No. 21-954

In the Supreme Court of the United States

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

v.

STATE OF TEXAS, ET AL.,
Respondents.

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

BRIEF OF ILLINOIS, CALIFORNIA, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, HAWAII, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE

The States of Illinois, California, Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Vermont, and the District of Columbia (collectively, the "amici States") submit this brief in support of petitioners.

The amici States are home to millions of noncitizens.[1] These state residents attend school, enlist in the military, and care for the sick and elderly. They add billions to federal, state, and local economies by paying taxes and spending their income. And they fill important jobs that United States-born workers cannot or do not want to take. The amici States thus have a significant interest in ensuring that these individuals can safely migrate to and live within their communities.

The court of appeals' decision threatens this interest in multiple respects. The court ordered the executive branch to continue the Migrant Protection Protocols ("MPP"), which the court itself found decreases migration to the States, including because fewer individuals are released on parole pending their removal hearings. Individuals detained in Mexico also face significant hurdles in pursuing—and thus

[1] This brief uses "noncitizen" in place of the statutory term "alien," which refers to "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). The brief also uses "immigrant" to refer more broadly to all foreign-born individuals, including those who have been naturalized.

prevailing in—their applications for admission to the United States, including limited access to counsel and the possibility that they will be victims of violence in that country.[2]

The amici States are further interested in ensuring that the executive branch maintains its historical authority to exercise enforcement discretion in immigration law, including with respect to its parole power. The States and their residents rely on the exercise of that discretion in a range of contexts, as many individuals who receive parole live and work in the amici States. The court of appeals' decision, however, severely limits that discretion in several ways, including in its apparent—and wholly unprecedented—view that the executive branch cannot grant parole on a programmatic basis to a large number of people. The amici States thus urge this Court to reverse the court of appeals' decision requiring the continuation of MPP.

SUMMARY OF ARGUMENT

For decades, the executive branch has exercised its enforcement discretion not to detain—and instead to "parole" into the United States—many of the noncitizens who present themselves at the U.S.-Mexico border. It has likewise granted parole to nonciti-

[2] *The "Migrant Protection Protocols"* at 4-5, Am. Immigr. Council (Jan. 7, 2022), https://bit.ly/3vJeZ86. All cited websites were last visited on March 18, 2022.

zens in a wide range of other contexts, from those escaping persecution, to those fleeing natural disaster, to the family members of U.S. servicemen and women.

The court of appeals' decision in this case imperils this longstanding exercise of enforcement discretion, and in all these contexts. That court held that the executive branch is required to continue MPP because it must detain all noncitizens seeking admission to the United States who are not clearly admissible or turn them back, and it lacks the resources to detain them. This holding rested in large part on the court's conclusion that the executive branch could not instead parole a large number of noncitizens into the country on a programmatic basis, allowing them to remain in the United States pending their removal proceedings. But that conclusion runs counter to decades of practice across presidential administrations of both parties and cannot be squared with the numerous parole programs established to provide protection in the United States to those with compelling humanitarian or other significant needs. It cannot be correct.

Moreover, the decision below, if upheld, would acutely harm the amici States and those members of their communities who have relied on parole programs of this sort. The amici States welcome immigrants into their communities because immigrants contribute to their economies and their civic life. The decision below forestalls the migration on which the amici States rely. And, if the court of appeals' statutory holding were upheld, the consequences would be significant for members of the amici States' communities, many of whom arrived in the United States via

some form of immigration parole. The decision below should be reversed.

ARGUMENT

The court of appeals' decision rests on a deeply flawed understanding of the executive branch's enforcement discretion in the area of immigration law, particularly its authority to "parole" noncitizens into the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* ("INA"). The court's reasoning runs contrary to decades of administrative practice, and if it were accepted, it would have significant consequences for federal immigration law and those whose lives such law affects, including many of amici States' residents.

I. The Decision Below Rests On A Deeply Flawed Understanding Of The Executive Branch's Parole Power.

The court of appeals held that the INA requires the executive branch to continue MPP (with very limited exceptions) until it has the capacity to detain all arriving noncitizens who are not clearly admissible. Pet. App. 115a-117a, 119a-123a. That conclusion is critically mistaken. As the government explains, 8 U.S.C. § 1225(b)(2)(C)'s permissive character—particularly in light of its legislative history and the implications of requiring its use—demonstrates that the INA does not compel the executive branch to return noncitizens to contiguous territories whenever it lacks detention capacity. But even setting aside § 1225(b)(2)(C), the INA's parole provision, 8 U.S.C.

§ 1182(d)(5)(A), reveals the errors in the court's holding. Section 1182(d)(5)(A) provides the executive branch with broad authority to release noncitizens into the United States. The court of appeals badly misread that provision—and upended decades of settled administrative practice—in reaching the opposite conclusion.[3] And the court's decision could carry serious repercussions in many contexts beyond this case, because the court's reasoning endangers the many parole programs that the executive branch has established under § 1182(d)(5)(A) and thereby threatens the welfare of the individuals, communities, and States that depend on these programs.

A. Congress has granted the executive branch broad authority to parole noncitizens into the United States on a case-by-case basis.

