time when the alien will receive an initial interview on his or her eligibility for parole and the date by which any documentary evidence the alien wishes considered should be provided, as well as instructions for how any such information should be provided.

8.2 Unless an additional reasonable period of time is necessary (e.g., due to operational exigencies or an alien's illness or request for additional time to obtain documentation), no later than seven days following a

finding that an arriving alien has a credible fear, a DRO officer familiar with the requirements of this directive and corresponding legal authorities must conduct an interview with the alien to assess his or her eligibility for parole. Within that same period, the officer must complete the *Record of Determination/ Parole Determination Worksheet* and submit it for supervisory review. If the officer concludes that parole should be denied, the officer should draft a letter to this effect for the FOD's, DFOD's, or AFOD's signature to be provided to the alien or the alien's representative and forward this letter for supervisory review along with the completed *Record of Determination/Parole Determination Worksheet*. The letter must include a brief explanation of the reasons for denying parole and notify the alien that he or she may request redetermination of parole based upon changed circumstances or additional evidence relevant to the alien's identity, security risk, or risk of absconding.

8.3. An alien should be paroled under this directive if DRO determines, in accordance with paragraphs (1) through (4) below, that the alien's identity is sufficiently established, the alien poses neither a flight risk nor a danger to the community, and no additional factors weigh against release of the alien.

1) <u>Identity</u>.

a) Although many individuals who arrive in the United States fleeing persecution or torture may understandably lack valid identity documentation, asylum-related fraud is of genu-

ine concern to ICE, and DRO must be satisfied that an alien is who he or she claims to be before releasing the alien from custody.

b) When considering parole requests by an arriving alien found to have a credible fear, Field Office personnel must review all relevant documentation offered by the alien, as well as any other information available about the alien, to determine whether the alien can reasonably establish his or her identify.

c) In an alien lacks valid government-issued documents that support his or her assertion of identity, Field Office personnel should ask whether the alien can obtain government-issued documentation of identity.

d) If the alien cannot reasonably provide valid government-issued evidence of identity (including because the alien reasonably does not wish to alert that government to is or her whereabouts), the alien can provide for consideration sworn affidavits from third parties. However, third-party affiants must include copies of valid, government issued photo-identification documents and fully establish their own identities and addresses.

e) If government-issued documentation of identity or third-party affidavits from reliable affiants are either not available or insufficient to establish the alien's identity on their own, Field Office personnel should explore whether the alien is otherwise able to establish his or her identity through credible statements

such that there are no substantial reasons to doubt the alien's identity.

2) Flight Risk.

a) In order to be considered for release, an alien determined to have a credible fear of persecution or torture must present sufficient evidence demonstrating his or her likelihood of appearing when required.

b) Factors appropriate for consideration in determining whether an alien has made the required showing include, but are not limited to, community and family ties, employment history, manner of entry and length of residence in the United States, stability of residence in the United States, record of appearance for prior court hearings and compliance with past reporting requirements, prior immigration and criminal history, ability to post bond, property ownership, and possible relief or protection from removal available to the alien.

c) Field Office personnel shall consider whether setting a reasonable bond and/or entering the alien in an alternative-to-detention program would provide reasonable assurances that the alien will appear at all hearings and depart from the United States when required to do so.

d) Officers should exercise their discretion to determine what reasonable assurances, individually or in combination, are warranted on a case-by-case basis to mitigate flight risk.

In any event, the alien must be able to provide an address where he or she will be residing and must timely advise DRO of any change of address.

3) Danger to the Community.

a) In order for an alien to be considered for parole, Field Office personnel must make a determination whether an alien found to have a credible fear poses a danger to the community or to U.S. national security.

b) Information germane to the determination includes, but is not limited to, evidence of past criminal activity in the United States or abroad, of activity contrary to U.S. national security interests, of other activity giving rise to concerns of public safety or danger to the community (including due to serious mental illness), disciplinary infractions or incident reports, and any criminal or detention history that shows that the alien has harmed or would likely harm himself or herself or others.

c) Any evidence of rehabilitation also should be weighed.

4) Additional Factors.

a) Because parole remains an inherently discretionary decision, in some cases there may be exceptional, overriding factors that should be considered in addition to the three factors discussed above. Such factors may include, but are not limited to, serious adverse foreign

policy consequences that may result if the alien is released or overriding law enforcement interests.

b) Field Office personnel may consider such additional factors during the parole decision-making process.

8.4. Assigned DRO officers should, where appropriate, request that parole applicants prove any supplementary information that would aid the officers in reaching a decision. The *Record of Determination/ Parole Determination Worksheet* should be annotated to document the request for supplementary information and any response from the detainee.

8.5. After preparing and signing the *Record of Determination/Parole Determination Worksheet*, and in the case of a denial of parole, drafting a written response to the alien, the assigned DRO officer shall forward these materials and the parole request documentation to his or her first-line supervisor for review and concurrence.

8.6. Upon his or her concurrence, the first-line supervisor shall sign the *Record of Determination/Parole Determination Worksheet* where indicated and forward it, along with any related documentation, to the FOD (or, where applicable, the DFOD or AFOD) for final approval.

8.7. The FOD (or, where applicable, the DFOD or AFOD) shall review the parole documentation, consult with the preparing officer and supervisor as necessary, and either grant or deny parole by signing the *Rec-*

ord of Determination/Parole Determination Worksheet where indicated and, in the case of a denial, signing the written response to the alien.

8.8. Following a final decision by the FOD to deny parole (or, where applicable, the DFOD or AFOD), the Field Office shall provide the written response to the alien or, if represented, to the alien's legal representative, indicating that parole was denied. If parole is granted, the Field Office shall provide the alien with a date-stamped I-94 Form bearing the following notation: **"Paroled under 8 C.F.R. § 212.5(b). Employment authorization not to be provided on the basis."**

8.9. If an alien makes a written request for redetermination of an earlier decision denying parole, the Field Office may, in its own discretion, reinterview the alien or consider the request based solely on documentary material already provided or otherwise of record.

8.10. The supporting documents and a copy of the parole decision sent to the alien (if applicable), the completed *Record of Determination/Parole Determination Worksheet*, and any other documents related to the parole adjudication should be placed in the alien's A-file in a record of proceeding format. In addition, a copy of the *Record of Determination/Parole Determination Worksheet* shall be stored land maintained under the authority of the FOD for use in preparing monthly reports.

8.11. On a monthly basis, FODs shall submit reports to the Assistant Director for Operations, or his or her designee, detailing the number of parole adjudications

conducted under this directive within their respective areas of responsibility, the results of those adjudications, and the underlying basis of each Field Office decision whether to grant or deny parole. The Assistant Director for Operations, or his or her designee, in conjunction with appropriate DRO Headquarters components, will analyze this reporting and collect individual case information to review in more detail, as warranted. In particular, this analysis will rely on random sampling of all reported cases for in-depth review and will include particular emphasis on cases where parole was not granted because of the presence of additional factors, per paragraph 8.3(4) of this directive. Any significant or recurring deficiencies identified during this monthly analysis should be explained to the affected Field Office, which will take appropriate corrective action.

8.12. At least once every six months, the Assistant Director for Operations, or his or her designee, shall prepare a thorough and objective quality assurance report, examining the rate at which paroled aliens abscond and the Field Offices' parole decision-making, including any noteworthy trends or corrective measures undertaken based upon the monthly quality assurance analysis required by paragraph 8.11 of this directive.

9. **ATTACHMENTS**.

- *Parole Advisal and Scheduling Notification*
- *Record of Determination/Parole Determination Worksheet.*

10. **NO PRIVATE RIGHTS CREATED**. This directive is an internal policy statement of ICE. It is not intended to, shall not be construed to, may not be relied upon to, and does not create, any rights, privileges, or benefits, substantive or procedural, enforceable by any party against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

Approved: /s/ JOHN MORTON
JOHN MORTON
Assistant Secretary
U.S. Immigration and Customs Enforcement

SRE

Subsecretaría para América del Norte

Ciudad de México, 20 de diciembre de 2018.

Sr. John Creamer
Encargado de Negocios
Embajada de Estados Unidos en México

A continuación se transcribe el posicionamiento del Gobierno de México ante la decision del Gobierno de Estados Unidos de implementar la sección 235(b)(2)(c) de su Ley de Inmigración y Nacionalidad:

"A las ocho de la mañana, el Gobierno de Estados Unidos comunico a Gobierno de México que el Departamento de Seguridad interna de los Estados Unidos de América (DHS por sus siglas en inglés) tiene la intención de impiementaruna sección de su ley migratoria que lo permitiría devolver a extranjeros, no mexicanos, a nuestro país para que aguarden aqui el desarrolio de su proceso migratorio en Estados Unidos.

