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

SUPPLEMENTAL BRIEF AMICUS CURIAE OF THE NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

Amicus National Immigrant Justice Center (NIJC) is a nonprofit organization. NIJC collaborates with more than 2500 pro bono attorneys to represent thousands of immigrants and asylum-seekers annually, including asylum-seekers forcibly expelled to Mexico under the "Migrant Protection Protocol" (MPP).[1]

SUMMARY OF THE AMICUS ARGUMENT

The Court solicited briefing on whether it lacks jurisdiction. The answer is yes, because the challenge to the June rule was mooted by the rule's subsequent rescission. Moreover, even if these claims might satisfy Article III standing, rescission of the rule militated prudentially against the sweeping equitable relief afforded below. Vacatur of the lower court decisions would obviate the other supplemental questions.

Vacatur of the lower court decisions is appropriate, although the federal government adopted new rules after losing below. The Court's equitable powers permit consideration of numerous factors, nearly all of which favor vacatur. First, the district court's permanent injunction goes beyond vacatur and precludes the agency from adopting rules that do not coincide with the district court's view of the law. Second, courts apply anti-gamesmanship rules differently to governmental entities. Third, courts consider whether nonvacatur would affect parties other than the agency.

[1] Under Supreme Court Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and their counsel made a monetary contribution to its preparation or submission. The parties consented to this filing.

The procedural history of the case also militates against allowing mootness to insulate the district court's decision from vacatur. This action was instituted strategically in a district far from the border, in a courthouse where only one federal judge sits. The action proceeded at warp speed, and the stay denial created further impetus toward expedited handling. Yet immigration law is notoriously complicated, and this case is complicated even by immigration law standards. This may explain analytical missteps below, particularly the misreading of 8 U.S.C. § 1225. The lower courts understood that statute to mandate detention broadly, without noting that Congress imposed true mandatory detention on only one subset of noncitizens. Textual and structural clues show that any mandate that affected noncitizens "be detained" does not require that they "stay detained." Yet the lower courts' analysis stands or falls on the premise that the statute mandates continued detention. Vacatur of the lower court decisions and injunction would not preclude the plaintiff states from making these arguments, but would permit fuller consideration of these claims and reduce the likelihood of error.

ARGUMENT

I. THE CHALLENGE TO THE JUNE RULE BECAME MOOT ONCE IT WAS RESCINDED.

After the Government rescinded the June 1 termination order, this challenge became moot. Respondent suggests that Petitioner abandoned this issue, Tr. 78-79, 114, but Article III mootness cannot be waived. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

Even where cases may technically remain live, courts sometimes prudentially withhold injunctive relief, including during promulgation of new rules. See *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 342 (1961). Self-imposed limits on federal court powers have particular resonance for challenges involving questions of wide pubic significance. *See Allen v. Wright*, 468 U. S. 737, 750 (1984); *Vander Jagt v. O'Neill*, 699 F. 2d 1166, 1178-1179 (D.C.Cir. 1983) (Bork, J., concurring).

1. The Fifth Circuit found that the October memorandum—which rescinded the earlier termination, reassessed the program, and terminated again—did not have legal effect. App. 20a-33a. The Fifth Circuit reasoned that it could split apart a single agency action into (a) the "decision" and (b) the reasoning underlying the decision. It analogized the "decision" to a district court's judgment, and the agency's reasoning to a memorandum of law. App. 22a-23a.

Amici from the administrative law field have explained the intractable problems with the Fifth Circuit's analytical approach. See Br. of Prof. Benjamin Eidelson as Amicus Curiae at 4-16; Br. of Admin. Law Professors as Amici Curiae at 5-15.

There is a more basic problem with the Fifth Circuit's approach: it functioned as a bait-and-switch. For mootness purposes, the Fifth Circuit purported to treat the "decision" as the agency rule. App. 22a-23a. Then, having disposed of mootness, it proceeded to analyze the entire rule, including reasoning, to decide whether the decision was arbitrary and capricious. App. 103a-113a. This confirms the point made by the administrative law amici: an agency rule cannot consist merely of the agency decision. Br. of Admin. Law

Professors as Amici Curiae at 7-12. Stripping all reasoning from agency decisions would leave all agency rules unreasoned. That cannot be correct.