The INA has since its enactment authorized the executive branch to grant "parole"—that is, "official permission to enter and remain temporarily in the United States"[4]—to noncitizens. See 8 U.S.C. § 1182(d)(5)(A). Specifically, the statute authorizes the Secretary of Homeland Security to "in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-

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[3] The amici States also agree with the government that the court of appeals further erred in holding in this case that the Secretary of Homeland Security's October 2021 decision terminating MPP had no legal effect.

[4] *Immigration Parole* at 2, Cong. Rsch. Serv. (Oct. 15, 2020), https://bit.ly/35dE6VQ. Parole does not constitute formal admission to the United States. 8 U.S.C. § 1182(d)(5)(A).

case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." *Ibid.*[5]

The Secretary and his delegees within the executive branch have wide discretion when exercising this authority. As this Court has explained, "[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), and the parole authority is a key component of that system. Indeed, Congress expressly committed the decision whether to grant parole to the executive branch's "discretion." 8 U.S.C. § 1182(d)(5)(A). Congress, moreover, set out broad standards rather than specific rules to govern parole eligibility, authorizing parole based on either "urgent humanitarian reasons" or "significant public benefit" grounds. *Ibid.*; see *Babbitt v. Sweet Home*

[5] Although the INA has authorized parole since its enactment in 1952, the "case-by-case" requirement was added to § 1182(d)(5)(A) in 1996. Pub. L. No. 104-208, 110 Stat. 3009-689. Additionally, § 1182(d)(5)(A) refers to the Attorney General, but Congress later transferred responsibility for the detention of noncitizens to the Secretary. 6 U.S.C. § 251(2). The Secretary, in turn, has delegated his parole authority to U.S. Citizenship and Immigration Services ("USCIS"), U.S. Immigration and Customs Enforcement ("ICE"), and U.S. Customs and Border Protection ("CBP"). Dep't of Homeland Sec., *Memorandum of Agreement Between USCIS, ICE, and CBP for the Purpose of Coordinating the Concurrent Exercise by USCIS, ICE, and CBP, of the Secretary's Parole Authority Under INA § 212(d)(5)(A) with Respect to Certain Aliens Located Outside of the United States* at 2 (Sept. 29, 2008), https://bit.ly/3BYtVQQ.

Ch. of Cmtys. for a Great Or., 515 U.S. 687, 705-708 (1995).

When exercising this discretion in making parole decisions, the executive branch has for decades balanced multiple factors, including "immediate human concerns," "policy choices that bear on this Nation's international relations," *Arizona*, 567 U.S. at 396, and resource constraints.[6] It has also promulgated regulations that flesh out the circumstances that would constitute an "urgent humanitarian" reason or would confer a "significant public benefit." 8 C.F.R. § 212.5(b) (internal quotations omitted). These regulations set out categories of arriving noncitizens who may be granted parole if they do not present a security or flight risk, including but not limited to noncitizens who have serious medical conditions and minors who can be released to the care of a family member. *Ibid.* Consistent with the statutory directive that parole be granted on a "case-by-case basis," 8 U.S.C. § 1182(d)(5)(A), the regulations also provide that a noncitizen falling within these categories will be granted parole only if it is "justified" in their case,

[6] See *Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, to Leon Rodriguez, USCIS Director et al.* at 1 (Nov. 20, 2014), https://bit.ly/3hGOiZA; *Memorandum from Marcy M. Forman and Victor X. Cerda, ICE, to All Special Agents in Charge* at 2 (Jan. 11, 2005), https://bit.ly/3i6KYqV. Even the administration that established MPP considered "detention capacity" when making parole decisions. *Memorandum from Matthew T. Albence, ICE Executive Associate Director, to All Office of Enforcement and Removal Operations Employees* at 3 (Feb. 21, 2017), https://bit.ly/3vTulXB.

8 C.F.R. § 212.5(b), and further provide that other arriving noncitizens may be granted parole only if immigration officials deem it appropriate "after review of the individual case," *id.* § 212.5(c).

Beyond these generally applicable factors and regulations, the executive branch has also established different categories of parole through policies and administrative practice.[7] These categories span a range of circumstances, and ensure that arriving noncitizens have a full opportunity to show that they should receive parole.[8] For instance, under appropriate circumstances, an individual seeking to enter the United States to care for a sick relative or obtain life-saving medical treatment may be granted "humanitarian parole," and an individual whose participation in legal proceedings (including as a witness) is needed by the States or the federal government may receive "significant public benefit" parole.[9]

The executive branch applies different procedures to consider parole applications in different contexts, but all require "case-by-case" adjudication, as the INA demands. 8 U.S.C. § 1182(d)(5)(A). For instance, U.S. Citizenship and Immigration Services ("USCIS") has promulgated detailed guidance informing individuals outside of the United States seeking parole for specific

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[7] *Immigration Parole*, *supra* note 4, at 5-6.

[8] See *Memorandum of Agreement Between USCIS, ICE, and CBP*, *supra* note 5, at 2.

