No. 21A21

IN THE

Supreme Court of the United States

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

Applicants,

v.

TEXAS, ET AL.,

Respondents.

ON EMERGENCY APPLICATION FOR STAY PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AL OTRO LADO AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS

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MOTION FOR LEAVE TO FILE

Prospective *Amicus* Al Otro Lado respectfully move for leave to file a brief as *amicus curiae* in support of Applicants' request for a stay.[1] The Applicants' counsel have responded in writing indicating no opposition, and the Respondent's counsel have consented in writing to the filing of the enclosed brief without ten days' advance notice.

Prospective *Amicus* seeks leave to file the attached brief to explain errors in the legal findings underpinning the permanent injunction issued by the district court, which orders the Applicants to reinstate the Migrant Protection Protocols ("MPP"). In light of the organization's extensive experience in the field of asylum research and practice in general, and MPP in particular, *Amicus* respectfully submits that its unique perspective "may be of considerable help to the Court." Sup. Ct. R. 37.1.

Prospective *Amicus* has a substantial interest in the issues presented in this case, which implicate the opportunities for asylum seekers to access their statutory and constitutional rights. The ability of asylum seekers to pursue protections in the United States as guaranteed under domestic and international law is

[1] No counsel for any party authored the *amicus* brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to its preparation or submission. Applicants and Respondents have, respectively, not opposed and consented to the filing of the *amicus* brief.

core to the missions of Al Otro Lado. The outcome of this litigation is thus of great importance to *Amicus*.

Prospective *Amicus* has also litigated numerous cases involving the rights of asylum seekers and immigrants, including those addressing MPP specifically. *See, e.g.*, *Innovation Law Lab v. Mayorkas*, 3:19-cv-807 (N.D. Cal.); *Al Otro Lado, Inc. v. Wolf*, No. 3:17-cv-02366-BAS-KSC (S.D. Cal.); *E.A.R.R. et al v. D.H.S. et al* 3:2020cv02146 (S.D. Cal.).

Given the expedited consideration of the stay application, *Amicus* respectfully requests leave to file the enclosed brief in support of the stay application without ten days' advance notice to the parties of intent to file. *See* Sup. Ct. R. 37.2(a). The application for a stay was filed on August 20, 2021. That same day, this Court ordered a response by August 24, 2021. On August 23, 2021, counsel for prospective *Amicus* gave notice to all parties of the intent to file an *amicus* brief in support of a stay. Respondents gave their consent on August 23, 2021. On August 23, 2021, Applicants indicated they take no position on this motion. The above justifies the request to file the enclosed brief without 10 days' advance notice to the parties of intent to file.

CONCLUSION

The Court should grant leave to file the accompanying *amicus* brief in support of a stay.

August 23, 2021 Respectfully submitted,

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STATEMENT OF INTEREST[1]

Amicus curiæ Al Otro Lado is a nonprofit advocacy and legal services organization based in Los Angeles, California with offices in San Diego, California and Tijuana, Mexico. Al Otro Lado provides holistic legal and humanitarian support to asylum seekers at the border between the United States and Mexico, including to those who were returned to Mexico under the Migrant Protection Protocols ("MPP"). Since MPP began in January 2019 through its termination in June 2021, *amicus curiæ* Al Otro Lado served over 1,000 asylum seekers subject to this policy. Protecting the legal rights of asylum seekers and ensuring they are able to access the U.S. asylum system is central to Al Otro Lado's mission. The reinstatement of MPP would frustrate this mission and force Al Otro Lado to divert significant resources from other programs.

SUMMARY OF ARGUMENT

Amicus submits this brief in support of the Government's motion to stay the District Court's injunction requiring the reinstatement of the MPP program pending disposition of the appeal in the Fifth Circuit Court of Appeals and, should the Fifth Circuit affirm the injunction, the filing and disposition of a petition for a writ of certiorari.

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[1] This brief is submitted pursuant to Supreme Court Rule 37 with the consent of Petitioners and Respondents. The parties were given timely notice. This brief has been written by the signatories hereto. Neither Petitioner nor counsel for Petitioner has contributed any funds for the preparation or production of this brief.

This *amicus* brief focuses on two legal issues on which the Fifth Circuit erred: determining that Texas had standing to bring the case, and upholding the District Court's injunction which applied the improper legal standard for a mandatory injunction that alters the status quo.

First, Texas and Missouri did not establish standing to bring this case. There was no injury-in-fact because termination of the MPP program did not cause the Respondents' purported harm. Even if Texas and Missouri had established injury, the remedy sought—re-implementation and enforcement of MPP—would not redress this injury.