2. The lower court's approach also results in de facto advisory opinions. When a court reviews the reasoning of a rescinded rule, the court is effectively advising the agency what it could have done (*vel non*); and what it might choose to redo later.[2] *See Wyoming v. US Dept. of Agr*, 414 F. 3d 1207, 1212-13 (10th Cir. 2005) ("to render a decision on the validity of the now nonexistent … Rule would constitute a textbook example of advising what the law would be upon a hypothetical state of facts") (internal quotations omitted*); see also Akiachak Native Community v. US DOI*, 827 F.3d 100, 113 (D.C.Cir. 2016); *National Mining Ass'n v. U.S. Department of Interior*, 251 F.3d 1007, 1011 (D.C. Cir. 2001) ("[t]he old set of rules… cannot be evaluated as if nothing has changed" because "[a] new system is now in place" and "[a]ny opinion regarding the former rules would be merely advisory").

II. VACATUR UNDER *MUNSINGWEAR* AND *BANCORP* IS APPROPRIATE.

When a matter becomes moot during appeal, vacatur of lower court decisions involves an equitable calculus influenced by the reason for the mootness. *United States v. Munsingwear, Inc.*, 340 U. S. 36, 40 (1950); *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25-29 (1994).

The Fifth Circuit found that even if the October rule mooted the case, it would be inequitable to vacate

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[2] Of course, in cases where a rescinded rule was applied to impose a fine or penalty, any remedy afforded the individual would not be advisory.

the injunction. App. 125a. The Fifth Circuit's analysis overlooked multiple relevant considerations.

1. The district court's permanent injunction will have persisting effects that will preclude the executive branch from undertaking independent rulemaking or other agency actions. Other briefs have addressed the flawed decisionmaking underlying that injunction. Br. of Admin. Law Professors as Amici Curiae at 26-30.

Unlike mere vacatur of the rule, the district court's injunction does not permit future rulemaking efforts unless they comport with the district court's views. This type of affirmative injunction fits squarely within the concern that "a judgment, unreviewable because of mootness," will "spawn[] … legal consequences." *Munsingwear*, 340 U.S. at 41.

2. Courts have found that subsequent agency rulemaking can support vacatur even where the agency lost below. Lower courts do not routinely assume that agencies are engaged in gamesmanship when they promulgate new rules. *See Wyoming v. U.S. Dep't of Interior*, 587 F.3d 1245, 1254 (10th Cir. 2009) (agency did not "moot[] the case for any untoward purpose"); *Wyoming v. Zinke*, 871 F.3d 1133, 1145 (10th Cir. 2017) ("it is not apparent that [the agency] took these actions to intentionally evade review."). Even where the government moots a case through unilateral action, vacatur can be appropriate where actions "constitute[] responsible governmental conduct to be commended" rather than gamesmanship. *McClendon v. City of Albuquerque*, 100 F. 3d 863, 868 (10th Cir. 1996). Federal agencies benefit from a presumption of regularity. *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). Ensuring that a decision

is adequately explained and considered all relevant factors is responsible government conduct.

Nor is responsible governmental conduct incompatible with agency decisions that "might have been influenced by political considerations or prompted by an Administration's priorities." *See Department of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019). Agency deference is premised on accountability to the elected head of the executive branch. *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). It *ought* to be influenced by executive priorities.

To leave in place an affirmative injunction governing future rulemaking otherwise would turn APA litigation from a shield into a sword. Flawed rulemaking normally results in vacatur, not permanent limits on executive authority to make rules.

3. Federal courts also consider whether the interests of other parties are affected in matters mooted by new agency rules. The principle is most widely applied where an intervenor seeks vacatur after rulemaking moots a case. *See*, *e.g.*, *Wyoming v. US Dept. Of Agr*, 414 F.3d at 1213 n.6; *Wyoming v. Zinke*, 871 F. 3d at 1145-46.