México reafirma su derecho soberano de admitir o rechazar el ingreso de extranjeros a su territorio, en ejercicio de su politica migratoria. Por elio, el Gobierno de México ha decidido tomar las siguientes acciones en beneficio de las personal migrantes, en particular a los menores de edad, estén acompañados o no, así como para proteger el derecho de aquellos que desean iniciar y seguir un procedimiento de asilo en territorio de los Estados Unidos de América:

1. Autoizara, por razones humanitarias y de manera temporaí, el ingreso de ciertas pesonas extranjeras provenientes de Estados Unidos que hayan ingresado a ese país por un puerto de entrada o que hayan sido aprehendidas entre puertos de entrada, hayan sido entrevistadas por las autoridades de contro migratorio de ese país, y hayan recibido un citatorio para presentarse ante un Juez Migratorio. Lo anterior con base en la legislación mexicana vigente y los compromisos internacionales suscritos, como la Convención sobre el Estatuto de los Refugiacios, su Protocolo, asi como la Convención Contra la Tortura y otros Tratos o Penas Crueles, Inhumanos o Degradantes entre otros.

2. Permitirá que as personas extranjeras que hayan recibido un citatorio soliciten su internación a territorio nacional por razones humanitarias en los lugares destinados al tránsito internacional de personas, permanezcan en territorio nacional bajo la condición e "estancia por razones humanitarias", y puedan realizar entradas y salidas múltiples del territorio nacional.

3. Garantizará que las personas extranjeras que hayan recibido su citatorio gocen plenamente de los derechos y libertades reconocidos en la Constitución, en los tratados internacionales de los cuales es part el Estado mexicano, así como en la Ley de Migración. Tendran derecho a un trato igualitario sin discriminación alguna y con el debido respeto a sus derechos humanos, así como la oportunidad de solicitar un permiso para trabajar a cambio de una remuneración, lo que les permitirá solventar sus necesidades básicas.

4. Procurará que la implementacion de las medidas que tome cada gobierno se coordine a nivel técnico-operativo con la finalidad de desarrollar mecanismos

que permitan la participación de las personas migrantes con citatorio en su audiencia ante un Juez Migratorio estadounidense, el acceso sin interferencias a informacion y servicios legales, así como para prevenir fraudes y abusos.

Las acciones que tomen los gobiernos de México y de Estados Unidos no constituyen un escuema de Tercer Pais Seguro, en el que se obligaría a las personas migrantes en tránsito a solicitar asilo en México. Estan dirigidas a facilitar el seguimiento de las solicitudes de asilo en los Estados Unidos, sin que eso implique obstáculo alguno para que cualquier persona extranjera pueda solicitar refugio en México.

El Gobierna de México reitera que toda persona extranjera deberá observar la Ley mientras se encuentre en territorio nacional."

Atentamente,

/s/ JULIÁN ESCUTIA RODRIGUEZ
JULIÁN ESCUTIA RODRIGUEZ
Coordinador de Asesores del
Subsecretario para América del Norte

Press Release No. 14
Mexico City, December 20, 2018

Statement of the Government of Mexico regarding the decision of the United States Government to implement section 235(b)(2)(c) of its Immigration and Nationality Law

At eight in the morning, the Government of the United States informed the Government of Mexico that the Department of Homeland Security of the United States of America (DHS) intends to implement a section of its immigration law that allows returning non-Mexican foreigners to our country so that they can wait for the development of their United States' immigration process.

Mexico reaffirms its sovereign right to admit or reject the entry of foreigners into its territory, in the exercise of its migration policy. Therefore, the Government of Mexico has decided to take the following actions for the benefit of the migrants, in particular of minors whether accompanied or not and to protect the right of those who wish to initiate an asylum procedure in the territory of the United States of America:

Mexico will authorize, for humanitarian reasons and in a temporary fashion, the entry of certain foreign persons from within the United States who have entered that country through a port of entry or who have been apprehended between ports of entry and interviewed by the authorities of migration authorities of that country, and have received a notice to attend a hearing before a judge. This is based on the current Mexican legislation and the international commitments thereby signed, such as the Convention on the Status of Refugees, its Protocol, as well as the Convention against Torture and other

Cruel, Inhuman or Degrading Treatment or Punishment, among others.

Mexico will allow foreigners with a notice to attend a hearing to request their admission to the national territory for humanitarian reasons in the posts designated to the international transit of persons, with the right to stay in national territory under the humanitarian reasons stay condition and make multiple entries from the national territory.

Mexico will guarantee that foreigners who have received their notice fully enjoy the rights and freedoms recognized in the Constitution, in the international treaties to which the Mexican State is a party, as well as in the current Migration Law. They will be entitled to equal treatment without any discrimination and with due respect to their human rights, as well as the opportunity to apply for a work permit in exchange for remuneration, which will allow them to meet their basic needs.

Mexico will ensure that the implementation of the measures taken by each government is coordinated at the technical-operational level in order to develop mechanisms that allow the participation of migrants with notice to attend a hearing before an immigration judge, the right to access information and legal services without interference, as well as to prevent fraud and abuse.

The actions taken by the governments of Mexico and the United States do not represent the scheme of a Third Secure Country, in which migrants in transit are forced to seek asylum in Mexico. They are aimed at facilitating the follow-up of asylum applications in the United States without any impediment to such matter.

The Government of Mexico stresses the need that every foreigner must respect domestic law while it is located in the national territory.

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U.S. LEGAL NEWS
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Trump attorney general's ruling expands indefinite detention for asylum seekers

By Mica Rosenberg, Kristina Cooke

NEW YORK/SAN FRANCISCO (Reuters)—The U.S. Attorney General on Tuesday struck down a decision that had allowed some asylum seekers to ask for bond in front of an immigration judge, in a ruling that expands indefinite detention for some migrants who must wait months or years for their cases to be heard.

The first immigration court ruling from President Donald Trump's newly appointed Attorney General William Barr is in keeping with the administration's moves to clamp down on the asylum process as tens of thousands of mostly Central Americans cross into the United States asking for refuge. U.S. immigration courts are overseen by the Justice Department and the Attorney General can rule in cases to set legal precedent.

Barr's ruling is the latest instance of the Trump administration taking a hard line on immigration. This year the administration implemented a policy to return some asylum seekers to Mexico while their cases work their way through backlogged courts, a policy which has been challenged with a lawsuit.

Several top officials at the Department of Homeland Security were forced out this month over Trump's frustrations with an influx of migrants seeking refuge at the U.S. southern border.

Barr's decision applies to migrants who crossed illegally into the United States.

Typically, those migrants are placed in "expedited removal" proceedings—a faster form of deportation reserved for people who illegally entered the country within the last two weeks and are detained within 100 miles (160 km) of a land border. Migrants who present themselves at ports of entry and ask for asylum are not eligible for bond.

But before Barr's ruling, those who had crossed the border between official entry points and asked for asylum were eligible for bond, once they had proven to asylum officers they had a credible fear of persecution.

"I conclude that such aliens remain ineligible for bond, whether they are arriving at the border or are apprehended in the United States," Barr wrote.

Barr said such people can be held in immigration detention until their cases conclude, or if the Department of Homeland Security (DHS) decides to release them by granting them "parole." DHS has the discretion to parole people who are not eligible for bond and frequently does so due to insufficient detention space or other humanitarian reasons.

Barr said he was delaying the effective date by 90 days "so that DHS may conduct the necessary operational planning for additional detention and parole decisions."

The decision's full impact is not yet clear, because it will in large part depend on DHS' ability to expand detention, said Steve Vladeck, a law professor at the University of Texas.

"The number of asylum seekers who will remain in potentially indefinite detention pending disposition of their cases will be almost entirely a question of DHS's detention capacity, and not whether the individual circumstances of individual cases warrant release or detention," Vladeck said.

DHS officials did not immediately respond to a request for comment on the decision. The agency had written in a brief in the case arguing that eliminating bond hearings for the asylum seekers would have "an immediate and significant impact on . . . detention operations."

In early March, Immigration and Customs Enforcement (ICE), the DHS agency responsible for detaining and deporting immigrants in the country illegally, said the average daily population of immigrants in detention topped 46,000 for the 2019 fiscal year, the highest level since the agency was created in 2003. Last year, Reuters reported that ICE had modified a tool officers have been using since 2013 when deciding whether an immigrant should be detained or released on bond, making the process more restrictive.

The decision will have no impact on unaccompanied migrant children, who are exempt from expedited removal. Most families are also paroled because of a lack of facilities to hold parents and children together.

Michael Tan, from the American Civil Liberties Union, said the rights group intended to sue the Trump administration over the decision, and immigrant advocates decried the decision.

Barr's decision came after former Attorney General Jeff Sessions decided to review the case in October. Sessions resigned from his position in November, leaving the case to Barr to decide.

