No. 21-954

In The
Supreme Court of the United States

JOSEPH R. BIDEN, JR. et al.,

Petitioners,

v.

STATE OF TEXAS, STATE OF MISSOURI,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Landmark Legal Foundation ("Landmark") is a national public-interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution and individual rights. Landmark has a unique perspective on this case because of its history of filing briefs in support of border security.

Landmark urges this Court to affirm the ruling of the court below.

INTRODUCTION AND SUMMARY OF ARGUMENT

The southwest border of the United States is overwhelmed by aliens seeking entry. There are untold millions of inadmissible aliens within the country. Through the Immigration and Nationality Act, Congress delegated authority to the Executive Branch to address both the interests of homeland security and humanitarian concerns for refugees and asylum seekers. This authority has two significant restrictions: a

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have filed blanket consent for amicus briefs to be filed.

detention requirement and a limitation on the use of parole. While failing to meet both, the Executive Branch is making the border crisis worse through the termination of the Migrant Protection Protocols (MPP). A new presidential administration sets out new policies and ends old ones with which it disagrees. But the Administrative Procedure Act requires reasoned decision-making while changing or winding down existing programs. The Biden Administration's improper attempt to end MPP failed that standard.

ARGUMENT

I. The Executive Branch's authority and discretion in immigration do not allow it to ignore congressional mandates for the detention and parole of aliens.

The backdrop to this dispute over the Migrant Protection Protocols (MPP) involves the boundary of authority over immigration between the political branches. This boundary helps determine the appropriateness of Petitioners' decision to terminate the MPP. At the very outset in its petition for certiorari, the Petitioners claimed broad constitutional and statutory power over the administration and enforcement of immigration law. Pet'rs' Cert. Br., 4. They cited *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950); 6 U.S.C. § 202(5) (granting the DHS authority to establish national immigration enforcement policies and priorities); 8 U.S.C. § 1103(a)(1)

(charging the DHS Secretary with the administration and enforcement of laws related to the immigration and naturalization of aliens); and (3) (charging the DHS Secretary with establishing such regulations and performing such acts as he deems necessary for carrying out his statutory authority).

In *Knauff*, the Supreme Court did acknowledge inherent executive authority to regulate entry into the United States. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). Since then, however, the Court's approach has frequently described Executive Branch authority to regulate immigration as derived from congressional delegation. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 461 (2009) (citing *INS v. Chadha*, 462 U.S. 919 (1983); *Kleindienst v. Mandel*, 408 U.S. 753 (1972)). In *Kleindienst*, the Court wrote, "'Over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Kleindienst*, 408 U.S. at 766 (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

Furthermore, despite the broad language about executive authority in *Knauff* "to control the foreign affairs of the nation," the actual holding of the case is more limited. *Knauff*, 338 U.S. at 542. Rather than a unilateral exercise of presidential power, *Knauff* involved the Attorney General's decision to exclude a war bride from the United States without a hearing—executive action that ultimately stemmed from powers delegated through congressional legislation. Id. And the

regulations cited by Petitioners under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq*., only provide limited power to the Executive Branch. "[T]his general authority to enforce the Code cannot reasonably be characterized as an express delegation of any particular form of authority; it is instead a recognition that the Executive will need to develop policies and protocols to accomplish all that the INA does expressly delegate." Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 Yale L.J. 104, 125 (2015).

While it is true that the Executive Branch has enforcement discretion over immigration, it is bounded by statute. See, e.g., *Dep't of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1911 (2020) (discussing forbearance authority). Congress established a comprehensive scheme for the inspection, admission, detention, and removal of aliens under the INA. (An alien is any person not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3).) And Congress has specifically limited the Executive Branch's immigration power under the INA by requiring that certain aliens be detained while they await hearings to determine whether they should be admitted into the country. See Hillel R. Smith, Cong. Research Serv., R45915, *Immigration Detention: A Legal Overview* 22-28 (Sept. 16, 2019). This system is necessary for the United States Government to decide who may enter the country and who may stay after entering. See *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018).