While no parties sought to intervene in this matter, it is undisputed that numerous parties are affected by MPP. Indeed, other plaintiffs had engaged in years-long litigation against MPP resulting in a litigation win that was vacated only when MPP was putatively terminated. *Mayorkas v. Innovation Law Lab*, 141 S. Ct. 2842 (2021). The Secretary expressly considered hardship to other parties under MPP. App. 352a, 282a (noting "extreme violence and substantial hardships

faced by those returned to Mexico to await their immigration court proceedings.... Litigants described being exposed to violent crime, such as rape and kidnapping, as well as difficulty obtaining needed support and services in Mexico, including adequate food and shelter"). Several amici have detailed the effects of asylum-seekers being returned to Mexico. See Br. for Amici Curiae the Border Project at 25-29; Br. of Amici Curiae 61 Advocacy and Legal Services Organizations at 5-27. MPP also affects the ability of lawyers to provide adequate legal assistance to MPP applicants kept abroad. See Br. for Amici Curiae the Border Project at 14-25 (detailing difficulties).

Against this backdrop, the equitable calculus strongly favors vacatur.

III. THE PROCEDURAL HISTORY, LACK OF PERCOLATION, AND ANALYTICAL MISSTEPS ARE ALSO RELEVANT.

The unusual procedural history of this case should also inform the Court's vacatur analysis.

1. Texas and Missouri filed this litigation (which contains no allegations specific to Amarillo) in the Northern District of Texas, Amarillo Division. Amarillo is more than 300 miles from the U.S.-Mexican border. Distance Between Cities, https://www.distance-cities.com/distance-el-paso-tx-to-amarillo-tx. Only one federal judge sits in Amarillo. *See* https://www.txnd.uscourts.gov/location/amarillo. The complaint sought a nationwide permanent injunction seeking to keep in place an practice adopted by former President Trump. Complaint 39.

The district court declined to transfer the case to a border district, App. 150a-51a, and raced through various procedural hurdles, including expedited discovery

and record disputes. The preliminary injunction hearing became a bench trial, App. 9a-10a, and the court issued its decision less than a month later. The agencies appealed three days later, and sought a stay, which was denied. App. 256a. The case followed a similarly expedited trajectory ever since.

The district court's decision was lengthy, but the timing was not designed to minimize error, triggering analytical missteps described *infra*. Under pressure of the stay denial, and seeking to conform border policies to the priorities of the executive (as contemplated by the constitution), the department employed opted not to seek reconsideration or rehearing and proceeded directly to this Court.

2. The legal issues involved in the case are particularly involved. Courts have long recognized the complexity of the immigration laws. *See Lok v. Immigration & Naturalization Serv.*, 548 F.2d 37, 38 (2d Cir. 1977) (noting "the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete"). This case is complex even by immigration standards, and involves, conservatively, over a dozen distinct legal and factual issues, not all of which have been briefed to this Court.

3. This complexity runs the risk of obscuring points and hiding error. Indeed, the lower courts' analysis is predicated on a misreading of the immigration statutes which is revealed only with careful parsing of the statutory language. The premise undergirding the lower courts' treatment of 8 U.S.C. § 1225(b)(2)(C) is that the statute mandates continued detention of every entrant; but this is wrong.

Congress knows how to create mandatory detention statutes. Section 1225 contains one mandatory detention provision: 8 U.S.C. § 1225(b)(1)(B)(iv). This provision applies to an individual who has not yet passed a "credible fear" interview. That provision does two things: first, it mandates that a noncitizen "shall be detained pending a final determination of credible fear of persecution." Id. Then, it mandates that the noncitizen should continue to be detained, "if found not to have such a fear, until removed." *Id.* The section header—"mandatory detention"—confirms the purpose of that provision. *See Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 529 (1947); 2B Norman J. Singer, Sutherland Statutes and Statutory Construction (6th ed. 2000) § 47:14.

Similarly, as to admitted noncitizens, the statute requires that the agency "shall take into custody any alien who" has been convicted of inter alia certain criminal offenses. 8 U.S.C. § 1226(c)(1). It then precludes release for most covered noncitizens. 8 U.S.C. § 1226(c)(2); *see generally Demore v. Kim*, 538 U.S. 529 (2003).

The statute authorizing detention for arriving noncitizens placed into regular removal proceedings does not share these features. Most significantly, it does not purport to limit or preclude release. 8 U.S.C. § 1225(b)(2)(A). Nor does the section header mention detention. Id. Further, this Court has expressly recognized that individuals covered by § 1225(b)(2)(A) can be released under 8 U.S.C. § 1182(d)(5). *See Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018). The natural import of the language in § 1225(b)(2)(A) is to authorize detention and inspection; not to impose mandatory detention.