[9] *The Use of Parole Under Immigration Law* at 2, Am. Immigr. Council (Jan. 24, 2018), https://bit.ly/3htttke.

reasons (such as to provide care for a seriously ill family member) what information to submit in support of their applications.[10] In a different context, U.S. Immigration and Customs Enforcement ("ICE") has for over a decade maintained a policy for arriving asylum seekers, under which a credible fear of persecution or torture weighs heavily in favor of granting parole but each request for "parole should be considered and analyzed on its own merits and based on the facts of the individual alien's case."[11]

Each year, applying these procedures, the executive branch considers parole applications in large numbers. Driven by the humanitarian and other public interests presented by the parole applicants, many of the applications are granted. During the first three years of President George W. Bush's administration, for instance, a total of 783,525 individuals received parole.[12] While more recent aggregate data is not available,[13] the data for individual categories of parole suggests that large numbers of parole requests

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[10] *Guidance on Evidence for Certain Types of Humanitarian or Significant Public Benefit Parole Requests*, USCIS, https://bit.ly/3CPUVlP (last updated Dec. 8, 2021).

[11] *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture* at 3, ICE (Dec. 8, 2009), https://bit.ly/3q3JK43.

[12] *2003 Yearbook of Immigration Statistics* at 81, Dep't of Homeland Sec., Off. of Immigr. Stats. (Sept. 2004), https://bit.ly/3Iy1SKi.

[13] The *2003 Yearbook* is the last publicly available source to contain comprehensive data on annual parole grants. *Immigration Parole*, *supra* note 4, at 4-5.

are still granted today.[14] And, for the reasons explained, this use of "discretion" to grant parole on a "case-by-case basis," 8 U.S.C. § 1182(d)(5)(A), albeit to many individual applicants, not only reflects longstanding practice over multiple administrations but also is consistent with Congress's grant of statutory authority to the executive branch under the INA.

B. The executive branch has exercised its parole authority for decades in a wide range of contexts, including to establish large-scale programs.

Pursuant to its broad authority under § 1182(d)(5)(A) to grant parole to arriving noncitizens, the executive branch has for decades established administrative structures to guide the exercise of its parole power in particular contexts—i.e., large-scale parole "programs." These programs produce social and economic benefits for many recipients, as well as their loved ones, the States in which they live and work, and the United States at large.

To begin, the executive branch has established several programs aimed at family reunification,

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[14] For instance, in 2015, the executive branch granted 300,803 requests for advance parole, which is a specific type of parole that allows noncitizens to leave and re-enter the United States. *USCIS Advance Parole Documents*, *Fiscal Year 2016 Report to Congress* at 6, Dep't of Homeland Sec. (Jan. 6, 2017), https://bit.ly/3vzuYp8; see *Immigration Parole*, *supra* note 4, at 5; *infra* pp. 15-16.

which is "an underlying principle" of our country's immigration system.[15] Often, individuals must wait years for family-based visas to join their relatives in the United States.[16] In the interim, individuals may resort to dangerous migration attempts—such as taking a raft from Cuba to the United States—in hopes of reuniting with their families.[17] In response to these concerns, available parole programs provide a "safe, legal, and orderly" path to "expedite family reunification" while individuals await approval of their visas.[18]

Take, for instance, the Haitian Family Reunification Parole program, which was established in 2014 to reunite families following a catastrophic earthquake in Haiti.[19] Eligible U.S. citizens and lawful permanent residents receive invitations to apply for parole for relatives living in Haiti.[20] But an invitation does not guarantee parole. Instead, USCIS exercises its "discretion[]" to grant parole on a "case-by-case"

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[15] *Immigration Parole*, *supra* note 4, at 9.

[16] *Id.* at 9-10.

[17] *Id.* at 10; *Cuban Family Reunification Parole Program*, 72 Fed. Reg. 65,588-01, 65,588 (Nov. 21, 2007); *Secretary Mayorkas Overviews U.S. Maritime Migrant Interdiction Operations*, Dep't of Homeland Sec. (July 13, 2021), https://bit.ly/3IBZZwd.

[18] *Implementation of Haitian Family Reunification Parole Program*, 79 Fed. Reg. 75,581-01, 75,581 (Dec. 18, 2014); see *Cuban Family Reunification Parole Program*, 72 Fed. Reg. at 65,588; *Filipino World War II Veterans Parole Policy*, 81 Fed. Reg. 28,097-02, 28,098 (May 9, 2016).

[19] *Implementation of Haitian Family Reunification Parole Program*, 79 Fed. Reg. at 75,582.

[20] *Ibid.*

basis, after consideration of an application and documentation.[21] This program has, as intended, been used to grant parole to large numbers of noncitizens: under Presidents Obama and Trump, it was used to grant parole to more than 8,300 individuals.[22] Similar initiatives include the Cuban Family Reunification Parole program and Filipino World War II Veterans Parole program.[23]

These are just a few of the population-specific parole programs that have been or are being used to grant entry to noncitizens. The executive branch has also used its parole power to allow foreign nationals fleeing persecution or violence to enter the country. The practice dates back to 1956, when President Eisenhower allowed the parole of 15,000 Hungarian refugees fleeing their country following the Soviet invasion to quell the Hungarian Revolution.[24] More recently, the Central American Minors Refugee and Parole program, which was started in 2014, has been employed to allow children living in dangerous conditions in El Salvador, Guatemala, and Honduras, as well as certain family members of those children, to

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[21] *Ibid.*

[22] *Form I-131, Travel Document Applications for the Haitian Family Reunification Parole (HFRP) Program: Applications Accepted, Denied, Approved, and Pending as of December 31, 2019*, USCIS (Jan. 2020), https://bit.ly/3K88Tls.