Reporting by Mica Rosenberg in New York and Kristina Cooke in San Francisco; additional reporting by Yeganeh Torbati in Washington; Editing by Lisa Shumaker

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Assessment of the Migrant Protection Protocols (MPP)
October 28, 2019

I. Overview and Legal Basis

The Department of Homeland Security (DHS) remains committed to using all available tools to address the unprecedented security and humanitarian crisis at the southern border of the United States.

- At peak of the crisis in May 2019, there were more than 4,800 aliens crossing the border daily —representing an average of more than *three apprehensions per minute*.
- The law provides for mandatory detention of aliens who unlawfully enter the United States between ports of entry if they are placed in expedited removal proceedings. However, resource constraints during the crisis, as well as other court-ordered limitations on the ability to detain individuals, made many releases inevitable, particularly for aliens who were processed as members of family units.

Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) authorizes the Department of Homeland Security to return certain applicants for admission to the contiguous country from which they are arriving on land (whether or not at a designated port of entry), pending removal proceedings under INA § 240.

- Consistent with this express statutory authority, DHS began implementing the Migrant Protection Protocols (MPP) and returning aliens subject to INA § 235(b)(2)(C) to Mexico, in January 2019.

- Under MPP, certain aliens who are nationals and citizens of countries other than Mexico (third-country nationals) arriving in the United States by land from Mexico who are not admissible may be returned to Mexico for the duration of their immigration proceedings.

The U.S. government initiated MPP pursuant to U.S. law, but has implemented and expanded the program through ongoing discussions, and in close coordination, with the Government of Mexico (GOM).

- MPP is a core component of U.S. foreign relations and bilateral cooperation with GOM to address the migration crisis across the shared U.S.-Mexico border.
- MPP expansion was among the key "meaningful and unprecedented steps" undertaken by GOM "to help curb the flow of illegal immigration to the U.S. border since the launch of the U.S.-Mexico Declaration in Washington on June 7, 2019."[1]
- On September 10, 2019, Vice President Pence and Foreign Minister Ebrard "agree[d] to implement the Migrant Protection Protocols to the fullest extent possible."[2]
- Therefore, disruption of MPP would adversely impact U.S. foreign relations—along with the

[1] https://www.whitehouse.gov/briefings-statements/readout-vice-president-mike-pences-meeting-mexican-foreign-secretary-marcelo-ebrard/

[2] https://www.whitehouse.gov/briefings-statements/readout-vice-president-mike-pences-meeting-mexican-foreign-secretary-marcelo-ebrard/

> U.S. government's ability to effectively address the border security and humanitarian crisis that constitutes an ongoing national emergency.[3]

II. MPP Has Demonstrated Operational Effectiveness

In the past nine months—following a phased implementation, and in close coordination with GOM—DHS has returned more than 55,000 aliens to Mexico under MPP. MPP has been an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system.

Apprehensions of Illegal Aliens are Decreasing

- Since a recent peak of more than 144,000 in May 2019, total enforcement actions—representing the number of aliens apprehended between points of entry or found inadmissible at ports of entry—have decreased by 64%, through September 2019.
- Border encounters with Central American families —who were the main driver of the crisis and comprise a majority of MPP-amenable aliens—have decreased by approximately 80%.
- Although MPP is one among many tools that DHS has employed in response to the border crisis, DHS has observed a connection between MPP implementation and decreasing enforcement actions at the border—including a rapid and substantial decline in apprehensions in those areas

[3] https://www.whitehouse.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/

where the most amenable aliens have been processed and returned to Mexico pursuant to MPP.

MPP is Restoring Integrity to the System

- Individuals returned to Mexico pursuant to MPP are now at various stages of their immigration proceedings: some are awaiting their first hearing; some have completed their first hearing and are awaiting their individual hearing; some have received an order of removal from an immigration judge and are now pursuing an appeal; some have established a fear of return to Mexico and are awaiting their proceedings in the United States; some have been removed to their home countries; and some have withdrawn claims and elected to voluntarily return to their home countries.
- MPP returnees with meritorious claims can be granted relief or protection within months, rather than remaining in limbo for years while awaiting immigration court proceedings in the United States.
    - The United States committed to GOM to minimize the time that migrants wait in Mexico for their immigration proceedings. Specifically, the Department of Justice (DOJ) agreed to treat MPP cases such as detained cases such that they are prioritized according to longstanding guidance for such cases.
    - The first three locations for MPP implementation —San Diego, Calexico, and El Paso—were chosen because of their close proximity to existing immigration courts.

- o After the June 7, 2019, Joint Declaration between GOM and the United States providing for expansion of MPP through bilateral cooperation, DHS erected temporary, dedicated MPP hearing locations at ports of entry in Laredo and Brownsville, in coordination with DOJ, at a total six-month construction and operation cost of approximately $70 million.
- o Individuals processed in MPP receive initial court hearings within two to four months, and—as of October 21, 2019—almost 13,000 cases had been completed at the immigration court level.
- o A small subset of completed cases have resulted in grants of relief or protection, demonstrating that MPP returnees with meritorious claims can receive asylum, or any relief or protection for which they are eligible, more quickly via MPP than under available alternatives.
- o Individuals not processed under MPP generally must wait years for adjudication of their claims. There are approximately one million pending cases in DOJ immigration courts. Assuming the immigration courts received no new cases and completed existing cases at a pace of 30,000 per month—it would take several years, until approximately the end of 2022, to clear the existing backlog.

- MPP returnees who do not qualify for relief or protection are being quickly removed from the

United States. Moreover, aliens without meritorious claims—which no longer constitute a free ticket into the United States—are beginning to voluntarily return home.

- o According to CBP estimates, approximately 20,000 people are sheltered in northern Mexico, near the U.S. border, awaiting entry to the United States. This number—along with the growing participation in an Assisted Voluntary Return (AVR) program operated by the International Organization for Migration (IOM), as described in more detail below—suggests that a significant proportion of the 55,000+ MPP returnees have chosen to abandon their claims.

III. Both Governments Endeavor to Provide Safety and Security for Migrants

- The Government of Mexico (GOM) has publicly committed to protecting migrants.
  - o A December 20, 2018, GOM statement indicated that "Mexico will guarantee that foreigners who have received their notice fully enjoy the rights and freedoms recognized in the Constitution, in the international treaties to which the Mexican State is a party, as well as in the current Migration Law. They will be entitled to equal treatment without any discrimination and due respect to their human rights, as well as the opportunity to apply for a work permit in exchange for remuneration, which will allow them to meet their basic needs."

  - Consistent with its commitments, GOM has accepted the return of aliens amenable to MPP. DHS understands that MPP returnees in Mexico are provided access to humanitarian care and assistance, food and housing, work permits, and education.
  - GOM has launched an unprecedented enforcement effort bringing to justice transnational criminal organizations (TCOs) who prey on migrants transiting through Mexico—enhancing the safety of all individuals, including MPP-amenable aliens.
- o As a G-20 country with many of its 32 states enjoying low unemployment and crime, Mexico's commitment should be taken in good faith by the United States and other stakeholders. Should GOM identify any requests for additional assistance, the United States is prepared to assist.

- Furthermore, the U.S. government is partnering with international organizations offering services to migrants in cities near Mexico's northern border.
  - o In September 2019, the U.S. Department of State Bureau of Population, Refugees, and Migration (PRM) funded a $5.5 million project by IOM to provide shelter in cities along Mexico's northern border to approximately 8,000 vulnerable third-country asylum seek-

ers, victims of trafficking, and victims of violent crime in cities along Mexico's northern border.

- o In late September 2019, PRM provided $11.9 million to IOM to provide cash-based assistance for migrants seeking to move out of shelters and into more sustainable living.

- The U.S. Government is also supporting options for those individuals who wish to voluntarily withdraw their claims and receive free transportation home. Since November 2018, IOM has operated its AVR program from hubs within Mexico and Guatemala, including Tijuana and Ciudad Juarez. PRM has provided $5 million to IOM to expand that program to Matamoros and Nuevo Laredo and expand operations in other Mexican northern border cities. As of mid-October, almost 900 aliens in MPP have participated in the AVR program.
- The United States' ongoing engagement with Mexico is part of a larger framework of regional collaboration. Just as United Nations High Commissioner for Refugees has called for international cooperation to face the serious challenges in responding to large-scale movement of migrants and asylum-seekers travelling by dangerous and irregular means, the U.S. Government has worked with Guatemala, El Salvador, and Honduras to form partnerships on asylum cooperation (which includes capacity-building assistance), training and capacity building for border security operations, biometrics data sharing and

increasing access to H-2A and H-2B visas for lawful access to the United States.

