No. 21-10806

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

State of Texas; State of Missouri,

Plaintiffs - Appellees,

v.

Joseph R. Biden, Jr., in his official capacity as President of the United States of America; United States of America; Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security; United States Department of Homeland Security; Troy Miller, Acting Commissioner, U.S. Customs and Border Protection; United States Customs and Border Protection; Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement; United States Immigration and Customs Enforcement; Tracy Renaud, in her official capacity as Acting Director of the United States Citizenship and Immigration Services; United States Citizenship and Immigration Services,

Defendants - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1 and Fed. R. App. P. 26.1, *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

3) The following entity has an interest in the outcome of this case: Immigration Reform Law Institute.

DATED: October 19, 2021

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens, and also to assisting courts in understanding and accurately applying federal immigration law. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 942 F.3d 504 (D.C. Cir. 2019); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

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[1] No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

IRLI respectfully submits that this Court should affirm the judgment of the district court. The Immigration and Nationality Act ("INA") sets forth several clear statutory directives relating to enforcement actions that must be taken with respect to aliens who cross the border illegally. Section 1225(b) requires the expedited removal or detention of every inadmissible applicant for admission encountered by border patrols. The only exceptions are for those aliens returned to contiguous territory pursuant to section 1225(b)(2)(C) or temporarily paroled into the United States on a case-by-case basis under section 1182(d)(5)(A). Nothing in the INA, including section 1226(a)(2), authorizes the Appellants to release inadmissible aliens into the United States on "bond" or "conditional parole." Reimplementation of the MPP as ordered by the district court, along with good faith enforcement efforts, can help stem the wave of illegal aliens swamping the southwest border and alleviate the need for additional detention resources. Finally, nothing precluded the district court from issuing its injunction and declaring what the law requires. For all of these reasons along with the reasons set forth by Appellees, this Court should affirm the district court's judgment.

ARGUMENT

I. Legal Background

It has long been recognized that the power "to forbid the entrance of foreigners … or to admit them only in such cases and upon such conditions as it may see fit to prescribe" is an inherent sovereign prerogative entrusted exclusively in Congress. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *see also Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress . . . ."). Upon their admission to the Union, Texas and Missouri ceded this sovereign prerogative to control their respective borders to the federal government. Because the States are challenging Executive action that runs contrary to statutory directives, the special solicitude to which the States are entitled in this Court's standing analysis is at its zenith. *See* Appellees' Brief at 17-18.

Congress established a comprehensive and uniform immigration system governing who may enter and remain in the United States by enacting the INA. Congress specified numerous classes of aliens who are either inadmissible or removable from the United States, including aliens who attempt to enter illegally, commit certain crimes, violate the terms of their status (visa overstays), obtain admission through fraud or misrepresentation, vote unlawfully, become a public charge, and whose work would undermine wages or working conditions of

American workers. *See generally* 8 U.S.C. §§ 1182(a), 1227(a). By simply defining the various classes of inadmissible or removable aliens and merely establishing the system by which such aliens may be ordered removed, *see* 8 U.S.C. § 1229a (establishing removal proceedings), Congress left many enforcement decisions to the discretion of the Department of Homeland Security ("DHS"). Thus, it is fair to say, as Appellants do, that the Executive branch exercises broad authority over immigration enforcement. Appellants' Brief at 6.

For instance, Congress created a default rule that permits DHS, on a warrant, to arrest and detain any removable alien pending a hearing on their removability. 8 U.S.C. § 1226(a).[2] Further, any alien detained under this discretionary detention authority may be released on bond or conditional parole at the discretion of DHS. 8 U.S.C. § 1226(a)(2).

Congress did not, however, leave such enforcement discretion unbounded. Instead, Congress has mandated that certain enforcement actions be taken against specific classes of aliens, including those aliens who attempt to enter the United States illegally. For instance, "an alien present in the United States who has not been admitted or who arrives in the United States … shall be deemed for purposes of this chapter an applicant for admission." 8 U.S.C. § 1225(a)(1). This designation

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[2] References to the Attorney General in the enforcement provisions of the INA now refer the DHS Secretary. *See* 6 U.S.C. §§ 251, 552(d).

triggers section 1225(a)(3), which specifies that all applicants for admission "shall be inspected by immigration officers."

