No. 21-954

In the
# Supreme Court of the United States

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JOSEPH R. BIDEN, JR.,

PRESIDENT OF THE UNITED STATES, ET AL.,

*Petitioners*

v.

STATE OF TEXAS, ET AL.,

*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF OF ADVANCING AMERICAN FREEDOM AS AMICUS CURIAE SUPPORTING RESPONDENTS

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Matthew J. Sheehan
*Counsel of Record*
Advancing American Freedom, Inc.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 780-4848
matt@advancingamericanfreedom.com

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## STATEMENT OF INTEREST OF AMICUS CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that preserve liberty and are consistent with the United States Constitution.[1] AAF believes that policies enacted by the federal government should be consistent with the rule of law. AAF files amicus briefs in federal courts that support these principles.

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than *amicus curiae* made any monetary contribution intended to fund the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

Congress has written into federal law the clear policy determination that undocumented aliens who are "applicant[s] for admission" "shall be detained" pending the resolution of removal proceedings. 8 U.S.C. § 1225(b)(2)(A). Federal law provides tailored alternatives to this statutory detention mandate, for the purpose of aiding the Department of Homeland Security (DHS) in the efficient administration of our immigration laws. But the Biden Administration insists that these statutory alternatives to the detention mandate are insufficient. Determined to release as many undocumented aliens as possible into the general public, the Biden Administration contends that this Court should grant it plenary release authority in contravention of the clear language of § 1225(b)(2)(A) by adopting the nonsensical reading that "shall" means "may."

This Court should reject the Biden Administration's Orwellian reading of our immigration statutes. Congress has made the policy determination that a baseline policy of mandatory detention of undocumented aliens who are applicants for admission into the United States is necessary to protect the public from the harmful effects of illegal immigration. President Biden is bound by his oath of office to faithfully execute our immigration laws, and the Biden Administration should not be permitted to disregard them in its fervent pursuit of its radical contrary policy agenda.

In particular, this Court should reject the Biden Administration's disingenuous argument that "shall" should be read to mean "may" because, it asserts, it cannot possibly detain all aliens pending the resolution of their removal proceedings. Before the Executive is permitted to claim that purported impossibility should influence this Court's interpretation of a statute, the Executive should first be required to demonstrate that it has done everything in its power to comply with the statute as written. The Biden Administration flunks that test in every respect, having instituted numerous policies as exercises of claimed executive discretion that have had the deliberate effect of making it substantially more difficult for DHS to enforce the laws enacted by Congress.

This Court should not allow itself to be made complicit in the Biden Administration's overt efforts to subvert the rule of law, by using illicit executive actions that contravene the immigration policy established by Congress to secure the statutory interpretation it prefers. The Court should instead forcefully remind the Biden Administration that it has a duty to enforce the laws, and that it cannot request that the courts release it from that obligation on grounds of impossibility until it first demonstrates that it has actually tried.

## ARGUMENT

The purpose of this amicus brief is to bring to the Court's attention numerous policies enacted by

the Biden Administration as claimed exercises of executive discretion that have had the deliberate effect of making it more difficult for DHS to enforce the immigration laws enacted by Congress. The Biden Administration should not be permitted to argue that the detention mandate that Congress enacted in § 1225(b)(2)(A) should instead be read to confer plenary discretion on the grounds that it is impossible for it to execute a policy of mandatory detention, while in practice deliberately doing everything it can to undermine the nation's detention capacity.

## I. Federal Law Requires That Aliens Who are Applicants for Admission and Not Entitled to Admission Must be Detained Pending Removal Proceedings.

Federal law is clear. If "an alien who is an applicant for admission . . . is not clearly and beyond a doubt entitled to be admitted, the alien ***shall*** be detained" pending removal proceedings. 8 U.S.C. § 1225(b)(2)(A) (emphasis added). Congress's decision to utilize the term "shall" – a mandatory term – in § 1225(b)(2)(A) indicates its determination that DHS has a baseline statutory obligation to detain aliens pending their removal (subject to any statutory exceptions). And the Supreme Court has previously opined that "[r]ead most naturally, §§ 1225(b)(1) and (b)(2) [] mandate detention of applicants for admission until certain proceedings have concluded." *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018).