Second, requirements for issuing the injunction were not met. "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 385 (1981). In this case, MPP was largely suspended as of March 20, 2020, when COVID-related travel restrictions were implemented on the border and MPP court dates were canceled and never rescheduled. The formal MPP wind-down began in January 2021, eight months prior to the District Court's order granting injunctive relief. Because the District Court ordered the Government to "enforce and implement MPP," a program that had been effectively suspended for more than a year, the order went beyond merely preserving the relative positions of the parties, and instead mandated the eventual result the Respondents would seek in a trial on the merits. *Texas v. Biden*, No. 21-cv-067-Z, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021).

ARGUMENT

I. TEXAS AND MISSOURI DID NOT ESTABLISH STANDING TO BRING THIS CASE

Article III standing is built on separation-of-powers principles. As such, it serves to prevent the judicial process from being used to usurp the powers of the political branches. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Respondents here seek to usurp the powers of the political branches through the courts. By granting injunctive relief—a "drastic and extraordinary remedy, which should not be granted as a matter of course"—the District Court and the Fifth Circuit have used a judicial order to direct foreign policy. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). Reimplementation and enforcement of MPP would require diplomatic engagement with Mexico to reach a new agreement on migrants returned to their territory.

The District Court and the Fifth Circuit also erred in finding that the Respondents satisfied the requirements of standing. Standing determines "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *E.g.*, *Barrows v. Jackson*, 346 U.S. 249, 255—256 (1953). This doctrine stems from "the proper—and properly limited—role of the courts in a democratic society." *See Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 221—227 (1974); *United States v. Richardson*, 418 U.S. 166, 188—197 (1974) (Powell, J., concurring); *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

As recently stated by this Court, "Article III standing requires a concrete injury even in the context of a statutory violation. The Court has rejected the proposition that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. An injury in law is not an injury in fact." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2197 (2021) (citations omitted).

A. THE STATE FAILED TO DEMONSTRATE INJURY-IN-FACT

In order to have standing, a plaintiff must have suffered an 'injury in fact'— "an invasion of a legally protected interest" which is "concrete and particularized." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

In this case, the Respondents presented similar arguments to those in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015), stating that the states are within the zone of interests of the Immigration and Nationality Act ("INA"). *Texas v. Biden*, No. 21-10806, 2021 WL 3674780, at *2 (5th Cir. Aug. 19, 2021) ("Fifth Circuit Order"). As in that case, the present Respondents explained that they would suffer imminent injury based on the allegation that "'aliens present in Texas because of MPP's termination would apply for driver's licenses,' the granting of which would impose a cost on Texas." *Id*, at *4; *see also Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015), *as revised* (Nov. 25, 2015) ("At least one state—Texas—has satisfied the first standing requirement by demonstrating that it would incur significant costs in issuing driver's licenses to DAPA beneficiaries. Under

current state law, licenses issued to beneficiaries would necessarily be at a financial loss. The Department of Public Safety shall issue a license to a qualified applicant. A noncitizen must present ... documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States.") (internal citations omitted).

However, the case at hand is different from *Texas v. United States* in multiple ways. In that case, a determined number of people were already within the state of Texas. Had the DAPA program gone into effect, the subjects of the lawsuit would have been eligible to be considered lawfully present and receive certain derivative benefits. 809 F.3d 134, 155 ("If permitted to go into effect, DAPA would enable at least 500,000 illegal aliens in Texas to satisfy that requirement with proof of lawful presence or employment authorization. Texas subsidizes its licenses and would lose a minimum of $130.89 on each one it issued to a DAPA beneficiary. Even a modest estimate would put the loss at several million dollars.") (internal citations omitted). There is no similar group of people in either of the Respondent states whose eligibility for state benefits rides on the existence of MPP.

In the present case, the subjects affected by the lawsuit are asylum seekers outside of the United States who would be amenable to MPP. Such asylum seekers are by no means guaranteed or even likely to remain in Texas if they are permitted to enter. Also unlike in *Texas v. United States*, here, there is also no affirmative status or benefit being granted to them based on the termination of the MPP program. Unlike for

DAPA, the injunction would not in fact address the eligibility of asylum-seekers for drivers' licenses or other state benefits. Seeking asylum is a lawful process and asylum seekers already have certain rights and entitlement to certain benefits, such as eligibility for work authorization, through legislation and regulation. The existence or absence of MPP does not change this, and the termination of MPP should not be considered the source of any of the Respondents' purported injuries.