Section 1225(b) governs the inspection of applicants for admission. Subsection 1225(b)(1) mandates the expedited removal of aliens who either lack entry documents or attempt to gain admission through misrepresentation. 8 U.S.C. § 1225(b)(1)(A)(i). If such an alien requests asylum, the INA mandates the detention of such an alien throughout the credible fear screening process or pending final consideration of an application for asylum. 8 U.S.C. § 1225(b)(1)(B)(ii), (iii)(IV).

Subsection 1225(b)(2) governs all other applicants for admission and specifies that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall* be detained for a proceeding under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(A) (emphasis added).[3] The only alternative to expedited removal or detention for inadmissible applicants for admission is found in subsection 1225(b)(2)(C), which grants DHS the discretion to return an alien who is arriving on land from a foreign territory contiguous to the United States to that territory pending a removal proceeding before an immigration court.

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[3] Proceedings under 8 U.S.C. § 1229a are removal proceedings in United States immigration courts.

Finally, Congress granted the DHS Secretary the discretion to:

> parole into the United States *temporarily* under such conditions as he may prescribe *only on a case-by-case basis* for urgent humanitarian reasons or significant public benefit *any alien applying for admission to the United States*, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

8 U.S.C. § 1182(d)(5)(A) (emphases added). Nowhere in section 1225 does Congress grant the Executive branch authority (discretionary or otherwise) to release any inadmissible applicant for admission into the United States.

II. Termination of the MPP Causes DHS to Violate the Statutory Scheme Governing Applicants for Admission

In evaluating whether DHS's termination of the MPP was arbitrary and capricious or otherwise contrary to law, the district court recognized that under the statutory scheme governing applicants for admission, the government is required to either detain inadmissible aliens who claim asylum or return them to a contiguous territory. *See Texas v. Biden*, 2021 U.S. Dist. LEXIS 152438, at *63, 2021 WL 3603341, at *22 (N.D. Tex. Aug. 13, 2021). Further, the district court reasoned that "where Defendants cannot meet their detention obligations, terminating MPP necessarily leads to the systemic violation of Section 1225." *Id.* The district court properly analyzed the lawfulness of DHS's termination of the MPP in the context

of the statutory scheme as a whole and correctly concluded that the termination of the program would necessarily cause the government to violate its detention obligations under the INA.

As set forth above, the INA mandates the immediate removal or detention of every inadmissible applicant for admission with only two exceptions.[4] 8 U.S.C. § 1225(b)(1)(A)(i), (1)(B)(ii), (1)(B)(iii)(IV), (2)(A). First, instead of removing or detaining an inadmissible applicant for admission, DHS is authorized to return the alien to a contiguous territory. 8 U.S.C. § 1225(b)(2)(C). Second, DHS could, in its discretion, parole such an alien into the United States under 8 U.S.C. § 1182(d)(5)(A), but such parole must be granted "only a case-by-case basis" and only "temporarily."

Despite these narrow options, Appellants suggest that Congress did not "provide any guidance in the statute for when DHS should use the contiguous-return authority" and that "nothing in the statute suggests a relationship between any purported detention mandate and the return authority, such that the Secretary is *required* to return any noncitizen he fails to detain." Appellants' Brief at 32 (emphasis in original). But the return authority is a statutory *alternative* to

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[4] Of course, an immigration officer could also simply deny admission to an inadmissible applicant for admission at a port of entry or an applicant could withdraw the application for admission. 8 U.S.C. § 1225(a)(4).

detention. That is, DHS can either detain inadmissible applicants for admission, or it can return them to a contiguous territory pending removal proceedings.

