No. 21A21

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

STATE OF TEXAS, ET AL.

REPLY IN SUPPORT OF APPLICATION FOR A STAY AND REQUEST FOR AN ADMINISTRATIVE STAY

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Absent a stay from this Court, the district court's nationwide injunction would compel the government to abruptly reinstate a short-lived, discretionary immigration program that has been suspended for seven months and largely dormant for nearly a year and a half. In so doing, the injunction would intrude on the Executive's immigration-enforcement and foreign-affairs authorities by disrupting border operations, diverting scarce resources from other urgent priorities, and intruding into the Nation's relations with Mexico and other foreign partners. Respondents fail to justify that extraordinary result.

Like the court of appeals, respondents largely retreat from the district court's assertion that terminating the Migrant Protection Protocols (MPP) caused the government to violate a purported mandate in 8 U.S.C. 1225 to detain virtually every applicant for admission. With good reason: The district court's holding ignores the express statutory authorities that every presidential

administration since 1996 has relied on to parole or otherwise release certain noncitizens subject to Section 1225. Respondents instead rest primarily on their quibbles with the Secretary's explanation for his decision. But unlike the "succinct" agency decision at issue in Department of Homeland Security (DHS) v. Regents of the University of California, 140 S. Ct. 1891, 1910 (2020), the Secretary's memorandum here assessed the competing considerations and explained why, as a matter of policy, he preferred to devote DHS's resources to other initiatives that he judged more appropriate and effective. Nothing more was required.

Respondents' arguments on the balance of the equities are no more persuasive. They cannot show that they will suffer any meaningful harm from preserving the status quo pending an appeal, which the court of appeals has already expedited. And their efforts to minimize the injunction's severe harm to the government blink reality. Their assertion (Opp. 36) that the government "unilaterally" instituted MPP and could do so again is refuted by, among other things, then-Secretary Nielsen's initial announcement of MPP on December 20, 2018, which catalogued Mexico's commitments to returned migrants -- and preceded MPP's implementation by weeks. See A.R. 151-153; Appl. App. 102a. That the injunction requires the government to reinstitute MPP in "good faith" does not solve the problem. It still compels a profoundly disruptive shift of priorities, resources, and relations with Mexico and other partners. The district court's apparent plan to superintend the good

faith of those diplomatic and policy efforts on pain of contempt is a vice, not a virtue.[1]

This Court should stay the injunction until it can be reviewed by the court of appeals and (if necessary) this Court. And if the Court does not rule before the existing administrative stay expires at 11:59 pm this evening, it should extend that stay pending the resolution of this application.

I. THIS COURT IS LIKELY TO GRANT CERTIORARI AND REVERSE IF THE COURT OF APPEALS AFFIRMS THE DISTRICT COURT'S INJUNCTION

Respondents do not meaningfully dispute that, if the court of appeals affirms the district court's injunction, this Court is likely to grant a writ of certiorari. Cf. Wolf v. Innovation Law Lab, 141 S. Ct. 617 (2020). And respondents fail to show that there is not even a fair prospect that this Court would vacate the district court's injunction. The Secretary's termination decision is neither reviewable nor contrary to law.

A. Respondents lack standing because their asserted injuries (Opp. 10-11) are speculative and self-inflicted. Moreover, respondents' theory reduces to the assertion that, because States

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[1] Contrary to respondents' suggestion (Opp. 3 n.1,), this Administration has never considered reinstating the previous Administration's MPP program. Even taking the anonymously sourced article on which respondents rely on its own terms, the article describes preliminary discussions about whether and under what circumstances the authority in Section 1225(b)(2)(C) might be used at some point in the future as part of a different program that addressed MPP's serious flaws. Such discussions do not remotely undermine the irreparable harms that would flow from the district court's mandate to reinstate MPP in precipitous fashion.

expend resources on their residents, a State may sue whenever the federal government takes any action that can be expected to increase the number of people (noncitizens or not) within its borders. By the same logic, other States could challenge any federal immigration or other policy that could reduce their population, on the theory that residents pay taxes and confer other benefits. This Court has never blessed such a limitless theory of standing.

