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 Amarillo Division Case No. 2:21-cv-00067-Z

BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF TEXAS IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPEAL

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 29.2 and 28.2.1, the undersigned counsel of record for *amici* certifies that the following persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. American Civil Liberties Union
2. American Civil Liberties Union of Texas

Pursuant to Fed. R. App. P. 26.1, *amici* state that they do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in either of the *amici*.

Dated: August 17, 2021

/s/ Cody Wofsy
Cody Wofsy

STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

No party's counsel authored this brief in whole or in part. No party contributed money that was intended to fund preparation or submission of the brief. No person other than amici or their members contributed money that was intended to fund preparation for or submission of the brief.

Dated: August 17, 2021

/s/ Cody Wofsy
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INTEREST OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly two million members, dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU's Immigrants' Rights Project engages in a nationwide litigation and advocacy program to enforce and protect the constitutional and civil rights of immigrants. The ACLU of Texas is the ACLU's Texas affiliate and likewise engages in litigation and advocacy to enforce and protect the rights of immigrants in the state of Texas.

INTRODUCTION

As the federal defendants have explained, the district court's opinion was deeply flawed in a variety of ways. Amici write to highlight one critical and fatal flaw. The entire decision is ultimately grounded on the district court's premise that the immigration statute offers only two choices to the Department of Homeland Security (DHS) when confronted with asylum seekers arriving at the border: detain everyone pending removal proceedings, or use the 'contiguous-territory-return' authority in 8 U.S.C. § 1225(b)(2)(C). But that premise is simply false. Among other tools to manage migration, DHS has broad "parole" power to release noncitizens pending removal proceedings, as is made clear in the statute and longstanding regulations, which has been exercised by every administration for

decades. Because DHS can lawfully exercise its parole authority to release asylum seekers on a case-by-case basis, the agency in fact has (at least) a third option available to it. And without the false choice the district court posited, its entire decision requiring DHS to restart the "Migrant Protection Protocols" (MPP) falls apart. The Court should grant a stay.

ARGUMENT

The district court conceded that § 1225(b)(2)(C) standing alone does *not* require MPP (or any similar program). Op. 32 ¶ 60. Nor could it have held otherwise. The language of that provision is plainly permissive—"the Attorney General *may* return"—and for over 20 years after its enactment no administration created a contiguous-territory-return program, until MPP. Rather, the court's conclusion that "terminating MPP necessarily leads to the systemic violation of Section 1225," Op. 44 ¶ 108, relies entirely on a (flawed) syllogism: If "Section 1225 provides the government two options vis-à-vis aliens seeking asylum: (1) mandatory detention; or (2) return to a contiguous territory," *id*. at 43 ¶ 106; and if DHS lacks the resources to detain all such asylum seekers, *id*. ¶ 107; then the *only* option is the contiguous-territory-return provision and so MPP is required under these circumstances, *id*. at 44 ¶ 108.

The major premise of that syllogism, that the statute requires either detention of everyone or use of contiguous-territory-return authority, is false, as explained

below. But it is worth pausing to note how central this syllogism is to the district court's decision. It forms the entirety of the court's holding that the termination of MPP violates §1225. *See id*. at 42-44. And that holding in turn is critical to the court's justification for issuing an injunction and for vacating the policy (rather than remanding without vacatur for additional explanation). *See id*. at 46 ¶ 121, 51 ¶ 137. The district court also leaned heavily on its syllogism to conclude that the decision whether to terminate MPP is not committed to agency discretion by law—which was necessary to even reach plaintiffs' Administrative Procedure Act claims. Op. 32 ¶ 59.

Yet the district court's assertion that DHS must either detain all asylum seekers or return them to Mexico is flat wrong. In reality, DHS enjoys broad authority to release noncitizens from detention pursuant to its parole power. That power has been exercised for as long as the federal government has been regulating immigration. *See, e.g.*, *Nishimura Ekiu v. United States*, 142 U.S. 651, 651, 661 (1892) (discussing release of noncitizen to care of private organization); *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (same). Eventually, Congress enacted 8 U.S.C. § 1182(d)(5) as a "codification of the [prior] administrative practice." *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958). And in the decades since, the immigration authorities have continued to broadly exercise their power to release people from detention under the rubric of "parole." This parole power provides the answer to the

court's flawed syllogism: Even if DHS cannot detain everyone, it has authority codified in statute to release some on parole, so § 1225 cannot be understood to mandate MPP.

To be sure, the Supreme Court has described § 1225 as "mandat[ing] detention of applicants for admission until certain proceedings have concluded." *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018). But that description is about the availability, or lack thereof, of release on *bond*—i.e. the authority of an immigration judge to require DHS to release a particular noncitizen. *See id*. at 839, 842-43. *Jennings* nevertheless explicitly recognized DHS's longstanding power to *choose* to release via parole. *Id*. at 844.

