No. 21-954

In the
Supreme Court of the United States

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

v.

TEXAS, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF RESPONDENTS

CHRISTOPHER J. HAJEC
Counsel of Record
MATT A. CRAPO
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW
Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org

Counsel for Amicus Curiae

APRIL 14, 2022

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute[1] ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts (including this Court) and administrative bodies, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C.2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 942 F.3d 504 (D.C. Cir. 2019); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

SUMMARY OF THE ARGUMENT

Petitioners raise no valid objection to the injunction prohibiting them from rescinding the Migrant Protection Protocols ("MPP") until they are able to obey the statutes Congress has passed. First, Petitioners

---

[1] Both Petitioners and Respondents have filed a written blanket consent to the filing of *amicus* briefs. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus*, its members, or its counsel—contributed monetarily to its preparation or submission.

claim that the Department of Homeland Security ("DHS") has discretion not to detain all illegal border crossers whom it neither returns to contiguous territory nor lawfully paroles. In fact, as this Court has recognized, Congress has removed such discretion. For this reason, the Court of Appeals properly enjoined Petitioners' rescission of MPP. Given the resource constraints Petitioners themselves make much of, that rescission forces them to violate the detention mandate.

Petitioners' concession that inadequate detention space prevents DHS from detaining every alien that falls within the detention mandate supports the injunction they challenge for another reason. Faced with inadequate resources, whether self-imposed or resulting from Congress's failure to provide adequate funding, agencies still have an obligation to effectuate the governing statutory scheme as much as possible given those resource constraints. Here, Petitioners do not claim that they lack the resources to implement MPP, and implementing MPP would effectuate the statutory scheme far more extensively than does the administration's policy of releasing illegal border crossers *en masse* into the United States.

Nor does the parole power give Petitioners the liberty to engage in these *en masse* releases. In a large proportion of them, the parole power is not even invoked, nor is any other valid statutory basis. And the numbers of those paroled are so great as to show the impossibility that parole is being given, as the law requires, only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.

In short, by rescinding MPP, Petitioners forced themselves both to violate the detention mandate and to abuse their parole authority, and refused their obligation to effectuate the governing statutory scheme as much as possible given resource constraints. The injunction they challenge merely ordered them to follow the only lawful course open to them.

ARGUMENT

I. By Rescinding MPP, Petitioners Force Themselves to Violate Section 1225.

8 U.S.C. § 1225 mandates the detention of all illegal border crossers that are not returned to contiguous territory or lawfully paroled. By rescinding MPP, DHS forced itself to violate section 1225's detention mandate, and was properly enjoined from doing so.

It has long been recognized that the power "to forbid the entrance of foreigners … or to admit them only in such cases and upon such conditions as it may see fit to prescribe" is an inherent sovereign prerogative. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). Under our Constitution, this sovereign prerogative is entrusted exclusively to Congress. *See Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress . . . ."). The central purpose of 8 U.S.C. § 1225 is to prevent aliens from entering the United States without permission. It accomplishes this purpose by requiring expedited removal, mandatory detention, or contiguous return pending a final determination of admissibility.

The Immigration and Nationality Act ("INA") established a comprehensive and uniform immigration system governing who may enter and remain in the United States. Congress has specified several classes of aliens who are either inadmissible or removable from the United States. Such aliens include those who enter illegally, commit certain crimes, violate the terms of their status (visa overstays), obtain admission through fraud or misrepresentation, vote unlawfully, become a public charge, and whose work would undermine wages or working conditions of American workers. *See generally* 8 U.S.C. §§ 1182(a) (defining classes of inadmissible aliens) and 1227(a) (defining classes of deportable aliens). By simply defining the various classes of removable aliens and merely establishing a procedure to adjudicate whether aliens are removable, *see* 8 U.S.C. § 1229a (establishing removal proceedings), Congress generally left the decision about whether to seek removal of any specific alien to the discretion of DHS.[2] Thus, it is fair to say, "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona v. United States*, 567 U.S. 387, 396 (2012).