Appellants also suggest that they retain discretion even in the face of seemingly mandatory legislative commands. *See id.* at 32-33 (citing *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005), and *Texas v. United States*, 2021 U.S. App. LEXIS 27686, 2021 WL 4188102, at *3-4 (5th Cir. 2021)). Appellants' reliance on *Castle Rock* is misplaced. In that case, the Supreme Court merely concluded that the "respondent did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband." 545 U.S. at 768. In other words, the Court rejected the respondent's claim that mandatory legislative language could suffice to establish that the plaintiff had a personal entitlement to police enforcement of her restraining order such that it constituted a protected property interest under the 14th amendment. *Id.* at 766. Here, in contrast, the district court did not find such a novel individualized entitlement, but instead issued an injunction preventing DHS from adopting enforcement priorities that conflict with the policies set forth by Congress.[5] In addition, nowhere do Appellants address the fact that the Supreme

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[5] Appellants' reliance on *Texas* fairs no better. As Appellees point out, Appellees' Brief at 40, inadmissible applicants for admission are already subject to enforcement action. Indeed, the INA mandates that all arriving aliens be deemed

Court has ruled that "§§ 1225(b)(1) and (b)(2) mandate detention of aliens throughout the completion of applicable proceedings . . . ." *Jennings v. Rodriguez*, 138 S. Ct. 830, 845 (2018).

Appellants also point out that, in addition to either detention or return under section 1225, DHS retains the authority to parole applicants for admission into the United States under 8 U.S.C. § 1182(d)(5)(A). Appellants' Brief at 33. As Appellees point out, however, both the district court and the motions panel of this Court acknowledged this parole authority. Appellees' Brief at 40. But it bears repeating just how narrow this section 1182(d)(5)(A) parole authority is: it may only be granted "temporarily," on a case-by-case basis, and "for urgent humanitarian reasons or significant public benefit." Such parole authority certainly does not contemplate the release of thousands of aliens into the United States *en masse* as enjoined by the Court. *See Texas v. Biden*, 10 F.4th 538, 558 (5th Cir. 2021).

Both Appellants and Appellees erroneously assert that DHS is also authorized to release inadmissible applicants for admission on "bond" or "conditional parole" under 8 U.S.C. § 1226(a)(2). *See* Appellants' Brief at 33-34; Appellees' Brief at 37. Section 1226(a)(2) does not grant DHS authority to release

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applicants for admission and mandates their inspection and removal or detention. *See* 8 U.S.C. § 1225(a)(1), (3).

applicants for admission into the United States for at least two reasons. First, that section does not apply by its own terms. Section 1226(a) provides, in relevant part:

> *On a warrant issued by the Attorney General*, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—
>
> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on—
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
>
> (B) conditional parole;

8 U.S.C. § 1226(a) (emphasis added). As the motions panel seemed to grasp, this release authority only applies to "an alien arrested on a warrant" and detained pending a decision on whether the alien is to be removed. *Texas*, 10 F.4th at 558. That is, the release authority granted in subsection 1226(a)(2) only applies to aliens detained under the authority of subsection 1226(a), not aliens detained under the authority of 1225(b). The hundreds of thousands of inadmissible applicants for admission encountered on the southwest border are not being arrested on a warrant, but instead are generally apprehended by the border patrol trying to cross into the United States. *See Texas*, 2021 U.S. Dist. LEXIS 152438, *27 (¶ 43). Further, 1225(b) mandates detention for a

specific period (pending removal, pending consideration of the application for asylum, or pending removal proceedings) with no exceptions.

Second, even if the text of section 1226(a)(2) could be read to encompass inadmissible applicants for admission detained under section 1225, it is a "well established canon of statutory interpretation … that the specific governs the general. That is particularly true where … Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (internal quotations and citations omitted). Here, the parole authority established under section 1182(d)(5)(A) specifically addresses "applicants for admission," the precise term used to describe the class of aliens to whom section 1225(b) applies. Further, if the more general "conditional parole" authority of section 1226(a)(2) applied to applicants for admission under section 1225, the more restrictive parole authority under section 1182(d)(5)(A) would be superfluous.

Appellants also argue that applicants for admission who are subject to expedited removal proceedings under section 1225(b)(1) are not "eligible for contiguous return." Appellants' Brief at 34 n.8 (citing 8 U.S.C. § 1225(b)(2)(B)(ii)). This is a strawman. Appellants themselves aver that DHS

retains discretion to place such aliens in either expedited removal proceedings under section 1225(b)(1) or full removal proceedings under section 1225(b)(2). Appellants' Brief at 6 (citing *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (B.I.A. 2011)).