[23] *Immigration Parole*, *supra* note 4, at 10-11. Processing for the Cuban Family Reunification Program has been suspended in Havana, Cuba due to security reasons, but the program remains in effect. *The Cuban Family Reunification Parole Program*, USCIS, https://bit.ly/3vv8Hc8 (last updated Oct. 22, 2020).

[24] *Immigration Parole*, *supra* note 4, at 2 n.6.

receive parole if they are ineligible for refugee status.[25] A similar program could be established to allow individuals fleeing the violence and destruction caused by the Russian invasion in Ukraine to enter the United States.[26]

The executive branch has also implemented population-specific parole programs to satisfy its foreign policy objectives. For instance, the Special Program for Cuban Migration, a lottery parole program, was used from 1994 to 1998 to enable the United States to satisfy its commitment to allow the migration of at least 20,000 Cubans annually.[27] As another example, one aim of the Haitian Family Reunification Parole program is to further the United States' "goals for Haiti's long-term reconstruction and development" following the 2010 earthquake.[28] After receiving pa-

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[25] *Central American Minors (CAM) Refugee and Parole Program*, USCIS, https://www.uscis.gov/CAM (last updated Sept. 14, 2021); Mark Greenberg et al., *Relaunching the Central American Minors Program: Opportunities to Enhance Child Safety and Family Reunification* at 1, Migration Pol'y Inst. (Dec. 2021), https://bit.ly/3tcB6SL. This program was terminated under President Trump but has been restarted under President Biden. *Restarting the Central American Minors Program*, U.S. Dep't of State, Off. of the Spokesperson (Mar. 10, 2021), https://bit.ly/3hypdzO.

[26] Alberto Gonzales & Patrick Glen, *The Attorney General's Immigration Powers Can Aid Fleeing Ukrainians*, The Hill (Mar. 11, 2022), https://bit.ly/3qq47IX.

[27] *Immigration Parole*, *supra* note 4, at 11-12.

[28] *Implementation of Haitian Family Reunification Parole Program*, 79 Fed. Reg. at 75,582.

role, program beneficiaries can apply for authorization to work in the United States and remit their earnings to Haiti to support economic revitalization of that country.[29]

Members of certain professions have likewise been permitted to enter the country via parole. President George W. Bush established the Cuban Medical Professional program, which was in place through 2017, to allow the parole of Cuban medical professionals who were forced by their government to work in other countries for little pay.[30] More recently, in 2017, the International Entrepreneur Parole program was established to allow the parole of certain foreign entrepreneurs and their families.[31] This program provides valuable economic benefits to the United States by permitting the migration of individuals who

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[29] *Ibid.* The Haitian economy relies significantly on remittances from Haitians living abroad; in 2019, global remittances amounted to $3.3 billion, or 37 percent of the country's gross domestic product. Kira Olsen-Medina & Jeanne Batalova, *Haitian Immigrants in the United States*, Migration Pol'y Inst. (Aug. 12, 2020), https://bit.ly/34sTdtV.

[30] *Cuban Medical Professional Parole (CMPP) Program*, USCIS, https://bit.ly/3K6opOJ (last updated Jan. 19, 2017); Press Release, Sen. Bob Menendez, *Menendez Leads Congressional Call to Reinstate Cuban Medical Professional Parole Program* (Dec. 4, 2017), https://bit.ly/3IyNKAH.

[31] *International Entrepreneur Parole*, USCIS, https://bit.ly/3K8Sldm (last updated Sept. 15, 2021).

will grow new businesses and create jobs for U.S. workers.[32]

Finally, certain parole programs established over the last decade allow individuals to either remain in, or return to, the United States in order to alleviate their own or others' hardship. For instance, the parole-in-place program permits individuals, particularly the family members of active-duty and former U.S. Armed Forces members, who have not been lawfully admitted to the United States to remain in the country.[33] This program honors the military service of veterans by protecting their family members from removal, and enables active military members to carry out their duties without worrying about their loved ones' immigration status.[34] Meanwhile, advance parole authorizes noncitizens living in the United States who lack legal permanent resident status to travel abroad and then seek parole upon their return.[35] Advance parole does not guarantee parole

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[32] *Immigration Parole*, *supra* note 4, at 7. The effective date of this program was delayed by the Trump Administration and legal challenges, but the program has since been resumed. *Removal of International Entrepreneur Parole Program*, 86 Fed. Reg. 25,809-01, 25,809 (May 11, 2021) (withdrawing proposed rule that would revoke regulations implementing program).

[33] *Immigration Parole*, *supra* note 4, at 6.

[34] *Fact Sheet: Military Parole in Place* at 1, Nat'l Immigr. Forum (Oct. 7, 2021), https://bit.ly/3HOkBQZ.

[35] *Immigration Parole*, *supra* note 4, at 5.

upon return, but it allows a noncitizen who would otherwise not be allowed to leave the United States to lawfully exit and seek re-entry.[36]

The executive branch has thus for decades used its parole authority under § 1182(d)(5)(A) to grant parole on a programmatic basis to noncitizens in a variety of circumstances. As noted, these grants of parole confer a wide range of benefits on noncitizens and their communities—from access to safe living conditions to family reunification—and they enable the executive branch to accomplish a wide range of policy objectives, including international development and the recognition of military veterans' service to the United States.