Congress did not, however, leave DHS's discretion unbounded. It established a detailed and comprehensive scheme governing the inspection, detention, and removal of aliens who attempt to enter the United States without permission. This scheme reflects Congress's purpose of preventing such illegal

---

[2] It further provided for various forms of discretionary relief from removal, such as asylum, cancellation of removal, and adjustment of status.

border-crossers from gaining entrance into the United States.

For example, Congress mandated that all applicants for admission—defined as "alien[s] present in the United States who ha[ve] not been admitted"—"shall be inspected by immigration officers." 8 U.S.C. § 1225(a)(1), (3). Section 1225(b), which governs inspection of applicants for admission, distinguishes between two classes of arriving aliens. The first class consists of aliens who have no valid entry documents or who attempt to gain admission through misrepresentation or fraud (collectively, "B-1 aliens"). 8 U.S.C. § 1225(b)(1)(A)(i).[3] The other class consists of all other arriving aliens ("B-2 aliens"). 8 U.S.C. § 1225(b)(2)(A), (B) (excluding B-1 aliens from the definition of B-2 aliens).

B-1 aliens are subject to mandatory detention or expedited removal. Such aliens "shall be" ordered removed from the United States "without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(i). If such an alien claims a fear of persecution, however, the alien "shall be detained pending a final determination of credible fear of persecution." *Id.* at § 1225(b)(1)(B)(iii)(IV). If the alien fails to establish a credible fear of persecution, the

---

[3] Section 1225(b)(1)(A)(i) refers to aliens who are "inadmissible under § 1182(a)(6)(C) or 1182(a)(7) of this title." Section 1182(a)(6)(C) describes aliens who seek a visa or admission through misrepresentation as inadmissible. Section 1182(a)(7), in turn, deems aliens with no valid entry document as inadmissible.

alien "shall be detained … until removed." *Id.* Even if the alien successfully establishes a credible fear of persecution, the alien remains subject to mandatory detention until the asylum claim is finally adjudicated. *See id.* at § 1225(b)(1)(B)(ii) ("the alien *shall be detained for further consideration of the application for asylum*") (emphasis added). Thus, B-1 aliens are generally subject to expeditious removal "without further hearing or review," but, if they raise an asylum claim, they are subject to mandatory detention until their asylum claim is either granted or denied.

Inadmissible B-2 aliens are similarly subject to mandatory detention pending final adjudication of their admissibility. If an immigration officer determines that a B-2 alien "is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained for a proceeding* under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(A) (emphasis added). Such a proceeding refers to regular removal proceedings before an immigration judge. *See generally* 8 U.S.C. § 1229a. Accordingly, regardless of whether aliens fall within the B-1 or B-2 class of applicants for admission, such aliens are subject to mandatory detention pending a final determination of their admissibility or asylum claims. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018) ("Read most naturally, §§ 1225(b)(1) and (b)(2) … mandate detention of applicants for admission until certain proceedings have concluded."). Indeed, sections 1225(b)(1) and (b)(2) "unequivocally mandate that aliens falling within their scope 'shall' be detained," *id.* at 844, "throughout the completion of applicable proceedings," *id.* at 845.

The only alternative to mandatory detention found in section 1225 is the discretionary contiguous-return authority.[4] Congress granted DHS the authority to return certain aliens "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 a proceeding under section 1229a of this title," 8 U.S.C. § 1225(b)(2)(C).[5] This statutory alternative

---

[4] As discussed below, separate and apart from section 1225, Congress has granted DHS a narrow authority to grant humanitarian parole to any arriving alien. *See* 8 U.S.C. § 1182(d)(5)(A).