Respondents also fail to overcome the multiple statutory bars to judicial review of the decision here. Respondents do not dispute (Opp. 13) that MPP invoked a discretionary authority that the Secretary "may" use. 8 U.S.C. 1225(b)(2)(C). Respondents instead cite general Administrative Procedure Act (APA) principles to assert (Opp. 13-14) that the Secretary's use of that authority is nonetheless reviewable for abuse of discretion. But respondents fail even to acknowledge -- much less distinguish -- 8 U.S.C. 1252(a)(2)(B)(ii), which expressly bars review of "any * * * decision or action" specified "to be in [Executive] discretion." And respondents' attempt (Opp. 14-15) to identify a meaningful statutory standard to judge the Secretary's decision simply repeats the district court's conclusion that the rescission ran afoul of Section 1225's detention mandate. That conclusion was wrong for the reasons explained below. See pp. 5-7, infra.

In addition, 8 U.S.C. 1252(f)(1) barred the district court's nationwide relief purporting to enforce Section 1225. Respondents contend (Opp. 15-17) that Section 1252(f)(1) is limited to

injunctions restraining, not enforcing, the covered provisions. But as Justices Thomas and Gorsuch have explained, that reasoning is "circular and unpersuasive." Nielsen v. Preap, 139 S. Ct. 954, 975 (2019) (Thomas, J., concurring in part and concurring in the judgment). Section 1252(f)(1) broadly prohibits district courts from "enjoin[ing] or restrain[ing] the operation of" the specified provisions. 8 U.S.C. 1252(f)(1) (emphasis added). It reflects Congress's judgment that suits by individuals in removal proceedings -- not APA suits by States -- are the appropriate vehicles for challenging immigration policy.

B. Even if respondents' claims were reviewable, the government would be likely to prevail on the merits.

1. The court of appeals declined to endorse the district court's interpretation of Section 1225. See Appl. App. 27a-29a. And respondents largely back away from (Opp. 24-27) the district court's extraordinary conclusion that the government must reinstate MPP because, otherwise, it cannot fulfill Section 1225's purported mandate to detain nearly all inadmissible applicants for admission. That conclusion was deeply flawed.

Respondents acknowledge that the contiguous-territory-return authority in Section 1225(b)(2)(C) is an "optional" tool that the Secretary "'may'" use at his "choice." Opp. 26 (quoting 8 U.S.C. 1225(b)(2)(C)). Respondents do not identify anything in the text or context of the statute to support their assertion that the return authority transforms into a mandatory duty whenever the

volume of noncitizens exceeds DHS's detention capacity -- as it has throughout the statute's history. Appl. App. 97a-98a.

Respondents also do not deny (Opp. 27) that the district court's reading of Section 1225 would mean that every presidential administration over the last quarter century has been in continuous violation of the statute. The Executive Branch has never been provided the resources to detain every noncitizen subject to Section 1225, and it has never tried to do so. See Appl. App. 98a-101a (Shahoulian Decl.). And contrary to respondents' vague suggestion (Opp. 25-27), that longstanding practice is firmly grounded in the statute. As then-Attorney General Barr explained, for example, Section 1225 "does not mean" that every noncitizen "must be detained from the moment of apprehension until the completion of removal proceedings," because 8 U.S.C. 1182(d)(5) "grants the Secretary discretion to parole." In re M-S-, 27 I. & N. Dec. 509, 516-517 (A.G. 2019). DHS has long interpreted 8 U.S.C. 1182(d)(5) to authorize parole of noncitizens who "present neither a security risk or a risk of absconding" and "whose continued detention is not in the public interest," 8 C.F.R. 212.5(b)(5) -- including in some cases because of limits on detention space. See generally Damus v. Nielsen, 313 F. Supp. 3d 317, 324 (D.D.C. 2018) (describing DHS's "Parole Directive," effective since 2009). In some circumstances, DHS also has authority to release noncitizens on bond. 8 U.S.C. 1226(a)(2); see 62 Fed. Reg. 10,312, 10,312-10,313, 10,323 (Mar. 6, 1997) (interim final

rule providing that certain noncitizens "have available to them bond re-determination hearings before an immigration judge").