Every day, aliens attempt to enter the United States, at official ports of entry or at unauthorized points along the border. Such aliens are considered applicants for admission. 8 U.S.C. § 1225(a)(1). As applicants for admission, they must be inspected by immigration officials to make sure they may be properly admitted. § 1225(a)(3). Generally, these applicants are broken into two categories under § 1225(b)(1) and § 1225(b)(2). The first group, under § 1225(b)(1), includes those applicants initially found inadmissible because of fraud, misrepresentation, or lack of valid documentation. See § 1225(b)(1)(A)(i) (citing §§ 1182(a)(6)(C), (a)(7)). This group also includes other aliens designated by the Attorney General at his discretion.[2] See § 1225(b)(1)(A)(iii). The aliens in this first group must be ordered removed "without further hearing or review," under § 1225(b)(1)(A)(i), unless they indicate an intention to apply for asylum or fear of persecution. Id. When that occurs, an immigration officer conducts an interview to determine whether the alien has a credible fear of prosecution. If such a credible fear is found, the alien "shall be detained" for further consideration of his application for asylum. § 1225(b)(1)(B)(ii). For aliens in the broader second group under § 1225(b)(2), unless an immigration officer determines they are "clearly and beyond a doubt entitled to be admitted," the INA requires that they "shall be detained" for a removal proceeding. § 1225(b)(2)(A).

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[2] Authority to administer the INA was transferred to DHS. See 6 U.S.C. §§ 202, 557.

The INA thus mandates detention of aliens in both groups except for those clearly and beyond a doubt entitled to be admitted. They can only be temporarily released pursuant to the government's parole authority under 8 U.S.C. § 1182(d)(5)(A). Under this section, with a few exceptions, the Attorney General may, "for urgent humanitarian reasons or significant public benefit," parole aliens detained under §§ 1225(b)(1) and (b)(2). 8 U.S.C. § 1182(d)(5)(A). "That express exception to detention implies that there are no other circumstances under which aliens detained under § 1225(b) may be released." *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018). Furthermore, such parole may be granted "only on a case-by-case basis." 8 U.S.C. § 1182(d)(5)(A).

The other exception authorizes the creation of the MPP. § 1225(b)(2)(C). Alien applicants for admission under § 1225(b)(2) who arrive on land from a foreign territory contiguous to the United States may be returned to that territory while they await a removal proceeding. Thus, Congress directed DHS to detain or remove aliens and granted limited discretion to parole them or have them wait in contiguous territory like Mexico while their hearings were pending.

Despite this statutory scheme, there are millions of deportable aliens within the United States. And more unauthorized aliens are coming. "The number of undocumented migrants crossing the southwest border has increased sharply during Mr. Biden's presidency." Eileen Sullivan, *Biden to Reduce Immigration Detention Bed Capacity*, N.Y. Times, Mar. 26, 2022, at A17. Yet the Biden Administration has sought to

decrease its detention capacity this year. Id. According to The New York Times, "the Biden administration is looking to cut more than 25 percent of the bed capacity at immigration detention facilities in its budget request for the next fiscal year, the latest indication that the government is shifting from incarcerating undocumented immigrants to using ankle-monitoring devices and other alternatives." Id. It did so last year as well. Nick Miroff and Maria Sacchetti, *Biden budget reflects shift in U.S. immigration policy and border enforcement*, Wash. Post, May 28, 2021. Despite its handwringing about not being capable of meeting the detention mandates of § 1225, it has repeatedly sought to decrease, not increase, its capacity.

Furthermore, according to the New York Times, the Biden Administration "has increasingly turned to alternatives to detention," including ankle monitors, facial recognition applications, and "phones that undocumented immigrants awaiting court proceedings can use to check in with immigration authorities." Sullivan, *supra*. In March 2022, "more than 200,000 immigrants were equipped with one of these monitoring devices . . . That is more than double the number of such devices that Immigration and Customs Enforcement was using a year ago." Id. One can only assume that many of these immigrants were given parole. Given the resources of DHS and the sheer numbers of border crossers, it is hard to believe that a reasoned, case-by-case analysis occurs before the granting of parole under 8 U.S.C. § 1182(d)(5)(A).

In short, despite a clear congressional mandate to detain aliens, the Executive Branch has apparently released hundreds of thousands of them, sought a smaller bed capacity to house them, and ended the safety valve of MPP.

II. The Administration's decision to terminate the Migrant Protection Protocols was arbitrary and capricious under the Administrative Procedures Act.