Moreover, these programs have yielded parole grants in large numbers, consistent with the humanitarian and other interests they recognize. For instance, between 2012 to 2015, more than one million individuals obtained advance parole.[37] Likewise, thousands of individuals have benefited from the population-specific programs, including nearly 5,000 Central American children who were enduring life-threatening conditions;[38] more than 8,300 Haitians

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[36] *Ibid.*; *Advance Parole*, CBP, https://bit.ly/3szubm4 (last updated July 22, 2019).

[37] *USCIS Advance Parole Documents*, *supra* note 15, at 6.

[38] *Restarting the Central American Minors Program*, *supra* note 26.

whose lives were disrupted by the deadly earthquake;[39] and more than 9,600 Cuban medical professionals who were, prior to coming to the United States, forced to work in inhumane conditions for minimal compensation.[40] Thus, not only has the executive branch exercised its broad authority to grant parole, including by creating programs for doing so, for decades, but the exercise of this authority also has proven invaluable to hundreds of thousands of individuals.

C. The court of appeals erred in adopting an excessively narrow reading of the executive branch's parole power.

The decision below rests on a narrow view of the executive branch's parole power that cannot be squared with this consistent practice over many decades and multiple administrations, and that threatens to undermine the many parole programs established pursuant to this power.

The court of appeals reasoned that § 1182(d)(5)(A) does not allow the executive branch to grant parole on a programmatic basis. Pet. App. 120a-121a. In that court's words, § 1182(d)(5)(A) cannot be used "to parole aliens *en masse*," because doing so would circumvent the parole power's "'case-by-case' requirement."

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[39] *Travel Document Applications for the Haitian Family Reunification Parole (HFRP) Program*, *supra* note 23.

[40] *USCIS I-131, Application for Travel Document Cuban Medical Professional Parole (CMPP) Program Approvals from January 1, 2006 to December 31, 2017*, USCIS (Dec. 2, 2019), https://bit.ly/36Yj6mr.

Id. at 120a. Respondents echo that characterization, contending that the "case-by-case" requirement is meant "to prohibit class-wide releases of aliens based on class-wide reasons, such as lack of detention capacity." Br. in Opp. 30 (emphasis omitted). That argument is flawed on multiple levels.

To start, neither the court of appeals nor respondents identify any support in the record for the premise that the executive branch does not exercise "case-by-case" discretion in granting parole applications at the border. That is in part because respondents failed to develop that argument: As the government explains, see U.S. Br. 34, respondents affirmatively waived any argument before the district court regarding the executive branch's parole policies, asserting that they were "not challenging" those policies, J.A. 212.

But it is also because there is no basis for respondents' sweeping claim that "any 'case-by-case' consideration" is "*pro forma* and illusory." Br. in Opp. 30. As the above discussion reflects, the consistent practice of the executive branch in a wide range of contexts is to ensure that parole is granted only on a case-by-case basis. Although both the processes that parole applicants undergo and the factors that immigration officials consider when reviewing applications vary based on the context, officials must always consider "the individual case" when granting parole. 8 C.F.R. § 212.5(c); see *id.* § 212.5(b) (directing that parole must be "justified only on a case-by-case basis"). Here, although the record does not include evidence of the on-the-ground practices for granting parole, the last publicly available guidance document for parole

determinations for arriving asylum seekers instructs officials to make case-by-case decisions. Specifically, it requires ICE agents to conduct detailed interviews of each arriving noncitizen, and to "consider[] and analyze[]" each noncitizen's "eligibility for parole . . . on its own merits and based on the facts of the individual [noncitizen]'s case."[41] The court below erred in concluding otherwise.

That error would have profound detrimental consequences if adopted by this Court. The decision below rests on the court of appeals' view that § 1182(d)(5)(A)'s requirement that parole be granted on a "case-by-case basis" means that the executive branch has "limited authority" to release noncitizens on parole, and so cannot parole large numbers of noncitizens based on broadly applicable factors. Pet. App. 14a, 120a. As the foregoing discussion reflects, though, the executive branch has consistently established parole programs of exactly that nature—programs that are designed to permit certain populations to come to the United States for purposes ranging from safety and security to family reunification. *Supra* Section I.B. All of these programs incorporate case-by-case decisionmaking, but, like the exercise of parole at issue here, they are also programmatic in nature, insofar as they rest on categorical judgments about why certain common factors warrant the exercise of discretion—or, in respondents' words, center on a "class-wide reason," Br. in Opp. 30, for why parole is warranted.

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[41] *Parole of Arriving Aliens*, *supra* note 12, at 3.

Under the court of appeals' reasoning, then, all of these programs would be vulnerable to challenge. For instance, the court of appeals' concern that the executive branch was paroling individuals arriving at the U.S.-Mexico border "*en masse*" into the United States, Pet. App. 120a, could easily be repurposed to support an argument that the executive branch cannot parole victims of the Haitian earthquake "*en masse*," or grant parole to the family members of U.S. veterans "*en masse*." In each context—as here—the executive branch has determined that certain shared traits warrant a favorable exercise of discretion, subject to case-by-case adjudication. Under the court of appeals' view, however, no such exercise of discretion is permissible. That view, if adopted, would be profoundly destabilizing for the hundreds of thousands of individuals who receive parole through these programs each year, as well as the families, communities, and States to which they contribute. And it would severely constrict the executive branch's discretion to establish additional programs—such as one to parole Ukrainians displaced by escalating violence—that could be life-altering and even life-saving for countless individuals.

