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.,
RESPONDENTS

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

BRIEF FOR *AMICI CURIAE* FORMER DHS SECRETARY JEH C. JOHNSON AND FORMER AMBASSADOR TO MEXICO ROBERTA S. JACOBSON IN SUPPORT OF PETITIONERS

MOSES SILVERMAN
Counsel of Record
GEOFFREY R. CHEPIGA
SARAH J. PROSTKO
MIGUEL ZAMORA
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
msilverman@paulweiss.com
(212) 373-3355

TANAZ MOGHADAM
ELIZABETH A. NORFORD
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006

Counsel for Amici Curiae

MARCH 21, 2022

TABLE OF CONTENTS

Page

Interest of *Amici Curiae* 1

Summary of Argument 2

Statement of Case 4

Argument 12

The decision below impairs the President's authority to conduct the Nation's foreign policy 12

Conclusion 15

TABLE OF AUTHORITIES

Cases

Arizona v. *U.S.*,
567 U.S. 387 (2012) (Scalia, J., concurring in part) 13

Epic Systems Corp. v. *Lewis*,
138 S. Ct. 1612 (2018) 14

Fong v. *U.S.*,
149 U.S. 698 (1893) 13

Harisiades v. *Shaughnessy*,
342 U.S. 580 (1952) 12

Jama v. *Immigration & Customs Enforcement*,
543 U.S. 335 (2005) 12-13

Kiobel v. *Royal Dutch Petroleum Co.*,
569 U.S. 108 (2013) 1, 15

Puerto Rico v. *Franklin California Tax-Free Trust*,
579 U.S. 115 (2016) 14

Trump v. *Hawaii*,
138 S. Ct. 2392 (2018) 13

United States v. *Curtiss-Wright Export Corp.*,
299 U.S. 304 (1936) 12

Whitman v. *American Trucking Associations*,
531 U.S. 457 (2001) 14

Zivotofsky ex rel. Zivotofsky v. *Kerry*,
576 U.S. 1 (2015) 12

Statutes

8 U.S.C. § 1225 .... 4, 10, 14

Other Authorities

Azam Ahmed, *El Chapo Case Draws Mexico Closer to U.S.*, N.Y. Times (Jan. 11, 2016) <https://tinyurl.com/NYTimes-ElChapo-Mexico> 6

Azam Ahmed, *El Chapo, Escaped Mexican Drug Lord, Is Recaptured in Gun Battle*, N.Y. Times (Jan. 8, 2016) <https://tinyurl.com/NYTimes-ElChapo-Recaptured> 6

Azam Ahmed, *El Chapo, Mexican Drug Kingpin, Is Extradited to U.S.*, N.Y. Times (Jan. 19, 2017) <https://tinyurl.com/NYTimes-ElChapo-Extradited> 6

Congressional Research Service, *U.S.-Mexico Economic Relations: Trends, Issues, and Implications* (updated June 25, 2020) <https://tinyurl.com/CRS-Report-US-Mex-Relations> 5

Joint Declaration and Supplementary Agreement Between the United States of America and Mexico (June 7, 2019) <https://tinyurl.com/US-Mex-Joint-Decl> 8

The "Migrant Protection Protocols," American Immigration Council (Jan. 7, 2022) <https://tinyurl.com/MPP-Fact-Sheet> 8

Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration, DHS Press Office (Dec. 20, 2018) <https://tinyurl.com/NielsenAddress> 8

Secretary Kirstjen Nielsen, *Policy Guidance for Implementation of Migrant Protection Protocols*, Homeland Security 2-3 (Jan. 25, 2019) <https://tinyurl.com/DHS-Guidance-Implement-MPP> 7, 14

Statement by Secretary Jeh C. Johnson on Southwest Border Security, DHS Press Office (Jan. 4, 2016) <https://tinyurl.com/Johnson-SWBorder-Security> 7

United States-Mexico-Canada Agreement (July 1, 2020) <https://tinyurl.com/US-Mex-Can-Agmt> 5

INTEREST OF *AMICI CURIAE*[1]

Amici are Jeh C. Johnson, the former United States Secretary of Homeland Security (2013-2017) and Roberta S. Jacobson, the former United States Ambassador to Mexico (2016-2018). *Amici* submit this brief to focus on one issue: the adverse consequences of the lower courts' rulings on U.S. foreign policy, in particular the relationship between Mexico and the United States. For good reason, this Court has warned against "the danger of unwarranted judicial interference in the conduct of foreign policy." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013).