On Inauguration Day in 2021, the Petitioners faced thousands of aliens attempting to enter the country daily, and millions of deportable aliens within the United States. Despite a prior 2019 DHS assessment that the MPP was functioning well, an agreement with Texas, and warnings from officials not to stop the program, the incoming Administration announced that it would end the MPP. Pet. App. 160a, 166a, 167a. Although we expect the Executive Branch to change policy direction at times, especially after presidential elections, its decisions to modify rules and rescind programs must comply with the arbitrary-and-capricious standard of the Administrative Procedure Act. 5 U.S.C. § 706(2).

There are recent examples of the prior Administration's attempts to modify or end existing programs that violated the APA and are relevant to the Petitioners' decision to end the MPP. *Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019) and *Dep't of Homeland Security v. Regents of the University of California*, 140 S. Ct.

1891 (2020). See GianCarlo Canaparo, *Administrative Inertia After Regents and Department of Commerce*, 6 Admin. L. Rev. Accord 101 (2021). In *Regents*, the Court examined the termination of the Deferred Action for Childhood Arrivals (DACA) program that addressed people unlawfully present in the United States, but brought here as children. The DACA program combined forbearance from removal from the country with the conferral of certain benefits like work permits. The Court found that rescission of the program required analysis of the two aspects of the program separately. *Regents*, 140 S. Ct. at 1912-13 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983)). Furthermore, "when an agency rescinds a prior policy its reasoned analysis must consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" *Regents*, 140 S. Ct. at 1913 (citations omitted). DHS "also failed to address whether there was 'legitimate reliance'" on the existing policy. *Regents*, 140 S. Ct. at 1913. "[S]erious reliance interests . . . must be taken into account" when an agency changes its policies. *Regents*, 140 S. Ct. at 1913 (citations omitted).

Regents represents a break from more deferential review of administrative action. *State Farm*, on which *Regents* heavily relied, "is regarded as the high-water mark for intrusive ("hard-look") judicial review of discretionary decisionmaking." Ronald A. Cass, *The Umpire Strikes Back: Expanding Judicial Discretion for Review of Administrative Actions*, 73 Admin. L. Rev. 553, 588-89 (Summer 2021). Professor Josh Blackman

argued that the test in *Regents* "resembles strict scrutiny" because DHS failed to consider "a more narrowly tailored way to accomplish their goal." Josh Blackman, *Why the DACA Rescission Failed CJ Robert's APA "Severability" Analysis*, Volokh Conspiracy (June 19, 2020, 2:03 PM), https://reason.com/volokh/2020/06/19/why-the-daca-rescission-failed-cj-roberts-apa-severability-analysis/. Thus, it appears "an over-inclusiveness standard" was applied to the arbitrary-and-capricious standard. Id.

Another recent case, *Dep't of Com. v. New York*, showed an intrusive review is justified in the face of bad faith or improper conduct and agency action may be set aside if based on a pretext. The case "stands for the proposition that an agency can comply with the APA's requirements and yet still see its action set aside if a court doubts the sincerity of the otherwise adequate rationale supporting the action." Canaparo, at 326. This inquiry into subjective motivations is a significant break from past treatment of agency action. In dissent, Justice Thomas wrote, "The Court's holding reflects an unprecedented departure from our deferential review of discretionary agency decisions." *Dep't of Com*, 139 S. Ct. at 2576.

Two years after *Regents*, the Court took a different tack. In *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021), the Court set a "deferential" arbitrary-and-capricious standard under which agency action must be "reasonable and reasonably explained." Id. at 1158. Courts "may not substitute its own policy judgment for that of the agency." Id. Instead, "A court

simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." Id. It is not clear whether this complements or replaces the *Regents* standard or closes the door to the subjective inquiries contemplated in *Dep't of Com*. See Josh Blackman, *Justice Kavanaugh quietly rephrased the arbitrary-and-capricious standard in FCC v. Prometheus*, Volokh Conspiracy (Apr. 1, 2021, 1:48 PM), https://reason.com/volokh/2021/04/01/justice-kavanaugh-quietly-rephrased-the-arbitrary-and-capricious-standard-in-fcc-v-prometheus/.