Congress, however, has provided two permissible statutory alternatives to the detention mandate of § 1225(b)(2)(A). *See Texas v. Biden*, 20 F.4th 928, 994-995 (5th Cir. 2021). First, § 1225(b)(2)(C) provides the Attorney General discretionary authority to "return" an alien "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States . . . to that territory" pending removal proceedings. 8 U.S.C. § 1225(b)(2)(C). Second, § 1182(d)(5) permits DHS to "parole" – rather than detain or return – an alien. This parole alternative, however, is very limited; parole may only be granted "on a case-by-case basis for urgent humanitarian reasons or significant public benefit[.]" 8 U.S.C. § 1182(d)(5).[2]

The Trump-Pence Administration implemented the Migrant Protection Protocols (MPP), which relates to the first of the two statutorily permissible alternatives to detention, in December 2018, in response to a surge of undocumented aliens arriving at the Southern Border of the United States. *Texas*, 20 F.4th at 944. MPP permitted DHS to return to

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[2] 8 U.S.C. § 1226(a) provides a separate "detention-and-parole scheme" that covers aliens who have already entered the United States. This provision allows for bond and conditional parole, but only applies "to aliens detained under § 1226(a) itself—not to aliens detained under § 1225(b)." *Texas*, 20 F.4th at 996; *id.* at 947 ("Section 1226(a) provides its own detention-and-parole scheme that applies to aliens who have already entered the United States—in contradistinction to the applicants for admission covered by § 1225(b)(2) and § 1182(d)(5).").

Mexico certain foreign individuals who illegally or without proper documentation sought entry or admission from Mexico to the United States. Department of Homeland Security, Migrant Protection Protocols Archived Content, https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols (last visited Apr. 12, 2022). Once returned to Mexico pursuant to MPP, undocumented aliens are required to wait outside the United States "for the duration of their immigration proceedings[.]" *Id*.

The second statutorily permissible alternative to detention – parole – applies only in very limited circumstances. Parole of an alien into the United States is forbidden "unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States[.]" 8 U.S.C. § 1182(d)(5)(B). Further, the unambiguous plain text of the statute only authorizes parole on a case-by-case basis; the *en masse* parole of aliens is impermissible. *Texas*, 20 F.4th at 997. ("DHS cannot use that power to parole aliens *en masse*; that was the whole point of the case-by-case requirement that Congress added in IIRIRA. So the Government's proposal to parole every alien it cannot detain is the opposite of the case-by-case basis determinations required by law.") (internal quotations and citations omitted). "Quintessential modern uses of the parole power include, for example, paroling aliens who do not qualify for an admission category but have an urgent need for medical care in the United States

and paroling aliens who qualify for a visa but are waiting for it to become available." *Id*. at 947. Merely paroling undocumented aliens *en masse* with a hope that they return for their immigration hearings, *see id.* at 944 (prior to the implementation of MPP aliens would "be released into the country, where they often fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim."), is not contemplated by or consistent with the statute.

Congress has thus provided the Executive with specific but limited authorities that allow it, in appropriate and specified circumstances, to avoid detaining undocumented aliens pursuant to the detention mandate of § 1225(b)(2)(A). There is no valid justification to override Congress's clear policy choice by granting the Biden Administration the plenary authority it seeks to release undocumented aliens into the general population.

## II. The Biden Administration and Department of Homeland Security Have Failed to Employ Procedures Making it Possible For DHS to Comply With § 1225(b)'s Detention Mandate.

The Biden Administration claims that Congress has failed to provide DHS with "sufficient appropriations to detain" all aliens encountered by the Agency who are subject to detention under 8 U.S.C. § 1225(b). Brief for the Petitioners, *Biden v. Texas*, No. 21-954, at 5. Yet, in the middle of the

worst border crisis in American history, instead of continuing the successful MPP in order to make best use of available detention capacity and to maximize legal compliance, the Administration has deliberately sought to end MPP so that it can instead release more undocumented aliens with no legal right to entry into the United States. *See Texas*, 20 F.4th at 944 ("Before MPP, resource constraints forced DHS to release thousands of undocumented aliens into the United States and to trust that those aliens would voluntarily appear for their removal proceedings"). The release of these aliens – rather than detaining or returning them to Mexico under the terms of the MPP – violates Congress's clear statutory command to detain undocumented aliens who are applicants for admission. *See id.* at 998.