Rather than endorse the district court's unprecedented interpretation of Section 1225 -- which respondents pressed below -- respondents now embrace (Opp. 27) the court of appeals' more modest holding that the government cannot "simply release every alien described in § 1225 en masse into the United States." Appl. App. 29a. But the government has never argued otherwise, and the record does not support respondents' and the court of appeals' supposition about DHS's parole practices. See id. at 99a (senior DHS official attesting that Immigrations and Customs Enforcement detained 25,671 noncitizens as of August 16, 2021, which is approximately 75% of its funded capacity and the maximum permitted under the CDC's current COVID-19 guidance); see also 8 C.F.R. 212.5(b) (requiring "case-by-case" determinations). Respondents' contrary assertion rests principally on a single law professor's opinion quoted in a newspaper article. Opp. 27 (citing App. 77a & n.11). And that professor was characterizing parole practices while MPP was in effect, not today. A.R. 184.

Even more to the point, the court of appeals' modest holding does not even arguably support the injunction. The district court did not merely require the government to maintain MPP until it can avoid releasing every noncitizen subject to Section 1225 en masse -- a condition that is already satisfied. Instead, it froze MPP in place until the government can "detain all aliens subject to

mandatory detention under Section [1225] without releasing any aliens because of a lack of detention resources" -- a condition that will likely never be satisfied. Appl. App. 86a. The court of appeals made no effort to explain its decision to leave the injunction in place while rejecting its essential premise.

2. Respondents also have not justified the district court's conclusion that the Secretary's explanation for terminating MPP fails the deferential APA standard. Respondents seek to undermine the Secretary's reasoning largely by pretending it does not exist.

Respondents principally contend (Opp. 18-19) that the Secretary failed to consider MPP's deterrence of non-meritorious asylum claims. But they ignore the Secretary's decision to address that problem with other tools, including long-term "anticipated regulatory and policy changes" and a "Dedicated Docket" program intended to expedite removal proceedings while "promot[ing] compliance and increas[ing] appearances." Appl. App. 92a-94a. Respondents may disagree with the Secretary about how to weigh the comparative advantages of MPP and these other initiatives. But their elevation of their preferred approach over his is an impermissible attempt to "substitute [their] judgment for that of the agency." Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

The Secretary further explained that MPP had not achieved its aims with sufficient efficacy to justify the substantial resources that it diverted from other programs. He noted that, while MPP

was in operation, "border encounters increased during certain periods and decreased during others," Appl. App. 91a; see A.R. 664, 669 (showing increased border encounters in early 2019), and further that asylum "backlogs increased," Appl. App. 92a. In light of those considerations, the Secretary determined that the Administration's "reforms will improve border management and reduce migration surges more effectively and more sustainably than MPP." Id. at 93a. Respondents have no answer to any of those points.