Further, the Respondents' termination of MPP is not forcing Texas to adapt to a new immigration system. It is simply a return to the state of affairs before 2019. The purported injury here is in reality the lawful functioning of the Refugee Act. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 427 (1987) ("The Refugee Act of 1980 established a new statutory procedure for granting asylum to refugees. The 1980 Act added a new § 208(a) to the [I.N.A.], reading as follows: The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum…"). The proper channel for addressing the system created by that Act is through congressional legislation, not through the courts.

B. ASSUMING ARGUENDO AN INJURY EXISTS, IT IS NOT REDRESSABLE BY A FAVORABLE RULING

Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged

action; and redressable by a favorable ruling. *Monsanto Co.,* 561 U.S. at 149. Here, the purported injury would not be redressable by a favorable ruling for three reasons.

First, the reimplementation of MPP does not prevent Texas from having to issue driver's licenses to people who are paroled into the country. As noted by the Fifth Circuit, the Petitioners may still "parole an alien into the United States on a case-by-case basis for urgent humanitarian reasons or significant public benefit" or "release on bond or conditional parole an alien arrested on a warrant and detained pending a decision on whether the alien is to be removed." *Texas*, 2021 WL 3674780, at *13 (5th Cir. Aug. 19, 2021) (internal citations omitted). Such persons are equally likely to live in Texas as any other asylum seeker processed in the absence of MPP.

Second, the reimplementation of MPP will not prevent the purported injury because the MPP program relies upon the agreement, coordination, and cooperation of a foreign, sovereign nation: Mexico. United States courts cannot force Mexico to accept and provide work authorization to foreign nationals while their asylum cases proceed in the United States. The Fifth Circuit stated that "the Government could have avoided any disruptions by simply informing Mexico that termination of MPP would be subject to judicial review." Fifth Circuit Order at *14 (5th Cir. Aug. 19, 2021). This is not a realistic understanding of how foreign policy functions. Changes cannot be made to a binational program by "simply informing" the other party. Mexico's continued participation cannot be assumed, as

has been demonstrated by certain Mexican states refusing to accept persons expelled under Title 42.[2]

The Fifth Circuit stated that the "injunction only requires good faith on the part of the United States—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."Fifth Circuit Order at *14. However, if Mexico does not comply, MPP cannot be reinstated. Considering that the alternative of detaining all arriving asylum seekers is not feasible or possible, this would mean that the Respondents' purported injuries caused by the termination of MPP would not be redressed and that the point of the court order would be negated.

Finally, ordering the restatement of MPP does not redress the Respondents' purported injury because the program as implemented from 2018 to 2021 was only applicable to persons of certain nationalities. Reinstating MPP would not alleviate the possibility that

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[2] *See* **Mica Rosenberg** & **Frank Jack Daniel**, *U.S. releases some Central American families after Mexican state limits returns*, Reuters, Feb. 3, 2021, https://www.reuters.com/article/usa-immigration-families/u-s-releases-some-central-american-families-after-mexican-state-limits-returns-idUSL1N2KA08Y. ("Tamaulipas recently stopped receiving Central American families with children under the age of six expelled from Texas, a U.S. source said. Mexico's foreign ministry confirmed "local" adjustments to policy, citing the implementation of a child protection law passed late last year.")

Texas might have to provide driver's licenses to asylum seekers who did not meet the MPP criteria. That would only be the case if MPP were expanded to all asylum seekers regardless of nationality. Neither the District Court nor the Fifth Circuit has the authority to order the federal government to not only reinstate an agency program but also to expand it.

II. THE REQUIREMENTS FOR ISSUING A PRELIMINARY INJUNCTION WERE NOT MET

Texas and Missouri did not meet the requirements for a preliminary injunction. "According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief." *eBay Inc. v. MercExchange, LLC.*, 547 U.S. 388, 391 (2006). The four factors require a plaintiff to demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.*

Before a preliminary injunction may be granted, "courts must balance the competing claims of injury and consider the effect of granting or withholding the requested relief, paying particular regard to the public consequences." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). This Court has stated that "issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our

characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* Stays of agency action under the Administrative Procedure Act are held to the same standard "as that which applies to requests for preliminary injunction" *Corning Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 562 F. Supp. 279, 280 (E.D. Ark. 1983); *citing Dataphase Systems, Inc., v. C.L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). Therefore, the following reasoning applies to both the preliminary injunction and the denial of the request for a stay.