Similarly, 8 U.S.C. § 1225(b)(1)(B)(ii) applies to a noncitizen who has passed a credible fear interview. It provides that "the alien shall be detained for further consideration of the application." *Id.* That section does not purport to preclude release of the covered noncitizens. Moreover, the section header, "Referral of certain aliens," does not mention detention. *Id*. The statute authorizes detention but focuses on next steps for the application. That was precisely how this Court described it two terms ago: "[a]pplicants who are found to have a credible fear *may also be detained* pending further consideration of their asylum applications. § 1225(b)(1)(B)(ii)." *Dept. of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1966 (2020) (emphasis added).[3]

It is true that § 1225 uses language that could be read as mandatory, when stating that certain noncitizens "shall be detained." Even if read as a mandate, absent a bar to releasing the noncitizen from detention, that language does not mandate that detention *continue*. This is particularly true given that Congress plainly knew how to mandate that detention continue; the "deliberate omission" of language Congress adopted elsewhere in the same statute, which Congress was "perfectly capable of adopting" here, is significant. *See Fedorenko v. United States*, 449 U.S. 490, 512 (1981).

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[3] Some language in *Jennings v. Rodriguez* might be read to support the lower court's approach. 138 S. Ct. 830, 842 (2018) ("§§ 1225(b)(1) and (b)(2) thus mandate detention … until certain proceedings have concluded."). *Jennings* considered whether § 1225 might impliedly limit the length of detention; its analysis relied on parole authority. 138 S. Ct. at 837. It thus did not imply mandatory detention in the sense used by courts below.

Congress can use words as it sees fit, but absent specific direction, words are given their ordinary meaning. *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975). The term "detain" does not necessarily denote long term detention; it is frequently used to describe brief seizures. *See*, *e.g.*, *Terry v. Ohio*, 392 U.S. 1, 10 (1968); *Whren v. United States*, 517 U.S. 806, 809 (1996) ("temporary detention" of motorists); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). Dictionary definitions call detention "the state of being detained; especially: a period of temporary custody prior to disposition by a court." *See* "Detention." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/detention. To be sure, detention can become prolonged; but a noncitizen detained for 12 hours would "be detained" during that time. The natural meaning of the text does not require detention of any particular length or until some specified point.

Notwithstanding this, the district court interpreted 8 U.S.C. § 1225(b)(2)(A) as imposing mandatory detention akin to § 1225(b)(1)(B)(iv). App. 156a ("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. § 1225(b)(2)(A)."). The Fifth Circuit reasoned similarly. See App. 115a-116a.

The lower courts' novel reading of § 1225(b)(2)(C) depends entirely on this reading. The Fifth Circuit's reasoning was pellucid: the language of § 1225(b)(2)(C) "is, of course, discretionary. But it does not undo the obvious fact that (A) is otherwise mandatory. So (A) sets a default (mandatory detention), and (C) explicitly sets out an allowed alternative (contiguous-territory

return pending removal proceedings)." App. 116a. What the Fifth Circuit viewed as an "obvious fact" is actually untrue. Amongst hundreds of pages of briefing on an expedited schedule, the mistake was understandable; but it is a significant misreading of the statute.

Absent vacatur, a finding of mootness would leave in place a permanent injunction binding the federal government to follow this erroneous view of the law. Vacatur of the lower court decision would permit these important matters to be revisited, unbound by prior injunctions and binding circuit case law.

4. The Plaintiff states would not be harmed by vacatur. They have already obtained the benefit of forcing the federal government to resume MPP for almost a year. Vacatur would not preclude them from litigating this question under the October rule; it would simply deprive them of a windfall win protected from appellate review by mootness. Given the extraordinary remedy they seek and the unprecedented intrusion into foreign affairs and executive decision-making implicated by their lawsuit, further steps to test the logic of their novel claims is a sensible and appropriate disposition.

CONCLUSION

The Court should grant the petition and remand with instructions to vacate the lower courts' opinions and injunctions.

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