The district court acknowledged that statutory parole authority in a footnote. Op. 43 n.11. But it waved the power away, contending that the statute was "narrowly prescribed" and suggesting that it could not authorize enough release on parole to obviate the asserted need for MPP. *Id*. That, again, is simply wrong. 8 U.S.C. § 1182(d)(5)(A) provides for case-by-case parole "for urgent humanitarian reasons or significant public benefit." Nothing about that language is *narrow*; indeed, its general terms indicate that Congress understood the agency itself would need to decide what, in particular circumstances, constituted an "urgent humanitarian" problem or a "significant" benefit to the public. And, notably, when Congress wants to more narrowly circumscribe the situations in which release is authorized, it knows

exactly how to do so. *See, e.g.*, 8 U.S.C. § 1226(c)(2) (permitting release of certain noncitizens "only" if "necessary" for witness protection purposes). It instead chose to use flexible and subjective language in codifying the parole authority in § 1182(d)(5)(A).

Indeed, DHS and its predecessor agency have long interpreted the parole authority to grant broad discretion to release, and codified that interpretation in regulations that have existed for decades. 8 C.F.R. § 212.5(b) describes situations in which parole would "generally be justified." Importantly, one of those categories is: "Aliens whose continued detention is not in the public interest as determined by" designated types of DHS officials. 8 C.F.R. § 212.5(b)(5). This substantial flexibility to decide if and when "continued detention" is in "the public interest," *id*., provides a clear third option to DHS—release of asylum seekers when appropriate in the judgment of DHS officials.

The district court did not even cite this regulatory authority. Yet this lawful source of authority is *itself* fatal to the district court's reasoning. And because the court did not even acknowledge the regulation, it made no effort to explain why it was refusing to defer the agency's longstanding interpretation of its parole power under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984); *cf., e.g.*, *Ibragimov v. Gonzales*, 476 F.3d 125, 137 n.17 (2d Cir. 2007) (deferring to another aspect of same parole regulation); *Momin v. Gonzales*, 447 F.3d 447, 459-61 (5th Cir. 2006)

(deferring to parole-related regulation), *vacated on other grounds*, 462 F.3d 497 (5th Cir. 2006).

Instead, the district court relied on a series of non-sequiturs and irrelevancies to avoid the parole power. It quoted, for example, a government website stating that parole is not "intended 'to replace established refugee processing channels.'" Op. 43 n.11 (quoting App. 336). But that observation has nothing to do with this case. *Refugee* processing is entirely distinct (as a statutory and practical matter) from processing *asylum seekers*; the former is about people who are seeking protection in the United States *from abroad*, 8 U.S.C. § 1157, while the right to seek asylum applies to those who are "physically present in the United States or who arrive[] in the United States," 8 U.S.C. § 1158(a)(1); *see Yang v. INS*, 79 F.3d 932, 938 (9th Cir. 1996) (explaining the difference). Notably, moreover, this website is from U.S. Citizenship and Immigration Services, which exercises the parole authority for *some* purposes (like allowing individuals to come into the country from abroad). But Immigration and Customs Enforcement (ICE) decides parole when the question is, as here, whether applicants will be released from detention pending removal proceedings.

The court also relied on a quoted prediction from a law professor in a newspaper article included in the administrative record. Op. 43 n.11 (citing AR 184). But that quote and article were about a decision under the Trump

Administration that certain asylum seekers would not be eligible for release on bond from an immigration judge. AR 181-85. The decision itself emphasized that noncitizens *would* still be eligible for release on parole. *Matter of M-S-*, 27 I.&N. Dec. 509, 516, 518 (A.G. 2019) (citing 8 C.F.R. § 212.5). The article thus underscores that the statutory and regulatory parole authority to release for various reasons is long established and has been recognized and used by *every* administration—including the Trump Administration.

Finally, the district court contended that in 1996 "Congress 'specifically narrowed the executive's discretion' to grant parole." Op. 43 n.11 (quoting *Cruz-Miguel v. Holder*, 650 F.3d 189, 199 (2d Cir. 2011)). But the most important change to the parole statute in 1996 was the introduction of a requirement that decisions be made on a "case-by-case" basis. *See Cruz-Miguel*, 650 F.3d at 199 n.15 (describing amendment).[1] That requirement does not bolster the district court's underlying reasoning because requiring release decisions to be "case-by-case" does not limit the number of cases in which DHS can decide to release. Thus, the supposed "narrowing" of parole authority in 1996 is irrelevant to the actual question in this case, namely whether the government has no lawful option but to reinstate MPP.

[1] *Cruz-Miguel* addressed an entirely inapposite question: Whether the term "conditional parole" in another statute had the same meaning as "parole." *See* 650 F.3d at 195-99. It sheds no light on the propriety of parole in this context.