Instead, respondents assert (Opp. 20-21) that the Secretary erred in treating the high rate of in absentia removal orders for MPP enrollees as cause for concern that MPP may have deterred some potentially meritorious asylum claims. Even if respondents were correct, such an isolated misstep would not render the Secretary's entire memorandum arbitrary and capricious. And in any event, the Secretary did not cite the in absentia rate in isolation, but rather examined it in the context of the "conditions faced by some MPP enrollees in Mexico, including the lack of stable access to housing, income, and safety." Appl. App. 92a. The Secretary was fully justified in reaching the modest conclusion that this evidence raised doubt about "whether the process provided enrollees an adequate opportunity to appear for proceedings to present their claims for relief." Ibid. Respondents do not explain how the Secretary could have determined the precise fraction of the in absentia rate attributable to the abandonment of non-meritorious claims. See Federal Communc'ns Comm'n v. Fox Television Stations,

Inc., 556 U.S. 502, 519 (2009) (declining "to insist upon obtaining the unobtainable"). "It is not infrequent that the available data do not settle a regulatory issue," and in that circumstance, an agency must "exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion," State Farm, 463 U.S. at 52. That is just what the Secretary did.

Respondents next contend (Opp. 21-23) that the Secretary failed to consider the States' reliance interests. But aside from invoking (Opp. 22-23) a purported contract with no legal effect, respondents do not even attempt to show that they took actions in reliance on MPP, such as by making budgeting decisions based on the number of noncitizens expected to be returned under MPP. Moreover, the Secretary expressly considered the effect of rescission "on border management and border communities, among other potential stakeholders." Appl. App. 93a. He was not required to consider every possible incidental, attenuated effect or "thought conceivable by the mind of man." Regents, 140 S. Ct. at 1915 (citation omitted).

Finally, respondents contend (Opp. 23-24) that the Secretary failed to consider a more limited version of MPP. But the Secretary did consider that path and explained why he rejected it. Appl. App. 93a. The APA did not require the Secretary to enumerate each alternative before rejecting it. See Regents, 140 S. Ct. at 1914-1915. Respondents rely on Regents, but there the Court addressed a multipart policy and found that the agency's stated

reasoning supported rescinding only one part. See id. at 1913 ("[T]he rescission memorandum contains no discussion of forbearance or the option of retaining forbearance without benefits."). Here, respondents do not identify which parts of MPP should have been retained in light of the Secretary's stated determinations.

3. Even if one or more of respondents' criticisms of the memorandum were valid, the district court abused its discretion by vacating the Secretary's decision and ordering MPP's reinstatement, especially given the disruption to foreign policy. See Appl. 33-34. Respondents do not attempt to defend the district court's remedy or show that the Secretary would be unable to cure any APA flaws on remand. In fact, they do not respond to this argument at all. Their inability to do so further confirms that the government is likely to succeed on the merits.

II. THE BALANCE OF HARMS OVERWHELMINGLY FAVORS A STAY

The equities overwhelmingly support a stay. Appl. 35-40. The district court's injunction effectively requires the Executive Branch to engage in diplomatic negotiations with Mexico to persuade it to accept migrants returned under MPP and accord them the protections that were integral to MPP's operation. See Appl. 36. That alone would be a serious intrusion "on the discretion of the Legislative and Executive Branches in managing foreign affairs." Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013) (citation omitted). But the harms to the government would not be limited to foreign policy. The injunction would disrupt border

operations and ongoing efforts to manage migration and combat criminal networks, and would require costly investments of limited DHS resources to rebuild a massive infrastructure that was disassembled more than a year ago, at the expense of other initiatives. See Appl. 37-38. It would make no sense to force DHS to bear those costs during the pendency of an expedited appeal, only for the whole effort to be wasted if the injunction is ultimately vacated.

Respondents unpersuasively attempt to discount the harms the injunction will inflict on the government. They parrot (Opp. 32, 36) the lower courts' assertion that DHS can simply restart MPP unilaterally, but they offer no meaningful answer to the government's extended explanation (supported by declarations from high-ranking officials and the text of the MPP guidance documents themselves) why that assertion is false. See Appl. 7-8, 36; A.R. 152-153. They also claim (Opp. 30) that Mexico was "a willing participant in MPP." Even if true, that assertion is beside the point. Because MPP requires Mexican cooperation, the district court's injunction necessarily forces the Executive Branch to secure Mexico's agreement to its reinstatement under the different conditions that prevail today. Being compelled to engage in diplomatic negotiations in the shadow of an injunction requiring the adoption of a specific policy is a serious intrusion on the Executive Branch's authority over the Nation's foreign policy.