IV. Screening Protocols Appropriately Assess Fear of Persecution or Torture

- When a third-country alien states that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico, the alien is referred to U.S. Citizenship & Immigration Services (USCIS). Upon referral, USCIS conducts an MPP fear-assessment interview to determine whether it is more likely than not that the alien will be subject to torture or persecution on account of a protected ground if returned to Mexico.
    - o MPP fear assessments are conducted consistent with U.S. law implementing the *non-refoulement* obligations imposed on the United States by certain international agreements and inform whether an alien is processed under—or remains—in MPP.
    - o As used here, "persecution" and "torture" have specific international and domestic legal meanings distinct from fear for personal safety.
- Fear screenings are a well-established part of MPP. As of October 15, 2019, USCIS completed over 7,400 screenings to assess a fear of return to Mexico.
    - o That number included individuals who express a fear upon initial encounter, as well as those who express a fear of return to Mexico at any subsequent point in their immigration

proceedings, including some individuals who have made multiple claims.

- o Of those, approximately 13% have received positive determinations and 86% have received negative determinations.
- o Thus, the vast majority of those third-country aliens who express fear of return to Mexico are not found to be more likely than not to be tortured or persecuted on account of a protected ground there. This result is unsurprising, not least because aliens amenable to MPP voluntarily entered Mexico en route to the United States.

V. Summary and Conclusion

In recent years, only about 15% of Central American nationals making asylum claims have been granted relief or protection by an immigration judge. Similarly, affirmative asylum grant rates for nationals of Guatemala, El Salvador, and Honduras were approximately 21% in Fiscal Year 2019. At the same time, there are—as noted above—over one million pending cases in DOJ immigration courts, in addition to several hundred thousand asylum cases pending with USCIS.

These unprecedented backlogs have strained DHS resources and challenged its ability to effectively execute the laws passed by Congress and deliver appropriate immigration consequences: those with meritorious claims can wait years for protection or relief, and those with non-meritorious claims often remain in the country for lengthy periods of time.

This broken system has created perverse incentives, with damaging and far-reaching consequences for both

the United States and its regional partners. In Fiscal Year 2019, certain regions in Guatemala and Honduras saw 2.5% of their population migrate to the United States, which is an unsustainable loss for these countries.

MPP is one among several tools DHS has employed effectively to reduce the incentive for aliens to assert claims for relief or protection, many of which may be meritless, as a means to enter the United States to live and work during the pendency of multi-year immigration proceedings. Even more importantly, MPP also provides an opportunity for those entitled to relief to obtain it within a matter of months. MPP, therefore, is a cornerstone of DHS's ongoing efforts to restore integrity to the immigration system—and of the United States' agreement with Mexico to address the crisis at our shared border.

Appendix A: Additional Analysis of MPP Fear-Assessment Protocol

U.S. Citizenship and Immigration Services (USCIS) strongly believes that if DHS were to change its fear-assessment protocol to affirmatively ask an alien amenable to MPP whether he or she fears return to Mexico, the number of fraudulent or meritless fear claims will significantly increase. This prediction is, in large part, informed by USCIS's experience conducting credible fear screenings for aliens subject to expedited removal. Credible fear screenings occur when an alien is placed into expedited removal under section 235(b)(1) of the Immigration and Nationality Act—a streamlined removal mechanism enacted by Congress to allow for prompt removal of aliens who lack valid entry documents or who attempt to enter the United States by fraud—and the alien expresses a fear of return to his or her home country or requests asylum. Under current expedited removal protocol, the examining immigration officer—generally U.S. Customs and Border Protection officers at a port of entry or Border Patrol agents—read four questions, included on Form I-867B, to affirmatively ask each alien subject to expedited removal whether the alien has a fear of return to his or her country of origin.[4]

The percentage of aliens subject to expedited removal who claimed a fear of return or requested asylum was once quite modest. However, over time, seeking asylum has become nearly a default tactic used by undocumented aliens to secure their release into the United

[4] *See* 8 C.F.R.§ 235.3(b)(2).

States. For example, in 2006, of the 104,440 aliens subjected to expedited removal, only 5% (5,338 aliens) were referred for a credible fear interview with USCIS. In contrast, 234,591 aliens were subjected to expedited removal in 2018, but 42% (or 99,035) were referred to USCIS for a credible fear interview, significantly straining USCIS resources.

Table A1: Aliens Subject to Expedited Removal and Share Making Fear Claims, FY 2006 - 2018

Fiscal Year	**Subjected to Expedited Removal**	**Referred for a Credible Fear Interview**	**Percentage Referred for Credible Fear**
2006	104,440	5,338	5%
2007	100,992	5,252	5%
2008	117,624	4,995	4%
2009	111,589	5,369	5%
2010	119,876	8,959	7%
2011	137,134	11,217	8%
2012	188,187	13,880	7%
2013	241,442	36,035	15%
2014	240,908	51,001	21%
2015	192,120	48,052	25%
2016	243,494	94,048	39%
2017	178,129	78,564	44%
2018	234,591	99,035	42%

Transitioning to an affirmative fear questioning model for MPP-amenable aliens would likely result in a similar increase. Once it becomes known that answering "yes" to a question can prevent prompt return to Mexico under MPP, DHS would experience a rise in fear claims similar to the expedited removal/credible fear process. And, affirmatively drawing out this information from aliens rather than reasonably expecting them to come forward on their own initiative could well increase the meritless fear claims made by MPP-amenable aliens.

It also bears emphasis that relatively small proportions of aliens who make fear claims ultimately are granted asylum or another form of relief from removal. Table A2 describes asylum outcomes for aliens apprehended or found inadmissible on the Southwest Border in fiscal years 2013 - 2018. Of the 416 thousand aliens making fear claims during that six-year period, 311 thousand (75 percent) had positive fear determinations, but only 21 thousand (7 percent of positive fear determinations) had been granted asylum or another form of relief from removal as of March 31, 2019, versus 72 thousand (23 percent) who had been ordered removed or agreed to voluntary departure. (Notably, about 70 percent of aliens with positive fear determinations in FY 2013 - 2018 remained in EOIR proceedings as of March 31, 2019.)

Table A2: Asylum Outcomes, Southwest Border Encounters, FY 2013 - 2018

Year of Encounter	2013	2014	2015	2016	2017	2018	Total
Total Encounters	490,093	570,832	446,060	560,432	416,645	522,626	3,006,688
Subjected to ER	225,426	222,782	180,328	227,382	160,577	214,610	1,231,105
Fear Claims[1]	39,648	54,850	50,588	98,265	72,026	100,756	416,133
Positive Fear Determinations[2]	31,462	36,615	35,403	76,005	55,251	75,856	310,592
Asylum Granted or Other Relief[3]	3,687 *11.7%*	4,192 *11.4%*	3,956 *11.2%*	4,775 *6.3%*	2,377 *4.3%*	2,168 *2.9%*	21,155 *6.8%*
Removal Orders[4]	9,980 *31.7%*	11,064 *30.2%*	9,466 *26.7%*	17,700 *23.3%*	12,130 *22.0%*	11,673 *15.4%*	72,013 *23.2%*
Asylum Cases Pending	17,554 *55.8%*	21,104 *57.6%*	21,737 *61.4%*	53,023 *69.8%*	40,586 *73.5%*	61,918 *81.6%*	215,922 *69.5%*
Other	241	255	244	507	158	97	1,502

Source: DHS Office of Immigration Statistics Enforcement Lifecycle.

Notes for Table A2: Asylum outcomes are current as of March 31, 2019.

1 Fear claims include credible fear cases completed by USCIS as well as individuals who claimed fear at the time of apprehension but who have no record of a USCIS fear determination, possibly because they withdrew their claim.

2 Positive fear determinations include positive determinations by USCIS as well as negative USCIS determinations vacated by EOIR.

3 Asylum granted or other relief includes withholding of removal, protection under the Convention Against Torture, Special Immigrant Juvenile status, cancelation of removal, and other permanent status conferred by EOIR.

4 Removal orders include completed repatriations and unexecuted orders of removal and grants of voluntary departure.

Implementing MPP assessments currently imposes a significant resource burden to DHS. As of October 15, 2019, approximately 10% of individuals placed in MPP have asserted a fear of return to Mexico and have been referred to an asylum officer for a MPP fear assessment. The USCIS Asylum Division assigns on average approximately 27 asylum officers per day to handle this caseload nationwide. In addition, the Asylum Division must regularly expend overtime resources after work hours and on weekends to keep pace with the same-day/next-day processing requirements under MPP. This workload diverts resources from USCIS's affirmative asylum caseload, which currently is experiencing mounting backlogs.