Mandatory preliminary injunctions, injunctions that alter the status quo, and those that give the moving party the remedy they would seek at a full trial on the merits are subject to a heightened burden compared to other preliminary injunctions, and therefore "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975–76 (10th Cir. 2004), aff'd and remanded sub nom. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). Cases involving such motions involve a higher standard than the "modified-likelihood-of-success-on-the-merits standard" and a moving party must instead "make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." *Id.*

In this case, Texas and Missouri did not meet any of the four factors—and as we have seen, a particularly

strong showing on likelihood of success and the balance of harms is required. Regarding likelihood of success on the merits, as the Petitioners have argued, the District Court erred in misapplying the I.N.A.; in its 'arbitrary and capricious' finding where the District Court substituted its policy judgment for that of the relevant governmental agency; in departing from the correct standard of review under the Administrative Procedure Act; in improperly relying on a void 'agreement' between the Department of Homeland Security and Respondent Texas; and in failing to remand this matter to the Secretary for the Department of Homeland Security. Pet.'s Br. 17-34, Aug. 20, 2021. Furthermore, as discussed below, regarding the balance of interests, the District Court's reliance on failure-to-appear statistics was misplace, given Immigration Judges' own recognition of systematically-improper notifications of court dates and other related violations in MPP.

As regards irreparable harm, the purported harm here is monetary - the Respondents claimed what amounts to monetarily-quantifiable administrative burdens, that they could sue the United States government to recover through a damages action instead. *See* Fifth Circuit Order at *4. This is by definition reparable.

The balance of interests sharply weighs in Petitioners' favor, too: this is a balance between the direction of national immigration policy and foreign relations with Mexico compared to Respondents' speculative concerns about drivers' licenses being issued to a few more individuals than normal. *Id*.

Lastly, the public interest lies sharply in conducting immigration processing for asylum-seekers in line with this country's international obligations and concerns for those individuals' well-being, as opposed to slightly affecting the speculative future numbers of drivers' licenses to be issued by two States among fifty in our Union.

Indeed, during the first year of MPP, immigration judges terminated large numbers of MPP cases due to concerns over lack of notice and other due process issues.[3] Between January and the end of September 2019, immigration judges in San Diego terminated 33% of more than 12,600 MPP cases, according to data collected by the Transactional Records Access Clearinghouse at Syracuse University.[4] The nine San Diego judges who terminated these cases repeatedly determined that asylum seekers waiting in Mexico were not properly notified of their court dates or that other due process rights were violated.[5] Because adherence to due process requirements is unquestionably in the public interest, this factor weighs heavily in favor of the Petitioner.

This case involves all three closely-scrutinized categories of preliminary injunctions as the injunction in

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[3] *Matter of J.J. Rodriguez* precluded such terminations, requiring immigration judges to enter *in absentia* orders. *Matter of J.J. Rodriguez*, 27 I&N Dec. 762 (BIA 2020).

[4] A. A. Caldwell, 'Judges Quietly Disrupt Trump Immigration Policy in San Diego', *The Wall Street Journal* (Nov. 28, 2019) **https://www.wsj.com/articles/judges-quietly-disrupt-trump-immigration-policy-in-san-diego-11574942400** (last accessed August 23, 2021).

[5] *Id.*

this case mandates a particular result (mandatory injunction), alters the status quo, and gives the states of Texas and Missouri all the relief they would seek at a full trial on the merits. *Id.* If belonging to a single such category is sufficient to increase the standard for the injunction sought, Texas and Missouri must face an exceptionally high standard, as their injunction spans all three suspect categories. *Cf. Uniao do Vegetal, supra.*

The Court must therefore consider the "public consequences" of this "extraordinary remedy", balancing the four factors of the likelihood (not just possibility) of eventual success on the merits by the movant; whether irreparable harm would be suffered; the balance of interests between the parties; and the public interest. *Winter*, 555 U.S. 7 at 24. Irreparable harm is typically not one involving financial loss, as this can be resolved through the payment of damages, particularly in the case of a defendant with pockets as deep as the United States government—instead some non-pecuniary, serious harm is required. *Cf. Winter, supra.,* 380-381.

This brief seeks to underline the particularly-heightened nature of the standard the injunction needed to clear in this case. The summary below refers to other filings before this Court to reflect how the Respondents failed to clear that standard.

The Respondents fail at each stage under the normal preliminary injunction test. But considering the particularly-heightened approach required here, given that this injunction fits every disfavored injunction category, it is even clearer that the Respondents

simply do not meet this heightened preliminary-injunction standard.

As a result, the District Court erred in granting the injunction in this case, and the Fifth Circuit erred in allowing the order to stand and in denying petitioner's stay.

CONCLUSION

For the reasons set out in this brief, the Court should grant the stay application

August 23, 2021 Respectfully submitted,

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