[5] Subparagraph (C) only applies to aliens "described in subparagraph (A)" and would appear at first blush to be inapplicable to B-1 aliens. 8 U.S.C. § 1225(b)(2)(C); *see also id.* § 1225(b)(2)(B)(ii) (excluding aliens "to whom paragraph (1) applies" from the reach of subparagraph (A)). The Board of Immigration Appeals has held, however, that DHS retains discretion to place B-1 aliens in regular removal proceedings as contemplated by subparagraph (A). *See Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 521-23 (BIA 2011). In addition, the regulations governing the credible fear screening process direct immigration officers to initiate regular removal proceedings against any B-1 alien who establishes a credible fear of persecution. *See* 8 C.F.R. § 208.30(f) (2020) ("If an alien … is found to have a credible fear of persecution or torture, the asylum officer will so inform the alien and issue a Form I-862, Notice to Appear, for full consideration of the asylum and withholding of removal claim in proceedings under [8 U.S.C. § 1229a]."). On December 23, 2020, DHS published a final rule amending 8 C.F.R. § 208.30(f) to require referral of such cases to an immigration judge for an "asylum-and-withholding-only proceeding" as opposed to a full removal proceeding. *See* Security Bars and Processing (Final Rule), 85 Fed. Reg. 84160, 84195 (Dec. 23, 2020). That amendment has been delayed until at least December 31, 2022. *See generally* Security Bars and Processing; Delay of Effective Date, 86 Fed. Reg.

permits DHS to return certain aliens to contiguous territory in lieu of mandatory detention.

As Respondents demonstrate (Resp. Br. at 14-19), section 1225(b) imposes a mandatory-detention obligation on DHS. *Amicus* would add that a case Petitioners' cite to the contrary, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), is distinguishable. (Pet. Br. at 29-31). In that case, this Court merely concluded that the "respondent did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband." *Castle Rock*, 545 U.S. at 768. In other words, the Court rejected the respondent's claim that mandatory legislative language alone could suffice to establish that the plaintiff had a personal entitlement to police enforcement of her restraining order such that it constituted a protected property interest under the Fourteenth Amendment. *Id.* at 766. Here, in contrast, the Court of Appeals did not find such a novel individualized entitlement, but instead affirmed an injunction preventing DHS from adopting an enforcement policy that would force it to violate the detention mandate.

Petitioners suggest that the broad discretion they generally exercise over how to enforce the law precludes the conclusion that section 1225(b) mandates detention. Pet. Br. at 31-32 (citing *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84

73615 (Dec. 28, 2021). In any event, no party disputes that B-1 and B-2 aliens are both amenable to contiguous return under the MPP and subparagraph 1225(b)(2)(C). Therefore, the Court need not reach the question.

(1999); *Arizona*, 567 U.S. at 396-97). But whatever broad discretion DHS enjoys in enforcing the immigration laws in general, such discretion is constrained with respect to unlawful arriving aliens. Section 1225 mandates the removal or detention of all such aliens. Thus, the broad discretion that DHS exercises in other areas of immigration law has no bearing on the scope of its discretion under section 1225.

Petitioners also argue that the Court of Appeals erred in holding that section 1225 mandates detention and requires the reinstatement of MPP because past administrations did not consistently detain every alien who entered the United States illegally and seldom utilized the contiguous-return authority. *See* Pet. Br. at 21-22, 24-25. As Respondents observe, however, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") in an effort to enhance immigration enforcement practices. *See* Resp. Br. at 23; *see also American Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1355 (D.C. Cir. 2000) ("IIRIRA reformed the secondary inspection process in order to 'expedite the removal from the United States of aliens who indisputably have no authorization to be admitted ….'") (quoting H.R. Conf. Rep. No. 104-828, at 209 (1996)). Thus, congressional intent would suggest reading such remedial legislation as imposing a detention mandate. In any event, "[e]ven if the Executive could accumulate power through adverse possession by engaging in a consistent and unchallenged practice [of non-detention] over a long period of time," *NLRB v. Canning*, 573 U.S. 513, 613-614, (2013) (Scalia, J., concurring), it would be

insufficient to overcome the clear detention mandate of section 1225. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2410 (2018) (historical practice does not justify "departing from the clear text of the statute").

II. In The Absence Of Adequate Detention Space, Contiguous Return Is Necessary To Effectuate Congress's Statutory Scheme.