Most importantly, DHS does not believe amending the process to affirmatively ask whether an alien has a fear of return to Mexico is necessary in order to properly identify aliens with legitimate fear claims in Mexico because under DHS's current procedures, aliens subject to MPP **may raise a fear claim to DHS at any point in the MPP process**. Aliens are not precluded from receiving a MPP fear assessment from an asylum officer if they do not do so initially upon apprehension or inspection, and many do. As of October 15, 2019[5], approximately 4,680 aliens subject to MPP asserted a fear claim and received an MPP fear-assessment **after** their initial encounter or apprehension by DHS, with 14% found to have a positive

[5] USCIS began tracking this information on July 3, 2019.

fear of return to Mexico. Additionally, Asylum Division records indicate as of October 15, 2019[6], approximately 618 aliens placed into MPP have asserted **multiple** fear claims during the MPP process (from the point of placement into MPP at the initial encounter or apprehension) and have therefore received multiple fear assessments to confirm whether circumstances have changed such that the alien should not be returned to Mexico. Of these aliens, 14% were found to have a positive fear of return to Mexico.

Additionally, asylum officers conduct MPP fear assessments with many of the same safeguards provided to aliens in the expedited removal/credible fear context. For example, DHS officers conduct MPP assessment interviews in a non-adversarial manner, separate and apart from the general public, with the assistance of language interpreters when needed.[7]

In conducting MPP assessments, asylum officers apply a "more likely than not" standard, which is a familiar standard. "More likely than not" is equivalent to the "clear probability" standard for statutory withholding and not unique to MPP. Asylum officers utilize the same standard in the reasonable fear screening process when claims for statutory withholding of removal and protection under the Convention Against Torture (CAT).[8] The risk of harm standard for withholding (or deferral)

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[6] USCIS began tracking this information on July 3, 2019.

[7] USCIS Policy Memorandum PM-602-0169, *Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols*, 2019 WL 365514 (Jan. 28, 2019).

[8] See INA § 241(b)(3); 8 C.F.R. § 1208.16(b)(2) (same); See 8 C.F.R. § 1208.16(c)(2).

of removal under the Convention Against Torture (CAT) implementing regulations is the same, i.e., "more likely than not."[9] In addition to being utilized by asylum officers in other protection contexts, the "more likely than not" standard satisfies the U.S. government's *non-refoulement* obligations.

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[9] *See* 8 C.F.R. § 1208.16(c)(2); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8480 (Feb. 19, 1999) (detailing incorporation of the "more likely than not" standard into U.S. CAT ratification history); *see also Matter of J-F-F-*, 23 I&N Dec. 912 (BIA 2006).

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

2:21-CV-067-Z

THE STATE OF TEXAS, ET AL., PLAINTIFFS

v.

JOSEPH R. BIDEN, JR. ET AL., DEFENDANTS

Filed: Jul 21, 2021

ORDER

Before the Court is Plaintiffs' Motion to Exclude Evidence or, in the alternative, Require Production of Witnesses for Live Testimony (ECF No. 80). By the Motion, Plaintiffs aver that Defendants are "attempt[ing] to backfill a glaring omission from their own previously filed administrative record and to derail the final trial on the merits set for tomorrow." *Id.* at 2. Defendants are **ORDERED** to file a responsive brief **by today, July 21, 2021 at 5:00pm (CT)**.

SO ORDERED.

July [21], 2021. /s/ MATTHEW J. KACSMARYK
MATTHEW J. KACSMARYK
United State District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Civil Action No. 2:21-CV-067-Z

THE STATE OF TEXAS AND THE STATE OF MISSOURI

vs.

JOSEPH R. BIDEN, JR., ET AL.

July 22, 2021
Amarillo, Texas

TRANSCRIPT OF CONSOLIDATED HEARING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND TRIAL ON THE MERITS BEFORE THE HONORABLE MATTHEW J. KACSMARYK UNITED STATES DISTRICT JUDGE

A-P-P-E-A-R-A-N-C-E-S

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[**MR. THOMPSON**:] Lastly, I'll note that we have some carryover between our arbitrary and capricious argument and our substantive 1225 argument. The idea here is that DHS ignored the effect of terminating MPP on its ability to comply with Section 1225's mandatory detention requirements.

And I think it makes the most sense to discuss that in the substantive section, but I'll just note that it is, in fact, a part of our arbitrary and capricious claim as well.

So, under the INA, Section 1225 offers Defendants a choice. One, the Defendant can detain as required by 1225(b)(2)(A) if the alien is in the United States, or, under paragraph (C), DHS can let the alien remain in Mexico under a MPP-like program.

Now, the Defendants say that they can't use these two options—or, excuse me, they say they can't detain everyone because of resource constraints. There are a number of citations for this. We've put them in our

brief. But App. 307 is talking about resource constraints. We have the custody and transfer statistics pointing out the same problem. They say, continued detention is not in the interest of resource allocution or justice.

[59]

This is from the Administrative Record. I'll note that the Court has heard evidentiary objections to news articles that were contained in our evidentiary appendix. The Defendants also include news articles in their Administrative Record, so the Reuters' article at AR183 notes that DHS has the discretion to parole people who are not eligible for bond and frequently does so due to insufficient detention space.

The same article quotes Professor Vladeck from UT for the proposition that the number of asylum seekers who will remain in detention will almost certainly be a question of detention capacity and not whether the individual circumstances of individual cases weren't release or detention.

Now, these are things that Defendants themselves chose to put in the record.

THE COURT: And the Court is carrying forward evidentiary objections in ruling on those objections. The order on those objections will be paired with the Memorandum Opinion and Order, so that the parties are clear on which documents the Court relied on or excluded.

But I do want to address just briefly, and I don't want this to descend into an evidentiary hearing—I vastly prefer this oral argument design that we've set up—Page 6 of the Motion to Strike though, Defendants note

in that [60] motion that the CBP website no longer contains the footnote that supported Plaintiffs' initial argument that parole was being granted on a class-wide basis.

Given this extant or missing footnote, how should the Court evaluate the now missing footnote moving forward and what weight should the Court give to that?

MR. THOMPSON: So I think the footnote deserves all the weight it bears as a result of just reading its text. It was on the government's website. It is a self-authenticating document.

Usually, these government websites are subject to judicial notice as well. And now it is true that counsel has said—I guess that counsel believes it to be inaccurate, but as far as I know, we don't have any evidence that it's inaccurate. We don't have a declaration or something that says, no, I typed the footnote, and I was mistaken for some reason. Instead, what we have is I think independently sufficient but also confirming evidence from the things that we've just put on the screen and other things cited in our brief.

So I suspect the footnote—or, excuse me, my position is that the footnote is entitled to evidentiary weight, but I don't think it's required. I think the same fact-finding is supported by other evidence.

THE COURT: Okay. And just I will instruct the [61] United States, whether through Mr. Ward or Mr. Darrow, if you reach a point where those motion to strike issues are relevant and that CBP website is relevant to your argument, I'll hear any response to that now missing footnote.

I know that that featured prominently in the motions practice on strike, so if there is any response from the Government, I would just ask that you supplement your presentation to include that.

So you may proceed.

MR. THOMPSON: Thank you, Your Honor. So MPP lowered the number of aliens who needed to be detained relative to the detention space available.

The point here is that, when the government says we don't have the resources to detain everybody, then that —that raises the question: Well, what is the ratio of people who need detention to the detention space available?

MPP made that ratio more favorable to compliance with the law by giving the government the option of letting people remain in Mexico and thereby reducing the number of people who needed detention in the United States. So it was a lawful option that helped the government comply with its obligations of mandatory detention under Section 1225. And the Government itself acknowledged this point.

So this is from the metrics and measures document in the Administrative Record that the Secretary says he [62] relied on in his June 1 Memorandum. The goal of MPP, one of the goals was to prevent catch and release, including for people who turn out to be filing false asylum claims. And they found that MPP, in fact, reduces the number of aliens released into the interior of the United States. So that was the goal, and it was being effectuated.

According to Mr. Morgan, in FY—fiscal year 2019, CBP was releasing more than 200,000 illegal aliens, and

then in 2020, in large part directly related to MPP, CBP released fewer that 1,000. This is a big deal.

The compliance with federal statutes, of course, matters, and we shouldn't—the courts know that a child who murders his parents can't plead for sympathy on the basis that he's an orphan.

THE COURT: Chutzpah.

(Laughter.)

MR. THOMPSON: So neither can the federal government, which has tied its own hands, saying, oh, we couldn't possibly comply with our detention obligations because we're letting so many people in without MPP that we can't detain them all, and say, but don't worry about it, because it's a completely separate problem; we just can't do it; it's resource problems.

They can solve their own resource problems by not enacting the unlawful memorandum terminating MPP. And even [63] if it didn't completely solve their resource problems, it would at the very least lessen them. It would certainly lead to fewer violations of Section 1225.

And while we would strongly prefer the federal government to fully comply with Section 1225, partial compliance would at least be an improvement.

THE COURT: Okay. So we are—we're at a point where the Court will interrupt to ask a question about termination of MPP and how this does intersect with prior court rulings at the District Court level and above on DACA, so that's D-A-C-A.

