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 CENTER FOR IMMIGRATION STUDIES AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Immigration Studies ("CIS" or "The Center") is an independent, nonprofit, nonpartisan research organization that has been recognized by the Internal Revenue Service as a tax-exempt educational organization. Since its founding in 1985, CIS has pursued a single mission–providing immigration policymakers, the academic community, news media, and concerned citizens with reliable information about the social, economic, environmental, security, and fiscal consequences of legal and illegal immigration into the United States. CIS has been awarded grants and contracts for immigration research from federal agencies, including the Department of Justice and the Census Bureau. CIS has been invited by Congress to provide expert testimony on immigration, including on the specific subject of refugees and asylum on more than 130 occasions. *See, e.g.*, Protecting Dreamers and TPS Recipients, Hearing Before the H. Comm. on the Judiciary, 116th Cong. 5 (2019), (statement of Andrew R. Arthur), available at: https://cis.org/Testimony/Protecting-Dreamers-and-TPS-Recipients. CIS wishes to use this expertise to give the Court a fuller understanding of the legal and policy issues that are relevant to this case.

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[1] Pursuant to Rule 37.2(a), both counsel of record filed a letter granting blanket consent. No counsel for any party authored this brief in any part, and no person or entity other than *amicus* made a monetary contribution to fund its preparation or submission.

SUMMARY OF ARGUMENT

The decisions of the district and circuit courts below to vacate the decision of the Secretary of the Department of Homeland Security (DHS) to terminate the Migrant Protection Protocols ("MPP") were correct. The courts correctly held that the termination of MPP violated 8 U.S.C. § 1225 given that such termination has caused and will continue to cause DHS to be unable to meet its mandatory detention obligations. In addition, the 5th Circuit's opinion may also be upheld on the grounds that the Secretary's termination of MPP was unlawful because it caused DHS to lose operational control over the Southern border, when maintenance of such "operational control" is mandatory upon the Secretary of Homeland Security under subsection 2(a) of the Secure Fence Act, Pub. L. No. 109-367, 120 Stat. 2638-39 (2006), 8 U.S.C. 1701. This Court should therefore find that the Executive Branch must restore the MPP as its termination of the program was *ultra vires*. The Executive Branch lacks the discretionary authority to violate the immigration laws passed by Congress because it has other policy preferences.

ARGUMENT

I. The Executive branch cannot override statutory mandates on immigration because it has differing policy preferences.

Congress has passed laws to prevent the Executive from allowing the "unlawful entry" of "terrorists, other unlawful aliens, instruments of

terrorism, narcotics, and other contraband" into the United States "over the entire international land and maritime borders of the United States." Secure Fence Act, sec. 2, Pub. L. No. 109-367, 120 Stat. 2638-39 (2006), 8 U.S.C. 1701.

The executive branch lacks the authority to ignore this congressional mandate by allowing the unlawful entry into the United States of an alien who is an "applicant for admission" and who an immigration officer determines is inadmissible to the United States as a deliberate policy. *See* 8 U.S.C. § 1225(a)(1) (defining "applicant for admission"); 8 U.S.C. § 1225(a)(3) ("inspection" of "applicants for admission"); 8 U.S.C. § 1182(a)(grounds of inadmissibility).

DHS's rescission of MPP is *ultra vires* because Congress's decisions on immigration override policy preferences of the Executive branch, and Congress has forbidden DHS to act as it has. The Constitution grants Congress, not the President, the power to "establish an uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4. The "formulation" of policies "pertaining to the entry of aliens and their right to remain here" are "entrusted exclusively to Congress." *Galvan v. Press*, 347 U.S. 522, 531 (1954).

As the Fifth Circuit correctly held, Congress has clearly spoken on the issue of whether DHS has the authority to release inadmissible aliens apprehended at the border into the interior of the United States. Congress amended the Immigration and Nationality Act ("INA") on September 30, 1996, in order to bar such action by the Executive Branch and to mandate the detention of all inadmissible

aliens. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Pub. L. No. 104-208, 110 Stat. 3009, sec. 302 (adding section 235, 8 U.S.C. § 1225 to the INA) (1996); 8 U.S.C. § 1103 (powers and duties of the Secretary of Homeland Security).

But 1996 was not the last time Congress acted to divest the executive branch of discretion in allowing "unlawful aliens" into the United States over our international borders. Ten years later, Congress passed The Secure Fence Act of 2006 on October 26, 2006 by significant majorities in both the House of Representatives and the Senate. Pub. L. No. 109-367, 120 Stat. 2638-39 (2006), 8 U.S.C. 1701. The Secure Fence Act also renders DHS' conduct in terminating MPP under the circumstances it did so *ultra vires*.