Petitioners claim that practical realities such as lack of detention capacity absolve them of their detention obligation under section 1225(b). *See*, *e.g.*, Pet. Br. at 31. The problem for Petitioners is that such difficulties do not absolve them of their more general statutory obligations.

In *Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977), the D.C. Circuit perspicaciously held that when compliance with a statutory mandate is not possible due to lack of funding, "the agency administering the statute is required to effectuate the original statutory scheme as much as possible, within the limits of the added constraint." Under this standard, Petitioners' refusal to utilize their contiguous-return authority, and instead to release asylum claimants *en masse* into the United States, was properly enjoined as a refusal to effectuate the INA as much as possible given practical constraints.

Because section 1225 requires the inspection, detention, removal, or contiguous return of all applicants for admission, that statute is fully effectuated only when *no* applicants for admission are released into the United States (unless lawfully paroled). Other provisions confirm this statutory

meaning. For example, Congress conferred upon the DHS Secretary "the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens …." 8 U.S.C. § 1103(a)(5). In addition, the Secure Fencing Act of 2006 provides that "the Secretary of Homeland Security shall take all actions the Secretary determines necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders of the United States …." Pub. L. 109–367, § 2(a), 120 Stat. 2638 (codified as a note to 8 U.S.C. § 1701). Congress defined the term "operational control" as "the *prevention of all unlawful entries* into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband." *Id.* at § 2(b) (emphasis added).

The lack of adequate detention capacity to comply fully with the detention mandate in section 1225 in no way prevents Petitioners from adopting the only statutory alternative to detention—the return of arriving aliens to contiguous territory under 8 U.S.C. § 1225(b)(2)(C)—and thus effectuating the governing statutory scheme as much as possible.

Petitioners' statutory obligation is especially clear because the lack of resources they complain of is largely self-inflicted. First, this administration's funding request for fiscal year 2022 included a requested *decrease* in funding for detention space. *See* DHS FY 2022 Budget in Brief at 35, available at: https://www.dhs.gov/sites/sites/default/files/publications/dhs_bib_-_web_version_-_final_508.pdf (last visited April 11, 2022) (noting that the President's FY 2022

budget for 32,500 beds decreased detention capacity by 1,500 adult beds from the FY 2021 Enactment funding). Second, this administration's well-publicized nonenforcement policies, including the cessation of border wall construction, the pause in removals, the suspension of MPP itself, and lax enforcement priorities, enticed hundreds of thousands of unlawful migrants to flood across the border starting in early 2021. And there is no sign that the numbers of aliens attempting to enter the United States is diminishing.

III. Petitioners' Refusal To Exercise Their Contiguous-Return Authority Forces Them To Abuse Their Parole Authority.

Apart from section 1225, Congress has authorized the DHS Secretary to "parole into the United States temporarily under such conditions as he may prescribe only *on a case-by-case basis* for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." 8 U.S.C. § 1182(d)(5)(A) (emphasis added). The current language in § 1182(d)(5)(A), including the "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit" limitation, was added by § 602(a) of IIRIRA,[6] "to limit the scope of the parole power and

---

[6] Title VI of division C of Pub. L. No. 104-208, 110 Stat. 3009, 3009-689; *see also* § 203(f) of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 107-08 (providing that DHS "may not parole into the United States an alien who is a refugee unless [DHS] determines that compelling reasons in the public interest *with respect to that particular alien* require that the alien be paroled into the United States rather than be admitted as a refugee") (emphasis added).

prevent the executive branch from using it as a programmatic policy tool." App. at 13a-14a.

The legislative history leading up to the enactment of IIRIRA reflects Congress's disapproval of the Executive Branch's overuse of the parole authority. For instance, a House Judiciary Committee Report complained of "recent abuse of the parole authority" by the Clinton administration in "using the parole authority to admit up to 20,000 Cuban nationals annually." H.R. Rep. No. 104-469, part 1 at 140 (1996). The committee report concluded:

> Parole should only be given on a case-by-case basis for specified urgent humanitarian reasons, such as life-threatening humanitarian medical emergencies, or for specified public interest reasons, such as assisting the government in a law-enforcement-related activity. It should not be used to circumvent Congressionally-established immigration policy or to admit aliens who do not qualify for admission under established legal immigration categories.