In addition, Appellants allege that the district court's reading of the statute would lead to "absurd results" because the MPP only came into existence in 2019 and every administration for the last 25 years "has repeatedly violated Section 1225 by paroling or otherwise releasing inadmissible applicants for admission due to a lack of detention space for which Congress has never appropriated sufficient funds." Appellants' Brief at 34-35. But Appellants fail to point to any authority for the proposition that a long-standing failure to comply with the law renders the law inapplicable. Furthermore, the only citation Appellants provide purportedly showing that the government's "longstanding practice on this matter is firmly grounded in the statute" is Attorney General Barr's decision in *Matter of M-S-*, 27 I. & N. Dec. 509, 516-17 (A.G. 2019), in which he discusses the parole authority under section 1182(d)(5)(A), a provision that all parties agree applies to applicants for admission.

Regardless, it is Appellants' wanton refusal to enforce the immigration laws that has led to absurd results that have been visible on the southwest border since this administration took office. DHS itself found the MPP to be a "cornerstone" of

its efforts to restore integrity to the immigration system and remove the perverse incentive that releasing illegal aliens into the United States created in the first place. *See Texas*, 2021 U.S. Dist. LEXIS 152438, *18 (¶ 26). Appellants' lack of resources argument is similarly misguided. Again, DHS concluded that the MPP was effective in reducing the incentive for aliens to attempt to enter the United States. *See id.* at *66 (¶ 119) (finding that the MPP deterred aliens, especially from the Northern Triangle, from attempting to illegally cross the border, allowed DHS to avoid systemic violation of section 1225's detention requirements, and reduced the burden on states caused by the release of tens of thousands of aliens). Because the MPP is effective in reversing the perverse incentives created by releasing illegal aliens into the United States, implementing the MPP in good faith would diminish the need for additional detention resources.

Finally, Appellants contend that the district court lacked authority to enter the injunction restraining Appellants from implementing its invalid rescission of MPP and ordering them to implement the MPP in good faith until such time as it is lawfully rescinded and until the government has sufficient detention capacity to detain inadmissible applicants for admission without releasing any aliens because of a lack of detention resources. Appellants' Brief at 37-40 (citing 8 U.S.C. § 1252(f)(1) (barring injunctive relief enjoining or restraining the operation of 8 U.S.C. § 1221-32)). The Court should reject this argument because the district

court's injunction does not compel the government to take any specific enforcement action under the relevant provisions of the INA. Instead, the district court's injunction simply ordered the government to reinstate MPP because it was terminated in violation of the APA for all the reasons set forth by Appellees.

Further, the district court's injunction, as upheld by the motions panel, enjoins the government from simply releasing every alien described in section 1225 *en masse* into the United States. *Texas*, 10 F.4th at 558. As the motions panel recognized, the injunction does not compel the government to detain every alien subject to section 1225(b). *See id.* at 557-58. Nowhere does the INA grant Appellants the authority to release such aliens into the United States. *See id.* at 558 ("The Government has not pointed to a single word anywhere in the INA that suggests it can do that. And the Government cannot claim an irreparable injury from being enjoined against an action that it has not statutory authorization to take."). In any event, nothing in 8 U.S.C. § 1252(f)(1) precludes the district court from rendering a declaratory judgment stating what the law requires.

In sum, section 1225(b) requires the expedited removal or detention of every inadmissible applicant for admission encountered by immigration officials. The only exceptions are for those aliens returned to contiguous territory pursuant to section 1225(b)(2)(C) or temporarily paroled into the United States on a case-by-case basis under section 1182(d)(5)(A). Nothing in the INA, including section

1226(a)(2), authorizes the Appellants to release inadmissible aliens into the United States on "bond" or "conditional parole." Reimplementation of the MPP along with good faith enforcement efforts can help stem the wave of illegal aliens swamping the southwest border and alleviate the need for additional detention resources.

CONCLUSION

For the foregoing reasons, along with the reasons set forth by Appellees, this Court should affirm the district court's judgment.

DATED: October 19, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with Fed. R. App. P. 29(a)(5) because it contains 3,269 words, as measured by Microsoft Word software. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, Roman-style typeface of 14 points or more.

DATED: October 19, 2021

Respectfully submitted,

/s/ Matt Crapo
Matt A. Crapo

CERTIFICATE OF SERVICE

I certify that on October 19, 2021, I electronically filed the foregoing motion and attached *amicus* brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Matt Crapo
Matt A. Crapo