While in office, Secretary Johnson and Ambassador Jacobson had extensive, firsthand experience dealing with the Government of Mexico, on issues ranging from lawful trade and travel to law enforcement, national security, and irregular migration.

In three years as Secretary of Homeland Security, Johnson visited Mexico numerous times and dealt personally with then-President Enrique Peña Nieto, the Mexican Attorney General, the Secretaries of Government, Foreign Affairs, Treasury, Defense, and the Navy, and senior officials in the Mexican Government's intelligence community. Secretary Johnson left office on January 20, 2017.

[1] Pursuant to U.S. Sup. Ct. Rule 37.6, counsel for *amici* affirms that no party other than the *amici* or its counsel authored this brief, in whole or in any part, and that no person or entity other than *amici* or its counsel has made a monetary contribution to the preparation and submission of this brief. The parties have provided their written consent for the filing of this *amici* brief.

Ambassador Jacobson has dedicated her public service career to the U.S. relationship with Latin America. She has been Director of the State Department's Office of Mexican Affairs (2002-2007), Deputy Assistant Secretary of State for Canada, Mexico, and NAFTA (2007-2011), Assistant Secretary of State for Western Hemisphere Affairs (2012-2016), and Ambassador to Mexico (2016-2018). Ambassador Jacobson returned to government from January 20, 2021 to April 23, 2021 to serve as the White House Coordinator for the Southwest Border. Ambassador Jacobson served in these roles across the Bush, Obama, Trump and Biden Administrations.

SUMMARY OF ARGUMENT

Compliance with the lower courts' rulings necessitates an abrupt about-face in our government's current foreign policy toward Mexico. More than that, the rulings require the U.S. Government to seek to impose upon another sovereign (Mexico) the resurrection of the so-called "Migrant Protection Protocols," or MPP. MPP is a costly and burdensome program that *both governments* had decided to terminate. Indeed, it is Mexico, not the United States, that shoulders the principal burden of MPP.

MPP was negotiated, agreed to and announced by the Governments of Mexico and the United States in 2018. Specifically, the Mexican Government agreed to the U.S. request that Mexico allow, on a "temporary" basis, migrants bound for the United States—including certain migrants from Guatemala, Honduras, and El Salvador—to remain in Mexico pending their immigration proceedings in the United States. J.A. 180. The expectation when MPP was negotiated was that the Mexican Government would then arrange for the housing and logistics for tens of thousands of those migrants to live in Mexico, receive

lawyers from the United States, and travel to the United States for court hearings. MPP was a huge ask by the U.S. Government, and Mexico acceded to it.

As it turned out, Mexico could not live up to its expectations under MPP. MPP also became an even larger and costlier imposition than both countries had anticipated. Due to COVID-19, U.S. removal proceedings for those enrolled in MPP were suspended, and migrants were then stuck in limbo on the Mexican side of the border. Added to that were increasing numbers of additional migrants arriving at Mexico's northern border, and reported acts of violence on migrants by transnational criminal organizations. This put a great strain on the stability and security of communities on the Mexican side of the border. All this in turn put tension on U.S.-Mexico relations, as the United States was now in breach of its promise to provide migrants waiting in Mexico with swift resolution of their immigration cases.

In 2021, as part of a new and comprehensive policy toward immigration, including what is often referred to as the "Root Causes Strategy," the United States and Mexican Governments determined to alter course and put an end to MPP.

But, the injunction in this case requires the Executive Branch to resurrect MPP, commits the United States to a foreign policy path contrary to that adopted by the President, and requires our government to seek to impose MPP upon the Mexican Government once again. The Government of Mexico could at any point refuse to participate in MPP or insist on ever greater concessions from the United States in other areas in exchange for continuing its consent to MPP.