The rule of law dictates that the government cannot merely decide to claim impossibility and ignore the plain command of the statutory text ("shall be detained") without any demonstration that it has first made best efforts to comply with the statute's text. *C.f. Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016) ("Unlike the word may, which implies discretion, the word shall usually connotes a requirement.") (internal quotations omitted). DHS claims that it cannot comply with the statutory text because it lacks resources to detain aliens, *see* Brief for the Petitioners, *Biden v. Texas*, No. 21-954, at 5, but DHS and the Biden Administration have not demonstrated that they first exhausted readily available methods that could be used to comply with

the statutory command to detain. The Biden Administration has several different procedures available to it to comply with the statute's command, ***including maintaining MPP***. *See* Brief for the Respondents, *Biden v. Texas*, No. 21-954, at 20-21 ("MPP enables DHS to comply with its section 1225 obligations by exercising one of its applicable statutory options, its contiguous-return authority, by returning eligible aliens to Mexico. Because DHS must comply with federal law if it is able, it cannot terminate MPP so long as, as the district court found, termination of MPP necessarily leads to the systemic violation of section 1225.") (internal quotations omitted).

### A. The Biden Administration and DHS Have Deliberately Reduced Available Detention Capacity.

During the Trump-Pence Administration DHS sought to increase detention capacity by (1) transferring and reprogramming other DHS appropriations to the U.S. Immigration and Customs Enforcement (ICE), and (2) requesting additional funds for detention bedspace from Congress.

In response to the number of single adults crossing the Southwest border in 2019, DHS used its reprogramming and transferring authority to increase the number of detention beds beyond Congress's baseline funding authorization. Department of Homeland Security, DHS to Reprogram and Transfer $271 Million to Support

Humanitarian and Security Emergency Response (Aug. 27, 2019), *available at* https://www.dhs.gov/news/2019/08/27/dhs-reprogram-and-transfer-271-million-support-humanitarian-and-security-emergency (last visited Apr. 13, 2022); U.S. Department of Homeland Security, Department of Homeland Security FY 2019 Southwest Border Emergency Transfer and Reprogramming Notification, *available at* https://s3.documentcloud.org/documents/6345992/DHS-FY-2019-Southwest-Border-Emergency-Transfer.pdf at 3 (last visited Apr. 13, 2022) ("ICE requires additional detention resources in order to maintain sufficient capacity to detain aliens and enforce the Nation's immigration laws."). DHS ultimately reprogramed and transferred $271 million in available funding via authority in the fiscal year (FY) 2019 DHS Appropriations Act to pay for additional detention space, court space, and transportation. U.S. Department of Homeland Security, Department of Homeland Security FY 2019 Southwest Border Emergency Transfer and Reprogramming Notification, *available at* https://s3.documentcloud.org/documents/6345992/DHS-FY-2019-Southwest-Border-Emergency-Transfer.pdf, 3 (last visited Apr. 13, 2022) (indicating that ICE requires $101.4 million for additional detention resources). Reprograming and transfer of funds to increase detention bed capacity is but one example of the many ways that the Biden Administration could take additional steps to increase detention capacity to comply with § 1225(b)(2)(A)'s mandatory detention requirement.

In its 2021 budget proposal, DHS requested $3.1 billion for 60,000 detention beds (55,000 adult beds and 5,000 family beds).[3] Department of Homeland Security, FY2021 Budget in Brief, *available at*, https://www.dhs.gov/sites/default/files/publications/fy_2021_dhs_bib_0.pdf at 3 (last visited Apr. 13, 2022). DHS found that this "increase in detention capacity is critical to supporting ICE's ability to apprehend, detain, and remove aliens." *Id*. at 32. Between FY 2018 and FY 2021, DHS requested an average of 54,344.75 detention beds each year. (51,379 detention beds for FY 2018, 52,000 detention beds for FY 2019, 54,000 detention beds for FY 2020, and 60,000 detention beds for FY 2021). *See* Department of Homeland Security, FY2018 Budget in Brief, *available at*, https://www.dhs.gov/sites/default/files/publications/DHS%20FY18%20BIB%20Final.pdf at 4 (last visited Apr. 13, 2022); Department of Homeland Security, FY2019 Budget in Brief, *available at*, https://www.dhs.gov/sites/default/files/publications/DHS%20BIB%202019.pdf at 4 (last visited Apr. 13, 2022); Department of Homeland Security, FY 2020 Budget in Brief, *available at*, https://www.dhs.gov/sites/default/files/publications/fy_2020_dhs_bib.pdf at 3 (last visited Apr. 13, 2022); Department of Homeland Security, FY 2021 Budget in Brief, *available at*, https://www.dhs.gov/sites/default/files/publications/fy

[3] Detention bed space is measured in terms of average daily population.