Id. at 141. The Senate Judiciary Committee Report stated that its parole reform provision was intended to "reduce[] the abuse of parole" and "[t]ighten[] the Attorney General's parole authority," and that "[t]he committee bill is needed to address ... the abuse of humanitarian provisions such as asylum and parole." S. Rep. No. 104-249 at 2 (1996).

The regulations governing the inspection of B-1 aliens further restrain the executive's discretion in exercising its parole power. Detention for B-1 aliens

who raise a persecution claim remains mandatory pending a credible fear determination, and parole of any such alien under § 1182(d)(5) "may be permitted only when [DHS] determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective." 8 C.F.R. § 235.3(b)(4)(ii).[7]

Similarly, parole of B-2 aliens is also restricted by regulation. B-2 aliens remain subject to mandatory detention under 8 U.S.C. § 1225(b)(2)(A), and parole of such aliens is governed by 8 C.F.R. § 212.5(b). *See* 8 C.F.R. § 235.3(c) (describing B-2 aliens who appear inadmissible and are placed in regular removal proceedings). Under the parole regulation, parole of B-2 aliens is limited to those who have serious medical conditions, are pregnant, are minors, who will be a witness in a judicial, administrative, or legislative proceeding, or whose continued detention is not in the public interest as determined by an authorized official. *See* 8 C.F.R. § 212.5(b).

As the Court of Appeals observed, nothing in the INA or relevant regulations authorizes Petitioners to "parole aliens *en masse*" or otherwise to release such inadmissible aliens into the United States. App. at 120a. Indeed, the congressional scheme is designed to

---

[7] On May 31, 2022, a DHS interim final rule will become effective and remove the "medical emergency" or "legitimate law enforcement objective" language and replace it with the following: "Parole of such alien shall only be considered in accordance with section [1182(d)(5)] and § 212.5(b) of this chapter." 87 Fed. Reg. 18078, 18220 (Mar. 29, 2022) (promulgating amended 8 C.F.R. § 235.3(b)(2)(iii) and (b)(4)(ii)).

ensure that illegal aliens apprehended at the border are either returned to contiguous territory or detained until they are either removed or have their asylum claims or removal proceedings fully adjudicated.

Petitioners assert that they can and do process some arriving aliens using the bond-and-conditional-parole authority under 8 U.S.C. § 1226(a). *See* Pet. Br. at 7, 35 (citing 8 C.F.R. § 236.1(c)(8)). Petitioners err in conflating its parole authority under section 1182(d)(5) with its bond-and-conditional-parole authority under section 1226(a). As Respondents establish, *see* Resp. Br. at 34-35, the bond-and-conditional-parole provisions under 8 U.S.C. § 1226(a) are inapplicable to aliens detained under section 1225(b).

In addition, Petitioners' reliance on 8 C.F.R. § 236.1(c)(8) for its bond-and-conditional-parole authority is misplaced. That regulation applies only to aliens subject to the Transition Period Custody Rules ("TPCR") set forth in paragraphs 303(b)(2)-(3) of IIRIRA (which governed the detention and release of certain criminal aliens during the transition period following IIRIRA's enactment). *See* 110 Stat. 3009-586-587; *see also* 8 C.F.R. § 236.1(c)(1)(ii) ("Paragraph[s] (c)(2) through (c)(8) of this section shall govern custody determinations for aliens subject to the TPCR while they remain in effect."). The TPCR have long since expired. *See* § 303(b)(2) of IIRIRA (providing that the TPCR may only apply for up to two years following the effective date of IIRIRA, depending on whether the Attorney General extends the applicability period). Thus, the regulation relied upon by Petitioners is no longer operative.

