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, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, Case No. 2:21-cv-00067-Z

REPLY IN SUPPORT OF EMERGENCY MOTION UNDER RULE 27.3 FOR ADMINISTRATIVE STAY AND FOR STAY PENDING APPEAL

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INTRODUCTION

Plaintiffs offer no persuasive justification for declining a stay and allowing the district court's injunction to begin dramatically altering U.S. immigration law and border operations on Saturday. Multiple senior federal officials have explained in sworn declarations that immediately implementing the district court's injunction would intrude on sensitive foreign relations with Mexico and other countries, and would undermine other missions and priorities. Put simply, the Migrant Protection Protocols (MPP) cannot be re-implemented in a responsible manner on the district court's timeline. Plaintiffs offer no credible response to those dramatic and irreparable harms from the injunction, instead dismissing them as "self-inflicted." That contention flouts the stay standard and disregards the Executive's authority to manage foreign affairs and immigration.

Plaintiffs' opposition also confirms the government is likely to prevail on the merits. Throughout their brief, Plaintiffs reveal that their real objection is not so much to MPP's termination but to the purported parole and detention policies of the Department of Homeland Security (DHS). But Plaintiffs cannot use their objection to DHS's parole decisions as a means to overturn the Secretary's decision to cease using his *discretionary* authority under Section 1225(b)(2)(C) and compel the Secretary to abruptly resume using that authority in precisely the fashion it was deployed under MPP. Moreover, Plaintiffs' contention that Section 1225 requires

DHS to detain or return all applicants for admission is badly mistaken. No Presidential administration since the provision was enacted in 1996 has adopted their reading of the statute.

Plaintiffs' case collapses without their extreme and atextual detention theory. Their remaining claim—that the Secretary's decision was insufficiently explained—is both unreviewable and meritless. The Secretary rationally exercised the discretion provided by statute, explaining his evaluation of the benefits and drawbacks of MPP, and the Executive's competing priorities for managing the challenges of regional migration. That explanation amply satisfies the Administrative Procedure Act's (APA) deferential standard. Even if this Court were to conclude that more explanation was needed, that could not possibly justify the district court's extraordinary injunction. Instead, the only appropriate remedy would be remand *without vacatur* in light of the significant foreign-policy and other disruptions that will follow from hastily reinstating MPP.

This Court should therefore stay the injunction pending appellate proceedings. If the Court denies the stay, it should at minimum grant a seven-day administrative stay to give the government the opportunity to seek emergency relief from the Supreme Court.

I. Defendants are likely to succeed on appeal.

A. MPP's termination is not reviewable

Plaintiffs lack standing, *contra* Opp. 6-7, because their asserted injuries are speculative and not judicially redressable. Whether MPP can be reinstated at all depends critically on the Mexican government. Plaintiffs' contention (Opp. 7) that DHS can simply restart MPP without cooperation from Mexico is refuted by sworn declarations of government officials, ECF 98-1, 98-3, and by the original policy itself. Plaintiffs acknowledge (Opp. 3) that MPP depended on "Mexico's agreement to permit entry of MPP enrollees back into Mexico." It also required Mexico's agreement to grant returned noncitizens legal protection and work authorization. AR151-53. Plaintiffs assert (Opp. 7) that the United States could simply "refus[e] to admit asylum applicants at ports of entry … before they ever enter the United states," but they do not explain how that course of action would be a valid use of the statutory authority, which allows returns only for noncitizens "arriving" in the United States, and only in support of removal proceedings. 8 U.S.C. § 1225(b)(2)(C). Moreover, Plaintiffs do not address noncitizens who enter between ports of entry. And their argument is inconsistent with MPP itself, which required non-refoulement screenings for those who had already crossed the border and expressed a fear of return to Mexico. The fact that the contiguous-territory return authority might theoretically be implemented without Mexico's agreement is irrelevant, because

MPP critically depended on Mexico's cooperation

Nor can Plaintiffs overcome the multiple bars to judicial review of the Secretary's decision. Mot. 8-10. Plaintiffs admit that contiguous-territory return is a discretionary authority that the Secretary "may" use—not must use. 8 U.S.C. § 1225(b)(2)(C). It therefore falls within 8 U.S.C. § 1252(a)(2)(B)(ii), which broadly bars review "of any ... decision or action" specified "to be in the discretion of ... the Secretary." The Secretary's decision is also committed to agency discretion by law under the APA, because the statute "provides absolutely no guidance as to how [the Secretary's] discretion is to be exercised." *Texas v. United States*, 809 F.3d 164, 168 (5th Cir. 2015). Plaintiffs' principal response (Opp. 8-9) is their claim that the Secretary's decision "violates mandatory duties under Section 1225." But that claim is incorrect for all the reasons explained previously (Mot. 11-14) and below.

B. Terminating MPP does not violate § 1225.

Plaintiffs endorse the district court's reasoning that "Section 1225 provides the government two options vis-à-vis aliens seeking asylum: (1) mandatory detention; or (2) return to a contiguous territory." On that basis, they claim that "failing to detain or return aliens pending their immigration proceedings violates Section 1225." Opp. 14. That view of Section 1225 is plainly mistaken, which is why Plaintiffs offer not a single precedent to support it and why no Presidential administration since Section 1225's enactment has enforced the immigration laws

that way. *See* Mot. 14; ACLU Amicus at 8-9 (discussing multiple policies across multiple administrations); ECF 98-1, ¶¶ 6-14.