These concerns are not merely speculative. Earlier this year, respondents and thirteen other States filed an action in federal district court against President Biden, the Department of Homeland Security, and other executive-branch officials and agencies that challenges the Central American Minors Refugee and Parole program as unlawful. Amended Complaint at 5-6, *Texas v. Biden*, No. 2:22-cv-00014, ECF No. 14 (N.D. Tex. Mar. 14, 2022). The plaintiffs contend that

by creating and implementing a parole program for a certain category of noncitizens, the executive branch has exceeded its "limited authority" to grant parole and violated the INA's requirement that parole determinations be made on a case-by-case basis. *Id.* at 28. In support, they rely on the court of appeals' decision in this case. *Id.* at 19-20. That case is still in its initial stages, but it illustrates the significant risk created by the court of appeals' circumscribed reading of the parole provision—one that threatens the welfare of parole recipients, their families, and their communities.

II. The Decision Below Harms Amici States And Their Community Members.

The court of appeals' unprecedented order not only is inconsistent with Congress's grant of statutory authority and decades of prior executive-branch practice, but it also harms the amici States and their residents in multiple respects. These serious consequences underscore the danger of affirming the court of appeals' decision requiring the executive branch to continue MPP, including the court's improperly narrow view of the executive branch's parole power.

At the most basic level, the decision below harms the amici States by depriving those States of members of their communities who might have migrated there absent the court order restoring MPP. See Pet. App. 59a ("drastically" more individuals are paroled into the United States absent MPP). Immigrants—including noncitizens—are a vital and substantial part of our nation. As of November 2021, 46.2 million people

living in the United States were born in another country.[42] This large immigrant population is unsurprising given that more individuals choose to migrate to the United States than to any other country.[43] The amici States, in particular, are home to some of the largest immigrant populations—amounting to more than 23.7 million immigrant residents.[44]

Contrary to respondents' and their amici's characterizations, immigrants enrich their communities, including the amici States, in a variety of ways. And it is amici States' experience that noncitizens—including those who are residing in the United States under a grant of parole—benefit their communities in the same ways.

For one, immigrants play a critical role in fueling and sustaining state economies. Every year, immigrants contribute hundreds of billions of dollars in taxes and consumer spending.[45] This includes noncitizens paroled into the United States, as they must pay

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[42] Steven A. Camarota & Karen Zeigler, *Immigration Population Hits Record 46.2 Million in November 2021*, Ctr. for Immigr. Studs. (Dec. 20, 2021), https://bit.ly/3MmezKS.

[43] Abby Budiman, *Key Findings About U.S. Immigrants*, Pew Rsch. Ctr. (Aug. 20, 2020), https://pewrsr.ch/3tkJuzw.

[44] See *United States Data*, New Am. Econ., https://bit.ly/3ugCOBY (listing immigrant population in 2019 by State).

[45] *Immigrants Are Vital to the U.S. Economy* at 5, U.S. Cong., Joint Econ. Comm. (Apr. 6, 2021), https://bit.ly/3IFNJed (in 2019, immigrants paid $492 billion in state, local, and federal taxes and wielded $1.3 trillion in spending power).

taxes on income generated here.[46] Immigrants also start businesses that generate billions of dollars in revenue.[47] As one example of immigrants' substantial economic contributions, the most recent data available shows that in 2019, immigrants in Illinois paid $13.4 billion in federal taxes and $8 billion in state and local taxes, had $50.2 billion to spend as consumers, and generated $2.8 billion in business income.[48] That same year, immigrants in California paid $88.2 billion in federal taxes, $42.6 billion in state and local taxes, held $317.6 billion in spending power, and generated $24.8 billion in business income.[49] In fact, although respondents and their amici complain that immigrants burden state resources,[50] a wealth of data

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[46] See *Taxation of Nonresident Aliens*, Internal Revenue Serv., https://bit.ly/3HM7xLI (last updated Feb. 24, 2022); *Aliens Employed in the U.S. – Social Security Taxes*, Internal Revenue Serv., https://bit.ly/3I0Jg4D (last updated Sept. 15, 2021).

[47] *Immigrants in the United States*, Am. Immigr. Council (Sept. 21, 2021), https://bit.ly/35qchtd (in 2019, immigrants generated $86.3 billion in business revenue).

[48] *Immigrants and the Economy in Illinois*, New Am. Econ., https://bit.ly/3tSHv4t.

[49] *Immigrants and the Economy in California*, New Am. Econ., https://bit.ly/3u8FHVk.