Based on their experience dealing with the Mexican Government, *amici* believe Mexican officials see the ruling as an intrusion on that Nation's sovereignty, and a breach of the promise the United States made to Mexico in 2021 to end MPP. In all, the lower courts' rulings are a significant setback to U.S.-Mexican relations.

This case is thus a prime example of why courts traditionally avoid intrusion into foreign policy. On matters of diplomacy, the United States Government must speak with one voice, declaring one policy at a time, and that voice belongs to the President. In the conduct of foreign affairs, nations should not fear that agreements they reach with the United States could be voided by the judicial branch of our government in civil litigation between and among U.S. litigants.

The Fifth Circuit's answer to this point is that the Executive Branch must "uphold American law" regardless of the effects on foreign affairs, and that our diplomats should have somehow warned Mexico "that [our government's] ability to terminate MPP was contingent on judicial review." Pet. App. 133a, 209a. Our reply is this: the Fifth Circuit's extraordinary interpretation of 8 U.S.C. § 1225 *is not and never has been* American law. No administration has ever understood the statute to mean what the Fifth Circuit said, nor did Congress intend such an interpretation.

STATEMENT OF CASE

There is perhaps no country with a deeper, broader diplomatic relationship with the United States than Mexico. The relationship is multi-faceted, to include *inter alia* diplomacy and agreements around lawful trade and travel, national security, law enforcement, intelligence

sharing, cultural exchange, health, the environment, education, and irregular migration.

Given the nature of diplomacy in general, negotiations on all these issues tend to be interrelated. Progress on one issue often involves compromise or concession on another.

Lawful trade and travel between our two countries is a huge component of the relationship. We share a 1,950-mile border with Mexico, over which people and commerce pass minute-by-minute. The economies of communities on both sides of the border rise and fall together. Mexico is the United States' third-largest trade partner, and the United States is Mexico's largest trade partner.[2] The North American Free Trade Agreement reached between the U.S., Mexico and Canada in 1994 (or "NAFTA") (replaced by the United States-Mexico-Canada Agreement in 2020) had a huge positive impact on the overall economy of Mexico, and a positive economic impact in the United States as well.[3]

Another component of the U.S.-Mexico relationship is collaboration in law enforcement. Cooperation between our two countries on drug and gun smuggling is vital. That relationship reached its pinnacle with the capture by Mexican authorities of drug lord Joaquín "El Chapo" Guzmán Loera in January 2016, with the vital assistance of

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[2] See Congressional Research Service, *U.S.-Mexico Economic Relations: Trends, Issues, and Implications* at Summary (updated June 25, 2020) <https://tinyurl.com/CRS-Report-US-Mex-Relations>.

[3] See *ibid.*; see also United States-Mexico-Canada Agreement (July 1, 2020) <https://tinyurl.com/US-Mex-Can-Agmt>.

U.S. law enforcement.[4] El Chapo was by far the most wanted criminal in Mexico, and it was only because of the special diplomatic relationship between our two governments that then-Mexican President Enrique Peña Nieto agreed to the extradition of El Chapo for prosecution in the United States.[5] The discussions leading to his extradition began almost immediately after El Chapo's capture in 2016, and culminated with his actual transfer on January 19, 2017.[6]

Finally, the United States and Mexico cooperate extensively on the subject of irregular or illegal immigration. No country can address this issue on its own. This is particularly true of the United States. Not only must the United States depend on Mexico to regulate its own southern border with Central America, we depend on Mexico to repatriate those of its citizens who are ordered deported or returned from our country.

Migration is a delicate and closely-watched subject in both countries. At the senior-most levels of government, U.S. and Mexican officials negotiate the details of matters such as the time and place for the arrival of flights carrying migrants repatriated to Mexico, and Mexican officials

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[4] See Azam Ahmed, *El Chapo, Escaped Mexican Drug Lord, Is Recaptured in Gun Battle*, N.Y. Times (Jan. 8, 2016) <https://tinyurl.com/NYTimes-ElChapo-Recaptured>.