_2021_dhs_bib_0.pdf at 3 (last visited Apr. 13, 2022). Further, DHS's budget requests for detention space between FY 2017 and FY 2021 increased by 29,087 beds, a 94.09% increase (30,913 detention beds for FY 2017 and 60,000 detention beds for FY 2021). Department of Homeland Security, FY 2017 Budget in Brief, *available at*, https://www.dhs.gov/sites/default/files/publications/FY2017_BIB-MASTER.pdf at 38 (last visited Apr. 13, 2022).

But instead of requesting more funding to comply with § 1225(b)(2)(A)'s mandatory detention requirement, the Biden Administration has done the opposite. DHS has instead asked Congress to ***reduce*** funding for immigration detention beds. In its 2023 budget proposal, DHS requested $1.4 billion for 25,000 detention beds (25,000 adult beds and elimination of all family beds). Department of Homeland Security, FY 2023 Budget in Brief, *available at*, https://www.dhs.gov/sites/default/files/2022-03/22-%201835%20-%20FY%202023%20Budget%20in%20Brief%20FINAL%20with%20Cover_Remediated.pdf at 3, 40 (last visited Apr. 13, 2022). This request represents a reduction request of 35,000 beds, a 58.33% reduction in bedspace between the agency's FY 2021 request and its FY 2023 request (60,000 detention beds for FY 2021 and 25,000 detention beds for FY 2023). Moreover, at a time when U.S. Customs and Border Protection encounters at the Southwest Land Border are at the minimum the highest in more than two

decades, *see* U.S. Customs and Border Protection, Southwest Land Border Encounters, *available at* https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (last visited Apr. 13, 2022), DHS's FY 2023 request is 5,913 beds lower than its FY 2017 request made during the last year of the Obama Administration, Department of Homeland Security, FY 2017 Budget in Brief, *available at*, https://www.dhs.gov/sites/default/files/publications/FY2017_BIB-MASTER.pdf at 38 (last visited Apr. 13, 2022); John Gramlich, Migrant encounters at U.S.-Mexico border are at a 21-year high (Aug. 13, 2021), a*vailable at* https://www.pewresearch.org/fact-tank/2021/08/13/migrant-encounters-at-u-s-mexico-border-are-at-a-21-year-high/ (last visited Apr. 13, 2022), and 7,500 beds lower than DHS's request for FY 2022, Department of Homeland Security, FY2022 Budget in Brief, *available at*, https://www.dhs.gov/sites/default/files/publications/dhs_bib_-_web_version_-_final_508.pdf at 3, 35 (last visited Apr. 13, 2022).

The Biden Administration claims that there is a lack of funding and capacity to detain aliens, yet DHS has not transferred or reprogramed funds, nor has it sought additional funding for detention space. Instead, it has twice asked Congress to reduce detention funding when compared to the agency's FY 2021 request. The Biden Administration cannot claim it is impossible to comply with the statutory detention requirements while simultaneously deliberately failing to request sufficient detention beds in its budget.

### B. DHS Has Eliminated All Family Detention Centers.

Instead of increasing family detention facilities to handle the influx of families illegally entering the United States, DHS has instead exercised supposed executive discretion to deliberately reduce family detention capacity. It has been reported that in early 2021, the agency transformed two of ICE's three family detention centers into "reception centers" that provided short-term housing before release into the United States.[4] Andrea Castillo, *Biden Administration Halts Immigration Family Detention For Now* (Dec. 18, 2021), *LA Times*, *available at* https://www.latimes.com/politics/story/2021-12-17/adults-only-biden-administration-repurposes-immigrant-family-detention-centers (last visited Apr. 13, 2022); Fox News, Biden administration releasing families from Texas migrant centers in 72 hours (Mar. 7, 2021), *New York Post*, *available at* https://nypost.com/2021/03/07/biden-administration-releasing-families-from-migrant-centers/ (last visited Apr. 13, 2022) (characterizing the transformed detention facilities as "Ellis Island-style rapid processing centers"). By the end of 2021, according to

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[4] The three family detention facilities located in Dilley (Texas), Karnes City (Texas), and Berks County (Pennsylvania) could house in total 3,335 undocumented aliens. Fox News, Biden administration releasing families from Texas migrant centers in 72 hours (Mar. 7, 2021), *New York Post*, *available at* https://nypost.com/2021/03/07/biden-administration-releasing-families-from-migrant-centers/ (last visited Apr. 13, 2022).

reports, DHS entirely ended the policy of housing undocumented families in detention centers and shifted the usage of at least one of the facilities to focus on detaining single adults. Stef Kight, Scoop: Biden to stop holding undocumented families in detention centers (Dec. 15, 2021), *available at* https://www.axios.com/biden-ends-migrant-family-detention-border-immigration-b39f3e04-689a-486b-82de-7deb9412cea6.html (last visited Apr. 13, 2022) (as of early December, "the U.S. had zero migrant families in detention facilities[.]").