The termination of MPP does not itself, unlike DACA, create affirmative benefits. It is the government's decision to parole illegal alien detainees into the

United States that creates affirmative benefits and burdens the state.

Isn't Plaintiffs' case truly a challenge to the government's parole practices and not the termination of MPP?

MR. THOMPSON: No, Your Honor. We're not challenging, you know, any kind of individual grant of parole or even the parole policies. What the parole policies provide are the legal context for understanding how the termination of MPP plays out in practice.

So I think the key sticking point between the parties is that everyone agrees that under some circumstances [64] MPP is voluntary. It's a discretionary option of the federal government. And so if the government were going to detain everyone who it doesn't enroll in MPP, as required by 1225, that would be fine. We—then, you know, the termination of MPP wouldn't violate Section 1225.

But the problem is, they're not doing that. They agree they're not doing that. I think the evidence about resource constraints shows they're not doing that, but another piece of the evidence showing that they're not doing that is the parole evidence, showing that what they are doing is releasing a—releasing on parole a class of individuals based on the, you know, class-wide ground that DHS lacks resources to detain everyone. Whereas, what parole was supposed to be, both originally and especially after Congress clarified the statute, is a case-by-case humanitarian program.

All right. So you're supposed to look at a particular alien and say, ah, well, you can be paroled in the United States because you need to get a medical service provided by a doctor here or something like that. It is not

nearly the same thing as saying, well, you know, everyone who comes in on Tuesday has to be released because we don't have any more beds.

THE COURT: It's a—you know, we—you know, everybody's fond of quoting Justice Scalia these days and his [65] books on canons. We can cite canons distinguishing the general from the particular, a case-by-case adjudication versus a categorical determination. We can pick our favorite Latin to explain this difference, but I think I understand the Government's response here.

This bleeds in to the section of your presentation on Take Care, but I think it's also relevant to the INA claim, whether review is limited by statutory text itself. So does 8 U.S.C. Sections 1226(e)—and that's the judicial review provision there—1252(a)(2)(B)(ii)—and that's a judicial review section—1182(d)(5)(A), as instructed by the *Trominksi* opinion by the Fifth Circuit, or any other statute or cases interpreting same, prohibit this Court's judicial review of Defendants' parole practices as compared to individual parole determinations?

So, in addition to sort of the theoretical question that I just presented, I want to take it to the particulars of the statutory language of the judicial review provisions, and then pair that with any case—case law.

Do you know of any other statutory provision or case interpreting same that would hold that those judicial review sections prohibit this Court from reviewing those decisions, or do I have the universe of statutes and cases I should consider, the aforementioned sections and *Trominksi*?

MR. THOMPSON: I think Your Honor has it. I think [66] there may be two conceptual distinctions, and I just want to make sure we have them both clearly explained.

So one is the difference between a challenge, like, to a particular grant of parole, right? So that's clearly different than what we're doing. But it's also different than a challenge to a hypothetical agency memo about parole. We're also not challenging a final agency action that's, you know, here are our parole practices, right? All we're using—

THE COURT: Which would sound more in prosecutorial discretion and be within the purview of the Article II Branch and all that.

You're not—I don't take the State of Texas or the State of Missouri to challenge that sort of triage prioritization that the Executive Branch has to make.

MR. THOMPSON: No, we've not challenged that, and there's another reason, Your Honor. I don't have a final agency action to put before you. I mean, if we get one, perhaps there will be a different case where we can raise those arguments.

But, no, the—the way these statutes work in terms of review is, I think the focus has to be on what is the Court potentially setting aside.

THE COURT: Right.

MR. THOMPSON: And we're not talking about setting [67] aside particular grants of parole. We're not talking about even setting aside a practice about parole.

It's just a background fact about the law and about the world that informs the Court's review of the June 1 Memo.

THE COURT: Right.

MR. THOMPSON: And since none of the statutes prohibit review of the June 1 Memo, the statutes have no application in this case.

THE COURT: And in thinking about metaphors and analogy for this judicial review question and how this Court's review intersects with those statutory provisions on judicial review and *Trominksi*, I thought of a toll booth.

Let's say this is a toll-booth law. And there's an individual particularized assessment at that toll booth. The light turns green based on certain internal memoranda. The light turns red based on internal memoranda.

The Governments of Texas and Missouri are not asking this Court to adjudicate any of those individual particularized decision to turn the light green and allow the truck to pass or to drop the arm, turn the light red and to stop it, because there's an infrared scanning policy or something internal to the agency operation.

Instead, we're talking about the termination of a memorandum involving toll booths in a categorical sense and whether that is adjudicable in this court pursuant either to [68] the APA, the Take Care claim, or even the INA claim.

Do I understand the distinction? And I know you're not bound to use toll-booth analogies, but—

MR. THOMPSON: I think I can go—

THE COURT: —have I correctly—

MR. THOMPSON: —with toll booths.

THE COURT: Have I correctly understood the nature of the Texas and Missouri arguments against these judicial review tensions that inhere in the statutory text and also in the structure of our Constitution?

MR. THOMPSON: I think that's true. Now, I'll hazard an extension of the toll-booth—

THE COURT: Please do.

MR. THOMPSON: —metaphor. So if there were a case about whether a driver were speeding, there might be a relevant fact of what time did he go past the toll booth and when did he enter this. And you might need to establish that the toll booth can turn from red to green, and it, in fact, did so on this date at this time.

Even if for some reason you weren't allowed to review anything about, you know, whether the light should have been green or red or anything like that, it could still establish the facts that showed when he entered, and that fact contributes to a finding that he was speeding.

THE COURT: Okay. I think I have your argument. I [69] do not bind the State of Texas, the State of Missouri or the United States of America to toll-booth metaphors. You do not need to follow that metaphor to every terminus.

(Laughter.)

THE COURT: So you may proceed with your next point.

MR. THOMPSON: Thank you, Your Honor. Very —I have only just a couple of slides here. Our constitutional claim is under the Take Care Clause. This is, of course, a typo. It is not in Article III. Sorry about that. He shall take care that the laws be faithfully executed.

We could have endless scholarly debates about what the outer bounds are of the Take Care Clause, and many scholars do have those debates.

But what I think is indisputably not taking care that the laws be faithfully executed is taking affirmative action that systematically prevents the Executive Branch from complying with a statutory command.

As to the agreement, there's—there's not much factual dispute here, Your Honor. The agreement requires that DHS consult with Texas, allow us the opportunity to comment on changes like this. It's very similar to a notice and comment regime under the APA.

* * * * *

[113]

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[**MR. WARD**:] Plaintiffs here haven't pointed to any sort of procedural right like that.

The Fifth Circuit in *Texas* applied sort of a looser analysis to the procedural right that's required in that case, because they distinguished DACA and DAPA as not just a nonenforcement policy but also as a policy that provided affirmative benefits, provided lawful status within the United States.

And they said that distinguished it from situations in which an agency just makes a decision to—a prosecutorial discretion decision or a nonenforcement decision to prioritize one aspect of a statute versus another. There, the stat—there, the program provided affirmative status and benefits to individuals, which distinguished it from prior cases where they had found no standing to sue.

If the Court—if the Court has any other questions on standing, I can move on to other topics.

THE COURT: Okay. So to your point on the particularity of the data marshaled by the States of Missouri and Texas, I've already asked multiple questions of those states regarding the sorts of numbers necessary to tip the scales to satisfy the standards set forth by the Supreme Court and the Fifth Circuit.

[114]

What is the government's detention capacity? So I see a lot of briefing about the surge of persons, how, you know, even things like the pandemic and political environments of host countries have overwhelmed federal resources for various reasons.

Has the United States ascertained even an approximated detention capacity in real numbers? So if I'm going to require particularity of the States of Texas and Mexico [*sic*], what is—what's the baseline that I can compare that to? What is the detention capacity as the United States understands it?

MR. WARD: I don't know the answer to that, Your Honor. It's possible that the Department of Homeland

Security has an understanding or a baseline of its overall detention capacity, but that's—I'm not aware of what that number is.

THE COURT: And, you know, given the voluminous records that have been supplied both by the United States in support of its defense of the APA claim and by the States of Texas and Missouri in response, is there any disaggregation of that data that would reflect the number of aliens detained versus paroled? Has that been disaggregated anywhere in the record for the Court's reference?

Since MPP specifically deals with that parolee category of persons, is there—is that reduced to absolute [115] number or even approximate number?

MR. WARD: Not in the record, Your Honor.

THE COURT: Okay.

MR. WARD: I'm not aware of any particular numbers. And, again, the MPP policy or the termination of the policy doesn't say anything in particular about parole. It doesn't—it doesn't provide any benefits or any determination or even any guidance to the agency on how it should or should not use parole.