[5] See Azam Ahmed, *El Chapo Case Draws Mexico Closer to U.S.*, N.Y. Times (Jan. 11, 2016) <https://tinyurl.com/NYTimes-ElChapo-Mexico>.

[6] See Azam Ahmed, *El Chapo, Mexican Drug Kingpin, Is Extradited to U.S.*, N.Y. Times (Jan. 19, 2017) <https://tinyurl.com/NYTimes-ElChapo-Extradited>.

at the highest levels follow closely legal and political developments on immigration policy in the United States.

In the first half of 2014, the United States faced a spike in illegal migration on our southern border, most notably from Central America.[7] Diplomatic engagement between the United States and Mexico was critical to addressing that spike. In summer 2014, U.S. officials prevailed upon the Mexican Government to augment its border security on its own southern border with Central America.[8] This was no small undertaking by the Mexican Government, as its border security force is nowhere near the capacity of ours, and Mexico was constrained financially to maintain this force in place for an extended period.

On December 20, 2018, the Mexican Government announced that it would accede to a U.S. request to participate in MPP. J.A. 180-182. This was a big ask on the part of the United States and a big undertaking by Mexico. As envisioned, Mexico would accept the return from the United States of migrants from certain third countries during the pendency of their U.S. asylum and removal proceeding.[9] As part of MPP, the United States expected Mexico to issue the appropriate immigration documents for these migrants, handle the logistics of transporting them to and from the border with the United States for court dates, arrange for law enforcement and security,

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[7] See *Statement by Secretary Jeh C. Johnson on Southwest Border Security*, DHS Press Office (Jan. 4, 2016) <https://tinyurl.com/Johnson-SWBorder-Security>.

[8] *Ibid.*

[9] See Secretary Kirstjen Nielsen, *Policy Guidance for Implementation of Migrant Protection Protocols*, Homeland Security 2-3 (Jan. 25, 2019) <https://tinyurl.com/DHS-Guidance-Implement-MPP>.

and, most notably, provide food and shelter for the vast majority of these migrants in communities along Mexico's northern border. See Pet. App. 288a.[10]

Notably, the Mexican Government cautioned that its consent to the arrangement was "temporary." J.A. 180-182. The U.S. Department of Homeland Security underscored that MPP was made possible by Mexico's "*independent* determination that [Mexico] will commit to implement essential measures on their side of the border."[11]

As the record in this case reflects, Mexico could not live up to its expectations to fully provide the logistics, food, and shelter for those enrolled in MPP. Pet. App. 288a-293a. On top of that, MPP was an even larger and costlier imposition on Mexico than both governments anticipated. Due to COVID-19, removal proceedings for those who were enrolled in MPP were suspended. See Pet. App. 387a (Shahoulian Decl. ¶ 3); Pet. App. 401a (Weiss Decl. ¶¶ 7-8). Those enrolled in MPP thus found themselves stuck in limbo, with no apparent timeline for resolution of their cases in the United States. At the same time, an increasing number of migrants—including those from beyond Central America and this hemisphere—arrived at Mexico's northern border. To make matters worse, "there were pervasive and widespread reports of

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[10] See also Joint Declaration and Supplementary Agreement Between the United States of America and Mexico 2-3 (June 7, 2019) <https://tinyurl.com/US-Mex-Joint-Decl>; *The "Migrant Protection Protocols,"* American Immigration Council (Jan. 7, 2022) <https://tinyurl.com/MPP-Fact-Sheet>.

[11] See *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration*, DHS Press Office (Dec. 20, 2018) <https://tinyurl.com/NielsenAddress> (emphasis added).

MPP enrollees being exposed to extreme violence and insecurity at the hands of transnational criminal organizations." Pet. App. 288a-293a. All of this created an increased level of stress, instability and insecurity in communities on Mexico's northern border. Pet. App. 395a-396a (Shahoulian Decl. ¶ 17). The situation also created a great strain on U.S.-Mexico relations, as the United States was now in breach of its promise to provide migrants in MPP waiting in Mexico with swift resolution of their immigration cases. *Ibid.*

On January 20, 2021, Joseph Biden succeeded Donald Trump as President of the United States. Almost immediately upon taking office, the Biden Administration adopted a very different approach to the U.S. Government's foreign policy toward Mexico. President Biden introduced this new approach on February 2, 2021, through Executive Order 14010, 86 Fed. Reg. 8267, "Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border." Pet. App. 411a-412a (Zúniga Decl. ¶ 4). This new policy became known as the "Root Causes Strategy." *Id.* at 412a (Zúniga Decl. ¶ 5).