The statutory text refutes Plaintiffs' argument by providing that the Secretary "may" return an applicant for admission arriving from Mexico to that territory. Nothing in Section 1225 or elsewhere in the INA suggests that the Secretary's decision whether to use that authority must be driven by whether an applicant for admission should be detained or released pending removal proceedings.

Plaintiffs concede (Opp. 16) that contiguous-territory return "is *optional*," and that the government "can always choose ... detention" or "may grant parole" consistent with Section 1182(d)(5). The problem, Plaintiffs say, is that DHS is granting parole too often for reasons not "specified by statute." *Id.* But that simply confirms that Plaintiffs' Section 1225 argument is not really about MPP at all—Plaintiffs merely object (Opp. 16-17) that paroling some noncitizens whom DHS lacks physical space to detain does not advance a "significant public benefit." 8 U.S.C. § 1182(d)(5). Plaintiffs cannot wedge their complaints about DHS's longstanding detention policies into an attack on the decision to discontinue MPP. Even if Section 1225(b) erected the unprecedented automatic-detention mandate that the district court conjured, a violation of that mandate would be just that—a violation of Section 1225(b)'s detention provisions—not a basis for ordering the Secretary to continue using MPP "until such time as the federal government has sufficient

detention capacity." Op. 52. Plaintiffs effectively concede that the rescission of MPP was not itself a violation of Section 1225 by arguing "that Defendants' suspension of MPP is *causing* their ongoing violation of Section 1225." Opp. 17 (emphasis added). That concession defeats their claim.

In any event, Plaintiffs are wrong about the scope of the parole authority and DHS's other options for release. The INA provides DHS with multiple options for noncitizens in expedited or Section 1229a removal proceedings, including "parole" under Section 1182(d)(5), which multiple administrations have read to permit release where a noncitizen's "continued detention is not in the public interest," 8 C.F.R. § 212.5(b)(5); *see* Mot. 14, or release on "bond" or "conditional parole" under Section 1226(a). *See also* 8 U.S.C. § 1226(c)(1) (prohibiting release only of particular categories of noncitizens). Plaintiffs do not even mention Section 1226. Instead they claim (Opp. 15-16) that the district court was correct because Section 1225 states that DHS "shall" detain noncitizens in expedited and full removal proceedings. That analysis not only reads parole and bond out of the statute for whole categories of noncitizens, but also runs straight into Supreme Court precedent holding that the "deep-rooted nature of law-enforcement discretion" persists "even in the presence of seemingly mandatory legislative commands." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005).

C. The Secretary's decision to terminate MPP satisfies the APA.

The Secretary's decision easily meets the APA's requirements. Mot. 14-20. The record demonstrates that he carefully reviewed MPP, prior DHS evaluations of it, and its original objectives, and issued a decision explaining the factors he considered, his weighing of those factors, and his ultimate conclusion. Plaintiffs seek to undermine the Secretary's reasoning largely by pretending it does not exist. Opp. 10-14. Each of their arguments lacks merit.

Plaintiffs principally contend (Opp. 11) that the Secretary failed to consider MPP's deterrence of non-meritorious asylum claims. But they ignore the Secretary's explanation of his decision to address this problem using different policy tools, including, among other things, by placing certain noncitizens in a "Dedicated Docket" and enrolling them in "Alternatives to Detention programs" to "promote compliance and increase appearances throughout proceedings." AR4-5. He also explained that MPP had not achieved this goal effectively enough to justify the substantial resources required to implement the program, noting that asylum backlogs had increased while MPP was in operation and that MPP had siphoned resources from other border-management approaches. AR4.

Plaintiffs also argue that the Secretary failed to heed purported warnings that suspending MPP would lead to a surge at the border. Opp. 12. Again, Plaintiffs ignore the Secretary's reasoning: he observed that "[o]ver the course of the program,

border encounters increased during certain periods and decreased during others." AR3; *see* AR664, 669 (showing increased border encounters in early 2019 after MPP first announced); Non-Profit Amicus at 3-6. Plaintiffs also overlook his considered judgment that the Administration's "reforms will improve border management and reduce migration surges more effectively and more sustainably than MPP." AR3-7.

Next, Plaintiffs contend the Secretary failed adequately to consider the States' "reliance interests." Opp. 11 (quoting Op. 37). But Plaintiffs have not shown that they took any actions in reliance on MPP. In any event, the Secretary explicitly considered the effect of rescission "on border management and border communities, among other potential stakeholders." AR5.

Plaintiffs incorrectly assert that the Secretary failed to adequately consider retaining a more limited form of MPP. Opp. 13. After cataloguing MPP's weaknesses, the Secretary explained that "addressing the deficiencies identified in my review would require a total redesign that would involve significant additional investments in personnel and resources. Perhaps more importantly, that approach would come at tremendous opportunity cost, detracting from the work taking place to advance the vision for migration management and humanitarian protection articulated in Executive Order 14010." AR5. The Secretary reasonably concluded that other strategies were preferable to a re-designed MPP.