Indeed, as explained above, longstanding regulations specifically contemplate release where DHS decides "continued detention is not in the public interest." 8 C.F.R. § 212.5(b)(5). That regulatory authority existed before 1996, and was maintained in the agency's regulations even as it incorporated the new "case-by-case" requirement following the 1996 amendments.[2] Notably, at the same time, the government did adopt a separate, narrower regulatory parole authority, but *only* as to certain noncitizens. *See, e.g.*, 8 C.F.R. § 235.3(b)(2)(iii) (parole available to certain noncitizens in expedited removal only when "required to meet a medical emergency" or "necessary for a legitimate law enforcement objective"); 62 Fed. Reg. at 10320, 10356. In other circumstances, the agency has concluded that, notwithstanding the 1996 statutory change, it still has broad authority to release where "continued detention is not in the public interest." 8 C.F.R. § 212.5(b)(5).[3]

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[2] *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,313 (Mar. 6, 1997) (noting that regulation was amended "to comport with the statutory change made by IIRIRA to [§ 1182(d)(5)(A)]").

[3] *See also, e.g.*, ICE Directive 11002.1, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture* § 4.4 (Dec. 8, 2009), ("ICE Parole Directive"), https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf. This directive, which recognizes and discusses the "public interest" category of parole under § 212.5(b)(5), was issued under the Obama Administration and kept in force throughout the Trump Administration and into the Biden Administration. *See* John Kelly, *Implementing the President's Border Security and Immigration Enforcement Improvements Policies* 3 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-

Again, the district court did not even cite the regulation, must less engage with the question of *Chevron* deference to it.

The point is not that this Court needs to agree with DHS's judgment about when release is in the public interest; indeed, how DHS is in fact exercising parole is not properly at issue in this case at all. Rather, recall the role of detention in the district court's syllogism: Because (the court held) detention of every asylum seeker is the *only* lawful alternative, and because DHS cannot detain all of them, MPP *must* be reinstated. But if there is any way to exercise the parole authority lawfully to avoid exhausting DHS's detention capacity, the agency has that third option available. There plainly is: DHS can release asylum seekers when their continued detention is no longer in the public interest. The district court's syllogism thus fails, and there is no basis to mandate a return to MPP.[4]

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the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

[4] If plaintiffs believe DHS is not in fact exercising its parole power in a lawful manner, they could try to challenge the current parole practices in court. But that would be an entirely different case, and the appropriate relief in such a case (if justiciable and meritorious) would be an injunction *against* certain parole practices, not an injunction *commanding* the reinstatement of MPP. In any event, any suggestion that under current policy parole is not considered on a case-by-case basis is baseless. The governing parole directive—in place continuously since the Obama Administration—instructs that "[e]ach alien's eligibility for parole should be considered and analyzed on its own merits and based on the facts of the individual alien's case," and permits parole only where a noncitizen "establishes to the satisfaction of [DHS] his or her identity and that he or she presents neither a flight risk nor danger to the community . . . ." ICE Parole Directive § 6.2.

Indeed, the permissive language of the contiguous-territory-return statute is clear, and no amount of verbal gymnastics from the district court can turn that permission into a statutory command. Rather, DHS has *at least* this third option—parole individuals out of detention on a case-by-case basis. Notably, that is not the only other tool available to the agency. For example, detention under § 1225 is authorized only pending removal proceedings. Yet the agency has long enjoyed broad authority to *terminate* such proceedings as an exercise of prosecutorial discretion (or to seek such termination from an immigration court). *See* 8 C.F.R. §§ 239.2(a), (c), 1239.2(c). Where proceedings are terminated, that individual would be released—not detained or returned to Mexico. Likewise, the agency may permit "any alien applicant for admission to withdraw his or her application for admission in lieu of removal proceedings" and depart the country. 8 C.F.R. § 1235.4. The important point is that with a variety of options depending on the circumstances—and most importantly with the availability of parole—the district court's simplistic premise that DHS must either detain or return to Mexico is simply wrong.

Because the central premise that DHS only has two options is incorrect, the court's conclusion that MPP is required by statute cannot survive scrutiny. And, as noted, that conclusion is central to the court's overall analysis; again and again, the court relied on this statutory view to conclude that the case is reviewable, that vacatur is appropriate, and that an injunction is warranted. Thus, the court's entire basis for

a sweeping injunction and vacatur falls apart along with its substantive § 1225 analysis. At a minimum, the critical flaw in the court's reasoning provides ample reason for this Court to stay the injunction and vacatur of the termination of MPP pending appeal.

CONCLUSION

The Court should stay the district court's order.

Dated: August 17, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing motion and attached brief via the Court's ECF filing system.

Dated: August 18, 2021

/s/ Cody Wofsy
Cody Wofsy

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with Fed. R. App. P. 27(d)(2)(A) and 29(a)(5) because it contains 2,536 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: August 17, 2021

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