Given this shift, the new Secretary of DHS, Alejandro Mayorkas, determined that MPP conflicts with the administration's "foreign-policy objectives." Pet. App. 260a-261a. The Secretary explained that "[e]fforts to implement MPP have played a particularly outsized role in diplomatic engagements with Mexico, diverting attention from more productive efforts to fight transnational" crime and smuggling and to "address the root causes of migration." Pet. App. 262a. Secretary Mayorkas further noted

that, as of 2021, Mexico "w[ould] not agree to accept" returning migrants without "substantial improvements" to MPP, which would require the agency to devote even more resources to the program. *Ibid.* In the Secretary's judgment, those additional resources would be better directed to other policies designed to "disincentivize irregular migration while incentivizing safe, orderly, and humane pathways." *Id.* at 267a-268a.

On August 13, 2021, the district court issued its injunction in this case. On December 13, 2021, the Fifth Circuit affirmed the district court's ruling and injunction.

The injunction in this case necessitates an abrupt about-face in the current foreign policy toward Mexico. More than that, the rulings require the U.S. Government to seek to impose upon the Mexican Government the restoration of MPP, a costly and burdensome program that both governments have decided to terminate.

To make matters worse, the injunction requires the U.S. Government to "enforce and implement MPP *in good faith* until such a time as it has been lawfully rescinded in compliance with the APA **and** until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention." Pet. App. 212a (emphasis in original). Thus, by the terms of this injunction, MPP must not only be restored, it could, in effect, last indefinitely. This is because DHS simply does not now have, and has never had, sufficient capacity to detain every single person who is subject to detention under 8 U.S.C. § 1225. Pet. App. 388a (Shahoulian Decl. ¶ 5). To meet such a requirement, DHS would have to depend

upon Congress to appropriate the funds for greatly expanded detention space, at levels Congress has never come close to funding.

Since the lower courts' rulings, DHS has, as required, resumed negotiations with the Government of Mexico in good faith, and reported on those ongoing negotiations to the district court. Not surprisingly, the Mexican Government has made clear that it has concerns about MPP and has informed the U.S. Government that "as a sovereign nation, it would not accept the return of individuals enrolled in the program until its concerns were addressed." D. Ct. Dkt. 117-2 at 2.[12] Nevertheless, as a result of the court ruling, Mexico will resume accepting the return of individuals enrolled in MPP, and DHS and Mexican officials are working to "implement operational details for enrolling noncitizens in MPP." D. Ct. Dkt. 117 at 2. More negotiations will be required as the United States and Mexico "continuously evaluate MPP's operations and effectiveness * * * to make ongoing adjustments, as needed." D. Ct. Dkt. 117-2 at 3. The Government of Mexico could decide at any point to withdraw its consent to MPP or insist on ever greater concessions from the United States in other areas in exchange for continuing its cooperation.

As part of its own efforts to resurrect MPP, DHS has had to "rebuild infrastructure and reapportion [its] staffing." D. Ct. Dkt. 105-1 at ¶ 5. As the DHS Secretary has noted, this will "divert[] attention from more productive

[12] See also D. Ct. Dkt. 105 at 1; D. Ct. Dkt. 111 at 2; D. Ct. Dkt. 114 at 1.

efforts to fight" transnational crime and smuggling and to "address the root causes of migration." Pet. App. 262a.

Based on their experience dealing with the Mexican Government, *amici* believe that Mexican officials see the ruling as an intrusion on that Nation's sovereignty and a breach of the promise the United States made to Mexico in 2021 to end MPP, and that the lower courts' rulings are a significant setback to U.S.-Mexican relations.