While claiming that DHS lacks sufficient detention space, the Biden Administration has deliberately eliminated all family detention space and repurposed at least one facility to house single adults. And it has done so even though, as discussed below, DHS had other tools available, including expedited removal, to handle an influx of single adult aliens.

### C. DHS Has Not Only Failed to Robustly Utilize Expedited Removal, But Also Restricted When That Authority May be Used.

Federal law, 8 U.S.C. § 1225(b)(1), permits the expedited removal of aliens without a hearing before an immigration judge "if they are inadmissible either because they (1) lack valid entry documents, or (2) tried to procure their admission into the United States through fraud or misrepresentation." Cong. Rsch. Serv., Expedited Removal of Aliens: An

Introduction, at 1 (updated Mar. 25, 2022), *available at* https://crsreports.congress.gov/product/pdf/IF/IF11357 (last visited Apr. 13, 2022). The statute also authorizes, but does not require, DHS to remove "certain other aliens," 8 U.S.C. § 1225(b)(1), if "they (1) were not admitted or paroled into the United States by immigration authorities and (2) cannot establish at least two years' continuous physical presence in the United States at the time of apprehension." Cong. Rsch. Serv., Expedited Removal of Aliens: An Introduction, at 1 (updated Mar. 25, 2022), *available at* https://crsreports.congress.gov/product/pdf/IF/IF11357 (last visited Apr. 13, 2022). Prior to 2019, DHS did not fully implement its expedited removal authority. *Id*. at 2.

In July 2019, DHS published a Notice in the Federal Register that enabled the Department "to exercise the full remaining scope of its statutory authority to place in expedited removal, with limited exceptions[.]"[5] Department of Homeland Security,

[5] The Notice specifically designated as eligible for expedited removal "(1) Aliens who did not arrive by sea, who are encountered anywhere in the United States more than 100 air miles from a U.S. international land border, and who have been continuously present in the United States for less than two years; and (2) aliens who did not arrive by sea, who are encountered within 100 air miles from a U.S. international land border, and who have been continuously present in the United States for at least 14 days but for less than two years." Department of Homeland Security, Designating Aliens for

Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (July 23, 2019). The basis for this expansion of the Department's expedited removal authority was the ongoing crisis on the Southern Border, which was caused by the "large number of aliens" entering the United States illegally who "were apprehended and detained within the interior of the United States" and "insufficient [DHS] detention capacity both along the border and in the interior of the United States[.]" *Id.* at 35411.

In its 2019 Notice, DHS found that "[f]ully implementing expedited removal will help to alleviate some of the burden and capacity issues currently faced by" the agency. *Id.* The Department noted that a significant number of aliens encountered in the interior of the United States by ICE would have been eligible for expedited removal had DHS previously exercised its discretion to use its full statutory authority. *Id.* ("In Fiscal Year (FY) 2018, 37% (20,570) of ICE's 54,983 total interior encounters, with entry dates, were of aliens who had been present in the United States for less than two years. Through March 30, 2019, 39% (6,410) of U.S. Immigration and Customs Enforcement's (ICE) 15,328 total interior encounters, with entry dates, in FY2019 were aliens who had been present in the United States for less than two years."). By placing these aliens in expedited removal, ICE reasoned it could "more effectively use its limited detention

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Expedited Removal, 84 Fed. Reg. 35412 (July 23, 2019).

resources." *Id.* Indeed, based upon FY 2018 statistics, DHS estimated that expedited removal would cut the average time that inadmissible aliens encountered in the interior of the United States spent in detention by approximately 40.1 days. *Id.* (average time in DHS custody for aliens placed in expedited removal was 11.4 days and the average time in DHS custody for inadmissible aliens encountered in the interior of the United States placed into full removal proceedings was 51.5 days). Thus, DHS's expanded use of its expedited removal authority would "likely result in those aliens spending less time in ICE detention than if they were placed in full removal proceedings. That, in turn, will more quickly make available additional ICE bed space, which can be used for additional interior arrests and removals." *Id.* And the continued use of DHS's expedited removal authority would allow it to deploy its limited resources more efficiently and use its "detention capacity more effectively," *id.* at 35412, to also detain "more aliens apprehended along the southern border," *id.* at 35411.[6]

[6] In *Make the Road New York v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020) the D.C. Circuit upheld DHS's expansion of its expedited removal authority, finding that "Congress committed the judgment whether to expand expedited removal to the Secretary's sole and unreviewable discretion" and is "not subject to review under the APA's standards for agency decisionmaking. Nor is it subject to the APA's notice-and-comment rulemaking requirements." *Id.* at 618 (internal quotations omitted).