Respondents also point (Opp. 31, 33) to the court of appeals' clarification that "[t]he district court did not order the

Government to restore MPP's infrastructure overnight," but rather "ordered that, once the injunction takes effect * * * , DHS must 'enforce and implement MPP in good faith.'" Appl. App. 28a (quoting id. at 86a). But the court of appeals did not and could not dispute that the injunction compels an abrupt shift in border policy, in the allocation of scarce resources, and in the Nation's diplomacy with Mexico and other regional partners. And although the court of appeals' interpretation of the good-faith standard offers some flexibility, it also creates new problems of vagueness and subjectivity. Among other things, it effectively authorizes judicial supervision of every aspect of MPP's reinstatement, including the government's negotiations with Mexico and any modifications to the program that may have to be made in light of the COVID-19 pandemic and the flaws identified by both the Secretary and the previous Administration. See, e.g., A.R. 192-201. The district court should not be permitted to determine -- under threat of contempt -- what terms the Executive must offer to Mexico in order to satisfy a "good faith" obligation to reimplement MPP after a significant hiatus. And the district court's reporting requirements, see Appl. App. 86a-87a, appear designed to facilitate micromanagement of DHS's detention practices nationwide.[2]

[2] Respondents also reiterate their assertion (Opp. 34) that any harm to the government is "self-inflicted." But they do not rebut the government's showing that this proposition would have the absurd consequence of requiring the government to treat all lawsuits as de facto injunctions. See Appl. 38-39.

Respondents, by contrast, do not come close to establishing irreparable harm. As discussed above, see pp. 3-4, supra, they assert nothing more than the incidental effects that would be occasioned by any government policy affecting the number of people present in a State, and they have not attempted to show a net harm from the alleged population increase.

The specific circumstances of this case further diminish respondents' claimed harms. The Fifth Circuit expedited the government's appeal "for consideration before the next available oral argument panel." Appl. App. 34a. Forcing respondents to bear any marginal costs of having some additional noncitizens present within their borders while an expedited appeal is pending pales in comparison to forcing the government to undertake diplomatic negotiations, restructure its border operations, reorganize immigration-court dockets, and reassemble the infrastructure for MPP.

Moreover, because the reimplementation of MPP necessarily depends on Mexico's cooperation, respondents cannot show that leaving the injunction in place would alleviate their asserted harms. In the related context of the CDC's Title 42 order -- under which far more noncitizens have been returned to Mexico since April 2020 than under MPP -- Mexico "has placed certain nationality- and demographic-specific restrictions on the individuals it will accept for return." 86 Fed. Reg. 42,828, 42,836 (Aug. 5, 2021). To the extent Mexico imposed such conditions (or others) on the

court-ordered version of MPP, it would necessarily reduce the purported benefits to respondents.

The court of appeals gamely acknowledged that "if the Government's good-faith efforts to implement MPP are thwarted by Mexico, it nonetheless will be in compliance with the district court's order." Appl. App. 31a. But that just underscores how far the injunction strays from the proper judicial role. Notwithstanding the "danger of unwarranted judicial interference in the conduct of foreign policy," Kiobel, 569 U.S. at 116, the district court would -- at the behest of States who may concededly gain nothing -- supervise the good faith of the diplomacy needed to reestablish a version of MPP that would function effectively in August 2021 and thereafter. This Court should not allow that unprecedented remedy to stand before appellate review.

CONCLUSION

The application for a stay pending proceedings in the Fifth Circuit and (if necessary) further proceedings in this Court should be granted. If the Court does not rule before the existing administrative stay expires at 11:59 pm this evening, it should extend that stay pending the resolution of this application.

Respectfully submitted.

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AUGUST 2021