[50] Br. for Appellees at 13-15, *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021) (No. 21-10806) ("Tex. C.A. Br."); Br. for Indiana et al. at 1, 4-6, *Texas v. Biden*, 20 F.4th 928 (No. 21-10806) ("Ind. C.A. Br.").

shows that immigrants' financial contributions far exceed their costs in terms of the social services they use.[51]

Immigrants, including individuals paroled into the United States, also add to the number of available workers and make labor markets more efficient. Some noncitizens on parole, like those who enter the country via the International Entrepreneur Parole program, are automatically eligible to work. 8 C.F.R. § 274a.12(b)(37). Others, like those who receive "humanitarian" or "significant public benefit" parole, must first apply for employment authorization. *Id.* § 274a.12(c)(11). While employment authorization thus is not guaranteed,[52] a large number of individu-

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[51] Dan Kosen, *Immigrants as Economic Contributors: Immigrant Tax Contributions and Spending Power*, Nat'l Immigr. Forum (Sept. 6, 2018), https://bit.ly/3CYEHab; Michael Greenstone & Adam Looney, *Policy Memo: Ten Economic Facts About Immigration* at 6, Brookings Inst. (Sept. 2010), https://bit.ly/3hAXoqK ("The consensus of the economics literature is that the taxes paid by immigrants and their descendants exceed the benefits they receive—that on balance they are a net positive for the federal budget."); *see also* Alex Nowrasteh & Robert Orr, *Immigration and the Welfare State: Immigrant and Native Use Rates and Benefit Levels for Means-Tested Welfare and Entitlement Programs*, Cato Inst. (May 10, 2018), https://bit.ly/3HEoxDs; Carole Keeton Strayhorn, *Special Report: Undocumented Immigrants in Texas: A Financial Analysis of the Impact to the State Budget and Economy* at 20, Off. of the Comptroller of Tex. (Dec. 2006), https://bit.ly/3hwKWbc ("[T]he Comptroller's office estimates that state revenues collected from undocumented immigrants exceed what the state spent on services, with the difference being $424.7 million.").

[52] *Immigration Parole*, *supra* note 4, at 14.

als on parole participate in the workforce after entering the United States. From fiscal years 2012 to 2015, for example, more than one million noncitizens on parole received employment authorization documents.[53]

Additionally, a significant percentage of immigrants work in industries that are important to state economies and communities, such as farming, cleaning and maintenance, and home health care.[54] In California, for instance, 6.6 million immigrant workers comprised 33 percent of the labor force in 2018.[55] Immigrants continued to play an important role in the labor force during the Covid-19 pandemic, putting their lives at risk by working at high rates in essential sectors.[56] Immigrants also fill gaps in the labor market by taking important low-wage jobs that U.S.-born workers do not want and by moving around the country to work in markets experiencing labor shortages.[57]

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[53] *USCIS Employment Authorization Documents Fiscal Year 2017 Report to Congress* at 7-19, Dep't of Homeland Sec. (Mar. 19, 2018), https://bit.ly/3sE9ntX (data for "advance parole" and "paroled in the public interest").

[54] Arloc Sherman et al., *Immigrants Contribute Greatly to U.S. Economy, Despite Administration's "Public Charge" Rule Rationale*, Ctr. on Budget and Pol'y Priorities (Aug. 15, 2019), https://bit.ly/3C5Z84F.

[55] *Immigrants in California* at 2, Am. Immigr. Council (Aug. 6, 2020), https://bit.ly/3ih0rET.

[56] Giovanni Peri & Justin C. Wiltshire, *The Role of Immigrants as Essential Workers During the Covid-19 Pandemic*, U.C. Davis, Glob. Migration Ctr. (Apr. 27, 2020), https://bit.ly/3Jrr2uV.

[57] Sherman, *supra* note 55; see Jenny Minier, *Immigrants Benefit the Community and Economy*, Univ. of Ky., Ctr. for Equal.

In addition to participating in the labor force, immigrants create jobs for U.S.-born workers by starting businesses. Studies, including a recent one from the Kellogg School of Management at Northwestern University, have found that immigrants are more likely than U.S.-born individuals to start businesses, and that they "create more jobs than they take."[58] In 2019 alone, more than 3.2 million immigrants nationwide operated their own businesses.[59] And, in 2017, immigrants owned nearly half of the small businesses in New York City, employed nearly half a million New Yorkers, and contributed $195 billion to the city's gross domestic product.[60]

In addition to their economic contributions, immigrants make our communities safer. Respondents and their amici States worry that immigrants who would have been subject to MPP will commit crimes

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and Soc. Just. (Sept. 2017), https://bit.ly/3sE3HQG; Pia Orrenius, *Benefits of Immigration Outweigh the Costs*, The Catalyst, George W. Bush Inst. (Spring 2016), https://bit.ly/3MgUIfS.

[58] Pierre Azoulay et al., *Immigrants to the U.S. Create More Jobs than They Take*, Kellogg Sch. of Mgmt. at Northwestern Univ. (Oct. 5, 2020), https://bit.ly/35KLlEh (internal quotations omitted); see *Value Added: Immigrants Create Jobs and Businesses, Boost Wages of Native-Born Workers*, Am. Immigr. Council (Jan. 1, 2012), https://bit.ly/3KaBuXp.

[59] *Immigrants and the Economy in the United States of America*, New Am. Econ., https://bit.ly/3MZwmrw.