Less than two weeks after his inauguration, however, President Biden issued an Executive Order directing the Secretary of Homeland Security to "promptly review and consider whether to modify, revoke, or rescind" DHS's July 2019 Notice expanding its expedited removal authority. President Joseph R. Biden, Jr., 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, Executive Order 14010, 86 Fed. Reg. 8270 (Feb. 5, 2021). Approximately a year later, DHS rescinded the July 2019 Notice, ending the Department's expanded expedited removal authority. Department of Homeland Security, Rescission of the Notice of July 23, 2019, Designating Aliens for Expedited Removal, 87 Fed. Reg. 16022 (March 21, 2022).

If the Biden Administration and DHS retained the expanded expedited removal program, it could have – as DHS previously predicted – resulted in the availability of additional bed space and reduced overall detention times, making it easier for DHS to comply with § 1225(b)'s command to detain all aliens.

## III. MPP Was an Effective Policy to Control the Crisis at the Southern Border.

MPP was an effective means of curtailing the crisis at the Southern Border of the United States.

*See* Assessment of the Migrant Protection Protocols (MPP) (Oct. 28, 2019), *available at* https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf (last visited Apr. 13, 2022) ("MPP Has Demonstrated Operational Effectiveness"). Prior to the implementation of the protocol, resource constraints forced DHS to release undocumented aliens seeking asylum into the United States, "trust[ing] that those aliens would voluntarily appear for their removal proceedings." *Texas*, 20 F.4th at 944. These releases resulted in significant numbers of undocumented aliens disappearing into the U.S., where they either failed to file an asylum application or appear before an immigration judge.[7] *Id.*

In an October 2019 memorandum, DHS concluded that MPP was "an indispensable tool in addressing the ongoing crisis at the southern border and

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[7] It has been reported that in 2021, the Biden Administration lost track of almost 50,000 migrants who were released from U.S. Customs and Border Protection custody – a number that represented nearly half of the approximately 100,000 noncitizens released at the southern border between March and August. Anna Giaritelli, 47,705 migrants released with instructions to report to ICE have gone missing under Biden (Jan 11, 2022), *available at* https://www.washingtonexaminer.com/news/47-705-migrants-released-with-instructions-to-report-to-ice-have-gone-missing-under-biden (last visited Apr. 13, 2022). These individuals who "disappeared and are untraceable" were merely "given instructions to self-report to Immigration and Customs Enforcement within 60 days" and have "failed to check in." *Id.*

restoring integrity to the immigration system." The protocol was responsible for a massive reduction in the number of aliens unlawfully present in the United States. Assessment of the Migrant Protection Protocols (MPP) (Oct. 28, 2019), *available at* https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf (last visited Apr. 13, 2022). DHS found that the number of aliens apprehended decreased by 64% through September 2019 from a peak of 144,000 in May 2019 and "[b]order 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%." *Id.* Between MPP's implementation and October 2019, DHS found a "connection between MPP implementation and decreasing enforcement actions at the border." *Id.* In other words, MPP worked.

The immigration system was also stronger and more efficient after the implementation of MPP. Under MPP, meritorious claims were processed more quickly. Rather than waiting years for relief, returnees who presented meritorious claims were granted relief in a matter of months. *Id.* Indeed, as of October 1, 2020, immigration judges had completed 67% (43,820) of the 65,409 MPP cases filed. Migrant Protection Protocols Metrics and Measures, *available at* https://www.dhs.gov/sites/default/files/publications/migrant_protection_protocols_metrics_and_measures_2.pdf (last visited Apr. 13, 2022).

While benefitting those with meritorious claims, MPP discouraged those with meritless claims from asserting requests for relief or protection. *See* Assessment of the Migrant Protection Protocols (MPP) (Oct. 28, 2019), *available at* https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf (last visited Apr. 13, 2022). Prior to MPP, meritless claims could be presented as a means for aliens to gain entry to the United States. *Id.*

## CONCLUSION

This Court should affirm the Fifth Circuit's decision.

Respectfully submitted,

Matthew J. Sheehan
*Counsel of Record*
Advancing American Freedom, Inc.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 780-4848
matt@advancingamericanfreedom.com