And so the record—the record doesn't contain any information about detention capacity or numbers of individuals versus detained versus paroled. It's possible, again, that the Department of Homeland Security has that information, but it's not, as far as I'm aware, in the record.

THE COURT: Okay. So—and I understand, and I have the Government's argument on the stressed resources, you know, in some of the affected border regions and even into the interior.

As a categorical question, is it the position of the United States that the government does or does not have the capacity to detain or expel every illegal alien required by 1225, subject to the government's discretionary authority to parole?

Like, are you able to ascertain if this is a [116] temporary surge, but the government otherwise has capacity, or, instead, that it is the position of the United States that they just do not have capacity for the numbers involved?

MR. WARD: I don't know the answer to that definitively, Your Honor.

I believe that there is—there are times in which there are surges which go beyond the capacity of the government to detain individuals or detain individuals in a particular region. There obviously is parole authority in those circumstances.

And there's some indication, as set out in the Secretary's memo, that it's been an unusual time, in that, with the coronavirus and individuals being on the other side of the border for a substantial amount of time, even when they were in MPP, that there's some effort to deal with this surge or pent-up group of individuals.

So that could indicate a temporary surge, which might place an additional burden on the detention ability of the government, but—so I—I think it's possible that there is—there is surges that affect the ability of

the government to detain everyone in certain circumstances, but I wouldn't—I don't have a definitive answer that that's currently the case.

THE COURT: So neither—I've neither heard from the Plaintiff—I should say I've—I've heard neither from [117] the Plaintiffs nor the Defendants absolute numbers on capacity and how far above capacity we are.

At this point, the Court, when doing the particularity analysis and the standing analysis, is dealing with approximated numbers, estimates, allegations of extraordinary surge numbers, but I'm not going to be able to sort of define the denominator in absolute end terms either way, as to capacity or the excess.

Is that your understanding of the record? We're just dealing with approximations start to finish.

MR. WARD: In terms of that question, yes, Your Honor, I think that's correct; that the record, as constituted, doesn't answer that question.

THE COURT: Okay. And did the Secretary consider—as you understand the record, did the Secretary consider the possible shortage of detention capacity when he terminated MPP? What does the record reflect on that?

MR. WARD: Yes, Your Honor. So the Secretary says in his memo that—

THE COURT: And if you could give me a record cite. Understanding that there are pending objections and responses subject to adjudication at this point, you can refer to anything that's before the Court. I'll make those determinations before issuing the final ruling. But is there a particular record cite?

[118]

MR. WARD: Yes, Your Honor. It's in the memo itself, so the memo is at record cites 1 through 7. So, in the record—in the memo itself, the Secretary says, the administration has been and will continue to be unambiguous that the immigration laws will be enforced, and has various tools at its disposal to do that, including detention and various alternatives to detention, and case management programs that have shown to be successful.

So the Secretary said in the memo that he was considering the various other options that the INA provides the Secretary in order to deal with individuals coming into the United States.

I don't have the record cites in front of me, but there are in the record things that he referred to related to other support programs and alternatives to detention that the agency uses to ensure individuals show up for their proceedings, other initiatives that the agency is taking including dedicated docket in immigration court for individuals arriving at the southern border to ensure that, if those individuals are brought into the United States, whether detained or not, that those proceedings can be expedited so that these aren't individuals being in the United States for a long length of time.

THE COURT: Okay. And I believe the Bates labels range is in the Administrative Record AR001 through AR007. [119] This is relevant both to the Plaintiffs' claim on APA, arbitrary and capricious, and then also particularity of the data regarding the harm or loss alleged by Plaintiffs.

So the Government agrees that this document on the termination of the Migrant Protection Protocols program is relevant as an admission by the Government on the effect of MPP at least when aligned alongside other various alternatives?

MR. WARD: Yes, Your Honor. That document represents the Secretary's view on MPP's effectiveness.

THE COURT: Okay. All right. You may proceed. I think—I think that is the only question I have regarding standing.

I know we're—both parties are being considerate in following sort of the order laid out in the posed questions, so the—

There's one other question on causation. So it's not expressly a factor, but it does relate to some of the factors that the Court must consider on standing.

Regarding cause, and traceability specifically, what is the United States' position on whether MPP caused the government to parole more illegal aliens than it would have if MPP were still in effect?

So, again, I understand I asked earlier if there had been a disaggregation of parolees versus people who had [120] simply evaded detection, and it doesn't seem like that disaggregation in that particularity is available in the record yet.

But regarding the losses alleged in the various different categories set forth by Texas and Missouri, does the Government have a position on whether the MPP caused the government to parole more illegal aliens than it would have had MPP remained in effect?

MR. WARD: I think the Government's position is that that has not been established one way or the other by the record presented in this case or the evidence in the record.

Again, it's—even if there are additional individuals, it's not clear that anyone would necessarily—even if there are additional individuals arriving at the southern border or who are being brought into the United States, whether detained or otherwise, it's not clear that MPP is the driver of that or would necessarily affect that.

So, again, for instance, if there's a surge, and that surge involves Mexican nationals, again, the individuals who are the majority of the individuals—

THE COURT: And MPP doesn't affect them?

MR. WARD: It doesn't apply them. The same—

THE COURT: I have the Government—

MR. WARD: —thing with—

[121]

THE COURT: I have the Government's argument on that, and I understand, you know, the Government's position that immigration patterns and alleged surge data is a multivariable prong such that the Government —such that the Governments of Texas and Missouri can't just point to MPP as sort of the dispositive decisive event.

But does the United States take a position on whether it would be paroling the same number of illegal aliens if MPP were an option still in place?

MR. WARD: I don't know the answer to that, Your Honor.

THE COURT: Okay. I was searching the memo—you know, the various memoranda in this case, and I couldn't ascertain if there was a definitive decision on that, and I think it may be a function of the data set. We just don't have the hard, concrete data on parolees versus the various different categories at this point.

But the United States does not take a position on whether it would be paroling the same number of illegal aliens if MPP were still an option for those illegal immigrants who hail from Honduras, Guatemala, and El Salvador?

MR. WARD: It's possible, Your Honor. I can't take a definitive position on that. I just don't know, and the record doesn't establish it.

* * * * *

[146]

* * * * *

THE COURT: The Court here followed counsel's argument referring to record Document 61, AR554 and AR555. I do have and find that the Government has well briefed its argument on the data, and the Supreme Court's guidance that not every cause-and-effect analysis needs to be reduced to metaphysical certitude.

But I've now heard—and I see this reflected in the Secretary's memorandum—that the data analysis raises questions. There's sort of a fog-of-war terminology that goes into the Secretary's analysis of MPP up to this date.

But relevant to the APA claims and this Court's task of determining whether it was arbitrary and capricious,

all of this vernacular about the data set raising questions —this appears in the memorandum; this has appeared in the Government's argument today—are there answers to those questions anywhere in the record, or is it just that the government cannot ascertain one way or the other the effectiveness of MPP?

MR. WARD: So I think—

THE COURT: So, here, you know, we have enough data to ascertain that 531 MPP aliens were granted relief. We [147] have on Page AR555—actually, this is just the second page of that same document—the goal of MPP is to provide a deterrent to illegal entry. That's followed by this statement: Metric MPP implementation contributes to decreasing the volume of inadmissible aliens arriving in the United States on land from Mexico.

I see in the Government's written arguments and oral arguments today a lot of questions raised, and I understand, you know, particularly early in administration you may not have the data set to give with particularity an answer to the cause-and-effect analysis that we're all doing here.

But is there any point in this record where those questions raised about the effectiveness of MPP are answered in any sort of conclusion from the Secretary that reflects his consideration of all of these data points and all the questions raised?

Where would you point the Court to to identify the answer to those raised questions?

MR. WARD: So I think the proper way to frame the question is not whether or not ultimately MPP was completely successful, or there's a lot of ways in which you

can assess success. It obviously wasn't completely successful. It—I think it's fair to say that it probably deterred some individuals from coming to the United States.

[148]

What's the actual answer to that, I'm not sure it's known from this record, but I don't think the Secretary's job is necessarily just to determine whether MPP was successful. The Secretary's job is to determine what initiatives does DHS or the current administration want to take in order to manage migration and comply with our obligations under the statute.

And I think what the memorandum says clearly is that the Secretary determined that, for whatever successes MPP may have had, that the current administration believes that there are other ways to better and more effectively achieve those same goals; that MPP required a tremendous amount of DHS resources even when it was in effect in order to manage, staff these immigration courts along the border, in order to constantly be paroling individuals back and forth into the United States, and in order to continue to negotiate with Mexico about supporting the individuals that were going to be in Mexico while they awaited their removal proceedings.