Further, as noted above, the regulations governing the inspection of applicants for admission specify that parole of such aliens is available only pursuant to 8 U.S.C. § 1182(d)(5). *See* 8 C.F.R. § 235.3(b)(2)(iii), (4)(ii), (c) (referring only to section 1182(d)(5) parole). Nowhere in the relevant regulations is bond-and-conditional-parole under 8 U.S.C. § 1226(a) mentioned, much less authorized for applicants for admission detained under section 1225(b).

Data provided by this administration show that it is impossible that the Executive Branch is keeping within its narrow humanitarian parole authority, and that it is "otherwise" releasing tens of thousands of aliens into the United States each month absent any valid statutory authority at all. Since the Biden administration took office in early 2021, the number of illegal aliens apprehended at the southwest border and subsequently released into the United States has skyrocketed. *See generally* https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy2021#, last visited April 11, 2022, which shows (under the "U.S. Border Patrol - Dispositions and Transfers" tab) that the number of aliens released into the United States went from fewer than two dozen per month in late 2020 to tens of thousands per month by mid-2021 (approximately 25,000 in March, April, and May, nearly 35,000 in June, over 60,000 in July, and 44,000 in August).

Since August 2021, DHS has paroled or otherwise released tens of thousands of aliens apprehended at the

southwest border into the United States. Data[8] show that, in the last seven months, just over half of the 1.2 million aliens encountered at the southwest border have been expelled under Title 42, and that, of the remaining 611,000 applicants for admission, more than 445,000 have been paroled *or otherwise released* into the United States (the 445,000 number includes over 128,000 aliens paroled under section 1182(d)(5)). In other words, nearly 317,000 aliens have been "otherwise released" into the United States—that is, absent any apparent statutory authority. Furthermore, at least half of the aliens encountered during this timeframe were expelled under Title 42. If Title 42 authority expires next month,[9] as the administration plans, the number of aliens released into the United States per month will soon likely more than double.

To put this number in perspective, the total number of immigrant visas available for fiscal year 2022 is 561,000. *See* Annual Numerical Limits FY-2022 (estimated), available at: https://travel.state.gov/content

---

[8] These data are derived from monthly status reports that the Petitioners filed with the district court below. *See* ECF Nos. 106, 112, 115, 119, 124, 129, and 133. These data also correspond roughly with the data found online at: https://www.cbp.gov/news room/stats/custody-and-transfer-statistics, but are more comprehensive because they include data from ICE in addition to CBP.

[9] *See* Centers for Disease Control and Prevention, Public Health Determination and Order Regarding Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 87 Fed. Reg. 19941 (Apr. 6, 2022) (announcing termination of the Title 42 order will be effective May 23, 2022).

/dam/visas/Statistics/Immigrant-Statistics/Annual%20%20Numerical%20%20Limits%20-%20FY%202022.pdf (showing 226,000 family-based visas and 280,000 employment-based visas available for fiscal year 2022); *see also* 8 U.S.C. § 1151(e) (making 55,000 diversity immigrant visas available annually).[10] In other words, the number of illegal aliens apprehended at the southwest border and subsequently released into the United States is on pace to surpass the total number of immigrant visas Congress has made available for the entire fiscal year.

***

In sum, Congress directed DHS to enforce the immigration laws in specific ways (mandatory detention or contiguous return) against specific classes of individuals (inadmissible applicants for admission). Because Petitioners refused to exercise their contiguous-return authority and terminated MPP, they forced themselves to violate both the detention mandate in section 1225(b) and the rules governing humanitarian parole under section 1182(d)(5), and signally failed in their duty to effectuate, as much as possible, the statutory scheme that governs them. They were properly enjoined from doing so.

---

[10] The number of family and employment-based immigrant visas available each fiscal year varies depending on the number of visas issued in preceding years and are also subject to a nationality cap. *See generally* 8 U.S.C. § 1151(c)-(d).

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

CHRISTOPHER J. HAJEC
Counsel of Record
MATT A. CRAPO
Immigration Reform Law Institute
25 Massachusetts Ave., NW
Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org

Counsel for Amicus Curiae
Immigration Reform Law Institute

April 2022