[60] Lena Afridi & Diana Drogaris, *The Forgotten Tenants: New York City's Immigrant Small Business Owners* at 3, Ass'n for Neighborhood & Hous. Dev. (Mar. 6, 2019), https://bit.ly/3tms9F7.

once paroled into the United States.[61] But research shows the opposite. Studies have repeatedly shown that immigrants commit significantly less crime than U.S.-born residents.[62] In Texas, for instance, the criminal conviction rate for noncitizens without legal status was 45% lower in 2018 than the rate for native-born Americans.[63] In fact, increased migration often corresponds with drops in crime rates in local communities.[64] For example, analyses of major cities such as New York, Chicago, Miami, and El Paso have shown that the rates of violent crime are lower in areas with more immigrants.[65] This makes particular sense in the context of individuals on immigration parole, as

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[61] Tex. C.A. Br. 15, 20-22; Ind. C.A. Br. 1.

[62] *See, e.g.*, Kristin F. Butcher & Anne Morrison Piehl, *Why are Immigrants' Incarceration Rates so Low? Evidence on Selective Immigration, Deterrence, and Deportation* at 24, Nat'l Bureau of Econ. Rsch. (July 2007), https://bit.ly/3MuifKD; Ramiro Martinez Jr. & Matthew T. Lee, *On Immigration and Crime*, 1 Crim. Just. 485, 514-15 (2000), https://bit.ly/3MiN4Sb.

[63] Alex Nowrasteh et al., *Illegal Immigration and Crime in Texas* at 4, Cato Inst. (Oct. 13, 2020), https://bit.ly/35NzqGb; see Michael T. Light et al., *Comparing Crime Rates between Undocumented Immigrants, Legal Immigrants, and Native-born U.S. Citizens in Texas*, 117 Proceedings of the Nat'l Acad. of Scis. of the U.S.A. 32340, 32345 (Oct. 2020).

[64] Chiraag Bains, *Commentary: How Immigrants Make Communities Safer*, The Marshall Project (Feb. 28, 2017), https://bit.ly/3IxGuVH.

[65] *Ibid.* (citing analyses); see Robert Adelman et al., *Urban Crime Rates and the Changing Face of Immigration: Evidence Across Four Decades*, 15 J. of Ethnicity in Crim. Just. 52, 70 (2017) (finding immigrants in urban areas less likely to commit crime than U.S.-born residents).

immigration officials may revoke parole if an individual commits a crime.[66]

Beyond depriving them of members of their communities who might have migrated absent the order restoring MPP, the court of appeals' decision more broadly threatens the amici States by creating a significant risk that the many parole programs on which they and their residents have relied will be cast aside. See *supra* Section I.C. The States rely on the federal government to operate these programs (which includes granting parole in the first instance and then monitoring recipients and, as appropriate, granting additional terms of parole). If these programs were undermined or annulled, the lives of many amici State residents, upon whom amici States themselves depend, could be upended.

To take one example, parole was momentous for the family of Rudolpho Panaglima, who was 13 years old when he joined a Filipino guerilla unit working secretly with the U.S. army during World War II.[67] He snuck past Japanese forces to bring information, food, and medicine to U.S. soldiers.[68] He eventually moved to the Washington, D.C. area with his wife, and waited for two decades for his two sons to obtain visas.[69] When Panaglima was in his late 80s, his sons

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[66] See *Matter of H-N-*, 22 I. & N. Dec. 1039, 1049 (B.I.A. 1999).

[67] Associated Press, *New Program Reunites Filipino World War II Vets with Family*, Star Advertiser (June 9, 2016), https://bit.ly/3ImAcYe.

[68] *Ibid.*

[69] *Ibid.*

were allowed to enter the United States through the Filipino World War II Veterans Parole program to care for their elderly parents.[70]

As another example, the life-changing impact of parole manifested very recently for two families fleeing Russian aggression in Ukraine.[71] Vira Krasiuk escaped Russian attacks in the besieged city of Mykolaiv with her family.[72] After escaping to Moldova, Krasiuk and her family were able to reach Mexico by plane and then entered the United States at the San Ysidro, California port of entry after they were granted humanitarian parole.[73] Two relatives, one of whom is a child, of California resident Maryna Sokolovska's also obtained parole after making it to San Ysidro from the battle zone outside Kyiv.[74] "'It was crazy, she was so afraid,' Sokolovska said of her cousin. 'She was saying they had run out of food.'"[75] These are just a few of the many families whose lives have been transformed through grants of parole.

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In requiring the executive branch to continue MPP, the court of appeals ignored Congress's broad

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[70] *Ibid.*

[71] Daina Beth Solomon & Dasha Afanasieva, *U.S. Lets Ukrainians Fleeing War into United States from Mexico*, Reuters (Mar. 17, 2022), https://reut.rs/3KTzTpl.

[72] *Ibid.*

[73] *Ibid.*

[74] *Ibid.*

[75] *Ibid.*

grant of parole authority to the executive branch and the consistent practice across presidential administrations of paroling large numbers of noncitizens on a programmatic basis. This decision, if affirmed by this Court, will undermine the executive branch's discretion to parole noncitizens in a variety of contexts—including when violence and social upheaval uproots individuals from their native countries. And allowing the decision to stand will rob the amici States, and the United States at large, of the invaluable contributions conferred by many immigrants who have made our nation their home.

CONCLUSION

The judgment of the court of appeals should be reversed.

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