ARGUMENT

THE DECISION BELOW IMPAIRS THE PRESIDENT'S AUTHORITY TO CONDUCT THE NATION'S FOREIGN POLICY

This Court has long recognized the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Under its Article II powers, the Executive Branch "has the power to open diplomatic channels simply by engaging in direct diplomacy with foreign heads of state and their ministers." *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 576 U.S. 1, 13-14 (2015).

The Executive Branch's discretion in matters of foreign policy includes matters of immigration and border control. "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). "[T]he selection of a removed alien's destination, 'may implicate our relations with foreign powers' and require consideration of 'changing political and economic circumstances.'"

Jama v. *Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005) (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976)). See also *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2418 (2018) ("For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.") (internal quotation marks and citation omitted).

Pursuant to his Article II authority, the current President has decided that he will no longer seek to impose the burdens of MPP on Mexico. Such a decision must be well within the President's discretion.

The injunction on appeal not only tramples on that long-standing discretion, it goes on to direct the President to seek Mexico's compliance with the injunction, by accepting the return of migrants from a third country (*e.g.*, Guatemala, Honduras, or El Salvador). The injunction therefore overlooks a simple reality of international law: the United States cannot unilaterally force another sovereign (in this case, Mexico) to accept individuals from third countries. See, *e.g.*, *Arizona* v. *U.S.*, 567 U.S. 387, 417 (2012) (Scalia, J., concurring in part) ("[M]ost would consider the defining characteristic of sovereignty[] the power to exclude from the sovereign's territory people who have no right to be there."); *Fong* v. *U.S.*, 149 U.S. 698, 705 (1893) ("[A]n accepted maxim of international law [is] that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.") (citation omitted).

In its own brief, Petitioner explains in detail why the Fifth Circuit's reading of Section 1225 is wrong. See Pet. Br. 19-28. The legal point *amici* emphasize here is that, where Congress seeks to override the President's traditional discretion on matters of foreign policy and immigration, it does so in explicit terms. More specifically, had Congress intended to *mandate* contiguous-territory return whenever the U.S. Government lacks adequate detention capacity—given the enormous foreign-policy consequences of such a mandate—Congress would have said so in explicit terms and provided the necessary funds to make that happen. Congress would "not alter the fundamental details" of foreign policy in "vague terms." *Whitman* v. *American Trucking Associations*, 531 U.S. 457, 468 (2001); see also *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1626-1627 (2018); *Puerto Rico* v. *Franklin California Tax-Free Trust*, 579 U.S. 115, 127 (2016). Put another way, Congress "does not * * * hide elephants in mouseholes." *Whitman*, 531 U.S. at 468.

To the contrary, Section 1225 says DHS "may return" a migrant to a contiguous country. And, in fact, every U.S. administration in the 25 years since Section 1225 was enacted has construed the statute as permissive rather than mandatory. Indeed, when the Trump Administration promulgated MPP, it also recognized that MPP does not *require* expulsion. The policy guidelines accompanying MPP in January 2019 cited "prosecutorial discretion" in determining who to place in removal proceedings and "*whether* to return the alien to the contiguous country from which he or she is arriving."[13]

[13] See Secretary Kirstjen Nielsen, *Policy Guidance for Implementation of Migrant Protection Protocols*, Homeland Security 3 (Jan.

As stated before, this Court has warned against "the danger of unwarranted judicial interference in the conduct of foreign policy." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013). That danger is present here and should again be guarded against by this Court.

CONCLUSION

The decision of the Fifth Circuit should be reversed.

Respectfully submitted.

TANAZ MOGHADAM
ELIZABETH A. NORFORD
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006

MOSES SILVERMAN
Counsel of Record
GEOFFREY R. CHEPIGA
SARAH J. PROSTKO
MIGUEL ZAMORA
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
msilverman@paulweiss.com
(212) 373-3355

Counsel for Amici Curiae
Former DHS Secretary Jeh C. Johnson and
Former Ambassador to Mexico Roberta S. Jacobson

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25, 2019) <https://tinyurl.com/DHS-Guidance-Implement-MPP> (emphasis added).