And so what I think the Secretary definitively determined is that MPP is not as successful in the current administration's view as other things the agency and the United States can do to manage migration; that freeing up diplomatic resources that were used to negotiate and support MPP, those resources could be used for other initiatives. Mexico could redeploy individuals that were dealing with the individuals that were living in

these camps that sprung up [149 along Mexico's northern border to dealing with individuals when they were transiting through Mexico; that those resources could be put to other—other initiatives that would better achieve the same goals of managing regional migration, deterring frivolous asylum claims, but also making sure that DHS could focus their limited resources on legitimate claims.

I think the—the couple cases from the Supreme Court that address this are help here. I think Justice Rehnquist's concurrence in the *State Farm* case, which we cite a few times throughout our brief, says that, as long as an agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.

And also the Supreme Court's decision in *FCC Television v. Fox* [*sic*], which said that an agency need not demonstrate to a court's satisfaction that the reasons for a new policy are better than the reasons for the old one; it suffices that the policy is permissible under the statute, and there are good reasons for it.

So I think the determination about whether MPP was successful is—is in the memorandum in the form of the Secretary determining it was not as successful as what the administration believes it's now undertaking and needs some time to undertake to better achieve those same goals.

[150]

THE COURT: Okay. And I think I have the Government's argument there. And, obviously, the June 1 Memorandum reflects some of those points as a factual

matter, and I also will pair that with the legal arguments and cases cited by the United States.

You may move on to your next point.

MR. WARD: Does Your Honor have any additional questions on the merits of the APA argument, or should I move on to the INA argument?

THE COURT: Yeah. Unless there is anything—if it would just be cumulative of your briefing, you may move forward to what I've identified as Claim 2, the statutory INA argument.

MR. WARD: Yes, Your Honor. So the statutory argument, or 1225(b)(2)(C), their—Plaintiffs' argument that terminating MPP violates Section 1225, this overlaps somewhat with the APA claims and the arguments I made earlier about the discretionary nature.

But nothing in 1225, again, says that the agency has to use this contiguous return authority, and nothing in it sets any particular standard for when the agency has to use it.

I think Plaintiffs' claim here, and their briefing focuses heavily on the use of parole, nothing in 1225(b)(2)(C) talks about parole or sets it out as a required [151] factor the agency has to consider in determining whether or when it's going to use this return authority that was the basis of MPP.

There is—and, again, there's nothing in MPP itself that says anything about narrows or requires the agency to use parole in a particular way. It doesn't say, we're terminating MPP, and we're necessarily going to parole these individuals. Parole remains a case-by-case determination of the agency in individual cases about

whether parole is appropriate that involves a lot of factors. The June 1 Memorandum says nothing about how those factors should be weighed or resolved.

So I think if—Plaintiffs' claim here is really a challenge to parole, and if they—if they believe that there is evidence that the government is misusing parole or they want to challenge the parole authority, then they should bring that case.

I took them this morning to say that they're not directly challenging the government's use of the parole authority. I think that's in part perhaps because there's a lot of decisions that say that's a discretionary determination, and that the government has discretion to use that parole authority, again, *Loa-Herrera*.

It's a discretionary judgment, including whether the procedural apparatus supplied satisfies regulatory, [152] statutory, constitutional constraints are not subject to review. That's the Fifth Circuit in *Loa-Herrera*.

Other cases, the Eleventh Circuit's decision in *Jean v. Nelson* said, quote: Congress has delegated remarkably broad discretion to executive officials under the Immigration and Nationality Act, and these grants of statutory authority are particularly sweeping in the context of parole.

So there's a lot of judicial decisions out there addressing the breadth of the discretion and scope of discretion of the agency with respect to its parole authority, but, again, parole is not something they're squarely challenging here. It's not squarely implicated by 1225, and so I think if—since—since nothing in 1225(b)(2)(C) requires the consideration of parole, and nothing in 1225(b)(2)(C) requires the creation of MPP whatsoever,

the termination of MPP itself can't violate Section 1225(b)(2)(C).

THE COURT: Okay. Understanding that 1225(b)(2)—and this was reflected in Mr. Thompson's presentation to the Court. There's essentially a binary choice there, and one of those provisions, the (2)(A) provision, says, aliens shall be detained. And, again, we're back to the disputed meaning of "may" or "shall" in giving construction to these various statutes.

[153]

Particular to capacity and some of the Government's explanations of being overwhelmed and taxed, does the federal government have capacity to fill—fulfill that statutory mandate for those aliens who shall be detained?

Unlike some of the other provisions and Fifth Circuit cases distinguishing discretionary authority from mandates, I understand those statutory construction arguments, but now particular to the facts reflected in the record before the Court, does—is it the position of the United States that they have sufficient capacity to fulfill the 1225(b)(2)(A) mandate to detain those aliens that shall be detained?

MR. WARD: Well, again, Your Honor, I think this comes back to my earlier point that the Secretary believes that the other initiatives the agency is undertaking will reduce the burden on the agency and surges of migration to the southern border that will help address that.

I don't have a definitive answer on what the current —right today or this month, what the influx of individuals arriving at the border is and how that compares to

our detention space. That's a—those are both fluid issues, and I don't have numbers on that.

But, again, I'd say that's not an issue that's squarely before the Court here. Plaintiffs don't directly challenge the parole authority or the use of 1252(b)(2)(A). [154] And while that provision may have mandatory language in it, there's no language between 1252(b)(2)(A) and 1252(b)(2)(B), 1252(b)(2)(C), there's nothing—there's no language in there that sets these out as the only alternatives or sets them as factors that must be considered together on when to use the contiguous return authority.

So for—to put it another way, there's nothing in 1252(b)(2) that says Congress intends for the Secretary to either use the contiguous return authority or use the detention parole authority under 1252(b)(2)(A). There's nothing in there that sets those out. They're different options the Secretary can use, but nothing about what 1252(b)(2)(A) says or nothing about what's in 1252(a) necessarily sets any standard for when the government must use the contiguous return authority or create a program like MPP.

THE COURT: Okay. And, you know, I would guess that's almost like a compound question, because it's one part statutory construction, one part a question about the facts, and the denominator of capacity this Court must consider, and this goes back to some of the standing analysis.

You know, if there's an absolute denominator—that's probably the wrong word. If there's one million beds

available for persons detained, and the government experiences a surge of 1.5 million, I would know exactly the [155] delta to apply to that number.

But, thus far, I don't see anything from the government in the Administrative Record that sort of aggregates all of those different categories so that I can ascertain detention capacity and thereby give absolute certitude to how much that capacity has been exceeded, and whether the government is using parolee status as a safety valve to that.

I understand the Government's argument on this. That question is one part statutory construction, one part data Administrative Record. And I think you've answered this question probably twice now or an iteration of it, so I have—I have the Government's response on that.

MR. WARD: Thank you, Your Honor. Just one other point that I think might be relevant here or it may be relevant to some other point, is that earlier you asked that we address the question with respect to the footnote in the document—

THE COURT: Yes.

MR. WARD: —in the Motion to Strike.

So, again, I think that goes sort of to our broader arguments on the Motion to Strike, that this is sort of a risk when you start looking at evidence outside of the Administrative Record or outside of evidence that the agency says is relevant to its determination.

[156]

But, essentially, what happened there, my understanding of what happened there is that that footnote

was inaccurate; that it didn't come to our attention or the attention of the attorneys with our client until it was cited in the Appendix. When it was cited in the Appendix, we—we pointed that out to our clients who corrected it.

And so the website no longer reflects that point. It's not an accurate representation of the agency's position, and so it would inappropriate to give weight to something that the agency said was an error and corrected as soon as it was brought to their attention.

THE COURT: I have the Government's argument on that, and I do understand that argument.

Does that complete any oral argument supplement to the Government's briefing on Claim 2, the INA claim arising under 8 U.S.C. 1225?

MR. WARD: Yes, Your Honor.

THE COURT: Okay. You may proceed with your argument on the Take Care Clause claim. I've identified this as Claim 3. Anything that's not cumulative of the written material before the Court?

MR. WARD: Yes, Your Honor. Just I think our briefing covers this well, but essentially the cases have long said that this is not a basis for a judicial—justiciable claim.

* * * * *

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FIFTH CIRCUIT
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October 29, 2021

Mr. Judd Edward Stone II
Office of the Attorney General
Office of the Solicitor General
209 W. 14th Street
Austin, TX 78701

No. 21-10806 State of Texas v. Biden
USDC No. 2:21-CV-67

Dear Mr. Stone,

This letter will serve to confirm that the court has requested a response to the Appellants' Motion to vacate the decision of the district court and to remand case.

The response must be be filed in this office on or before 11/1/2021 at 12PM CST.

Sincerely,

LYLE W. CAYCE, Clerk
By: /s/ LANEY L. LAMPARD
LANEY L. LAMPARD, Deputy Clerk
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cc:

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