II. The Secure Fence Act forecloses DHS' decision to surrender operational control of the southern border.

The Secure Fence Act did not merely authorize the building of infrastructure to secure the southern border, it also specifically eliminated the executive branch's discretion to opt to surrender control over the southern border. As stated in the synopsis of the act, its purpose was to "establish operational control over the international land and maritime borders of the United States". *Id*. "Operational control" is specifically defined in the act as "the prevention of *all* unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband." *Id*. at Section (2)(b) (emphasis added), 8 U.S.C. § 1701 note.

The prevention of unlawful entries is not optional or discretionary, but a requirement that the Secretary of Homeland Security *must* follow. The act states that, no later than 18 months after its enactment, "the Secretary of Homeland Security *shall* take all actions the Secretary determines necessary and appropriate to achieve and *maintain* operational control over the entire international land and maritime borders of the United States…" (emphasis added). *Id.* As is well established by this Court, the term "shall" generally "connotes a requirement". *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016). This contrasts with the "word 'may,' which implies discretion." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020).

Though this congressional "operational control mandate" was initially imposed on then-Secretary of Homeland Security Michael Chertoff on April 26, 2007, it was then and is still an ongoing requirement that never expired and has not been repealed. Therefore, Section 2 of the Secure Fence Act now mandates that Secretary Mayorkas "take all actions" he needs to in order to prevent illegal aliens from crossing the southern border. *Id*. This mandate, independent of other statutory authority preventing DHS from terminating MPP, prevents Secretary Mayorkas from choosing to allow the unlawful entry of "terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.

III. Secretary Mayorkas admits that DHS terminated MPP knowing it would surrender operational control over the border because the Administration had other priorities.

DHS might argue that, mandatory statutory language notwithstanding, the Secure Fence Act does not mandate a specific method of achieving and maintaining operational control over the border. It does, however, at the very least, prevent the Secretary of Homeland Security from choosing to sacrifice operational control of the border voluntarily. The termination of MPP by Secretary Mayorkas is not a case of an Administration failing to achieve its statutory duties despite some measure of an attempt to do so that proved inadequate, but deliberating deciding upon a policy contrary to law.

Secretary Mayorkas, in his second memorandum terminating MPP, stated that "costs on the individuals who were exposed to harm while waiting in Mexico" outweighed the costs to the American public of increased "migratory flows." U.S. DEPT. OF HOMELAND SEC., TERMINATION OF MPP PROGRAM MEMO (Oct. 29, 2021). Further, in DHS' addendum to Secretary Mayorkas' memorandum, "Explanation of the Decision to Terminate the Migrant Protection Protocols", the agency again asserted that Secretary Mayorkas placed certain policy preferences of the Biden Administration ahead of decreasing the number of illegal crossings at the border:

> the Secretary has concluded that this benefit [decreasing the flow of illegal migration] cannot be justified, particularly given the substantial and unjustifiable human costs on the migrants who were exposed to harm while in Mexico, and the way in which MPP detracts from other regional and domestic goals and policy initiatives that better align with this Administration's values…" U.S. DEPT. OF HOMELAND SEC., EXPLANATION OF THE DECISION TO TERMINATE THE MIGRANT PROTECTION PROTOCOLS, (Oct 29, 2021) at 23-24.

Simply put, Secretary Mayorkas decided to relinquish operational control of the southern border in order to provide a benefit to certain foreign nationals on the basis of the policy preferences of the Biden Administration. DHS therefore did not fail to achieve the "unachievable" with the resources it had, but made an active choice to create a situation where an increased number of illegal aliens, as well as narcotics, potential terrorists, and other contraband, would enter the United States across the southern border illegally. This choice, however, has been specifically foreclosed to this and future Administrations by the Secure Fence Act, unless and until a future Congress changes the law.

CONCLUSION

Congress has already decided that DHS cannot make the deliberate and proactive decision to allow illegal migrants to cross the southern border and to

release them into the interior of the United States. That is, however, what DHS has done so with its decision to terminate MPP. If President Biden wants to make a different policy that would violated the "operational control" mandate in the Secure Fence Act, he must convince Congress to change the law, not take *ultra vires* action.

This Court should uphold the judgment of the court of appeals.

Respectfully Submitted,

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