Plaintiffs also contend (Opp. 13) that the Secretary acted arbitrarily when he cited the high rate of *in absentia* removal orders as one reason to terminate MPP. The record supports the Secretary's conclusion, *see* Mot. 19; Non-Profit Amicus at 8-14, and in any event, Plaintiffs' demand (Opp. 13) for an in-depth empirical analysis of the reasons underlying the *in absentia* rate cannot be squared with the Supreme Court's admonition that the APA does not require "empirical or statistical studies." *FCC* v. *Prometheus Radio*, 141 S. Ct. 1150, 1160 (2021). Nor did anything in the APA require the Secretary to reach a "conclusion concerning that number," Opp. 14, which was merely one data point in a comprehensive review of MPP's strengths and weaknesses. The Secretary's caution in the face of empirical uncertainty is a strength of the memorandum, not a weakness.

Finally, Plaintiffs contend the Secretary acted arbitrarily by considering COVID-19 court closures and imply courts remain closed simply because the government has declined to reopen them. Opp. 14. But it was eminently reasonable for the Secretary to conclude, as the prior administration concluded, that COVID-19 inhibited the functioning of MPP, and that limited DHS resources and staff were better devoted to other policy approaches. AR4-6.

II. The balance of equities strongly favors a stay.

The equities overwhelmingly support a stay. Mot. 20-23. The district court's injunction effectively requires the Executive Branch to engage in diplomatic

negotiations with Mexico to persuade it to accept thousands of returned noncitizens and accord them rights, such as work permits and legal protections, that were integral to MPP's operation. It is hard to imagine a more serious intrusion "on the discretion of the Legislative and Executive Branches in managing foreign affairs," *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 116 (2013). *See Arizona v. United States*, 567 U.S. 387, 396 (2012) (noting Executive authority to make "discretionary decisions" with respect to "[r]eturning" noncitizens "that bear on this Nation's international relations"). Worse yet, the harms to the government are not limited to foreign policy. The injunction disrupts border operations and ongoing efforts to manage migration and combat criminal networks. It requires costly investments of limited DHS resources to rebuild a massive infrastructure disassembled more than a year ago, at the expense of other initiatives. And it hamstrings DHS's discretion to devote limited detention resources to individuals identified as a higher risk and detention priority. Mot. 20-21.

On the other side of the balance, Plaintiffs offer no evidence of any concrete harm to their own interests, particularly from a limited stay pending appeal. The balance of harms in this case is thus significantly different from *Texas v. United States*, 787 F.3d 733, 769 (5th Cir. 2015), on which Plaintiffs rely, *see* Opp. 19; *see also* Mot. 7-8.

Plaintiffs contend that the government's harms should be disregarded as "self-inflicted" because Defendants could have delayed any action until all "litigation was resolved." Opp. 17-18. That claim is hard to take seriously, as it would effectively require the government to treat all lawsuits as de facto injunctions, thereby severely limiting the Executive's statutory and constitutional authority. Indeed, Plaintiffs' theory would have prevented MPP itself from ever taking effect, since litigation challenging MPP has still not concluded. *See, e.g.*, *Innovation Law Lab v. Nielsen*, 19-cv-807 (N.D. Cal.). To the extent plaintiffs suggest that any harms were "self-inflicted" because they believe the Secretary's determination was unlawful, that contention improperly collapses the irreparable-harm and merits inquiries of the stay analysis.

Plaintiffs' separate contention that a stay is appropriate only when an injunction prevents the Executive from taking enforcement actions, Opp. 19, is no more persuasive—the stay standard is not a one-way ratchet. Plaintiffs' further contention that "the federal government is violating, not enforcing, federal immigration law" (Opp. 19) again collapses the merits into the equities. And regardless, the injunction in this case does not compel the *enforcement* of immigration law—it requires the Secretary to exercise an explicitly discretionary power to return noncitizens to Mexico pending their removal proceedings. *See* 8 U.S.C. § 1252(f).

At a minimum, this Court should enter a stay because the district court abused its discretion in vacating the Secretary's decision and ordering the resumption of MPP. Plaintiffs' statutory claim under Section 1225 is meritless, and even if this Court were to conclude that the Secretary's reasoning was insufficient under the APA, controlling circuit precedent provides that, where "there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so," "[o]nly in 'rare circumstances' is remand" without "vacatur" "not the appropriate solution." *Texas Ass'n of Manufacturers v. United States Consumer Prod. Safety Comm'n*, 989 F.3d 368, 390 (5th Cir. 2021); Mot. 22-23. Plaintiffs do not even attempt to suggest that the Secretary would be unable to cure any APA flaws on remand.

CONCLUSION

The Court should stay the district court's injunction pending appeal. If the Court denies a stay, it should grant an administrative stay for seven days to allow the government the opportunity to seek relief from the Supreme Court.

Respectfully submitted,

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August 19, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 2594 words. This motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2021, I electronically filed the foregoing document 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.

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