Although not directly similar to DHS's termination of the MPP, *Prometheus Radio Project* involved an agency trying to change existing rules. Challengers claimed flawed data was used in the agency's decision-making process. The Federal Communications Commission (FCC) maintains strict ownership rules, limiting the number of media outlets a single entity may own in a specific market. A statute mandates the FCC to periodically review its rules to determine whether they remain in the public interest and repeal or modify those that do not. As part of its review, the FCC said "traditional public interest goals of promoting competition, localism, and viewpoint diversity" would inform its analysis. Id. at 1156. The FCC also stated that an assessment of the ownership rules' effect on minority and female ownership would be analyzed. Id.

The FCC sought public comment on the minority and women ownership issue but "no arguments were

made" that might lead the commission to conclude the existing rules were required to protect these interests. Id. at 1158. The FCC relied on data sets that convinced them that prior relaxations of ownership rules did not reduce minority and female ownership. Furthermore, they argued, no one had given contrary evidence or a compelling argument that a new relaxing of rules would have a different effect. Id. at 1159.

Writing for the Court, Justice Kavanaugh found "the FCC's analysis was reasonable and reasonably explained for purposes of the APA's deferential arbitrary-and-capricious standard." Id. at 1160. He emphasized how the FCC solicited commenters to provide studies on the relationship between ownership rules and minority and women's ownership rates, yet no evidence was provided to show that changing the rules would affect those rates. The commission "made a reasonable predictive judgment based on the evidence it had." Id. He concluded, "In light of the sparse record" on ownership rates and the commission's findings on competition, localism, and viewpoint diversity, "we cannot say that the agency's decision to repeal or modify the ownership rules fell outside the zone of reasonableness for purposes of the APA." Id.

Regents and *Prometheus Radio Project* provide the Court with flexibility in its approach while reviewing agency action. See Cass at 589-90. It may use "hard-look" or deferential review in the instant case, but by either standard, the termination of the MPP was arbitrary and capricious. Under *Regents*, each part of the MPP should have been reviewed separately and

alternatives "within the ambit of the existing [policy]" should have been considered. *Regents*, 140 S. Ct. at 1912-13.

The June 2021 Termination Memorandum, Pet. App. 346a, raised two alternatives in a single paragraph (maintaining the status quo or resuming new enrollments in the program) but provided almost no discussion of these alternatives. Pet. App. 355a. There is little more than a series of conclusory statements in the document to show that DHS's decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Regents*, 140 S. Ct. at 1905 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). The Petitioners failed to meet the *Regents* "alternatives" requirement. *Regents* also required consideration of reliance interests. That requirement was not met. The June Memorandum mentions the consideration of the impact of the decision on "border communities," but not states. Pet. App. 355a. Since costs associated with health, criminal justice, and education are borne by the states when aliens arrive, their reliance interest must be considered. See *Regents*, at 1913. Under *Regents*, therefore, the Petitioners' action was arbitrary and capricious.

The Petitioners' decision to end the MPP was arbitrary and capricious even under the more deferential standard in *Prometheus Radio Project*. *Prometheus Radio Project* requires a showing that the agency has reasonably considered the issues and reasonably explained its decision. The surface analysis in

the June Memorandum towards alternatives does not show a thorough consideration of the issues. The Memorandum also does not provide much if any information about consultations with affected stakeholders. Key to the opinion in *Prometheus Radio Project* was the fact that the agency sought comment from the public on a point of contention but heard no arguments to justify maintaining the rules at issue. Here, on Inauguration Day, there was a prior positive internal DHS assessment, an agreement with Texas, and officials from the prior Administration warning about the consequences of ending MPP. Those views should have received more than the scant attention they did.

Furthermore, the June Memorandum fails any reasonableness test because it does not properly address the congressionally-imposed mandate to detain aliens that the Executive Branch continuously fails to meet. Elections have consequences and one of those consequences is that a change in presidential administration often brings a change in policy. But these new policies are not limitless in scope; they are bound by statutes like the INA. And the INA requires detention and limits parole authority, both of which the Petitioners ignored.

The October 2021 Memoranda suffers from many of the same fatal flaws as the prior one. Although there is a longer discussion of alternatives, the reliance interests affected by the termination of MPP are hastily dismissed. This is not surprising, given the fact that Secretary Mayorkas listed meetings leading up to his decision that were limited geographically. He met with

"officials from across the federal government working on border management, state and local elected officials *from across the border region*, border sheriffs and other local law enforcement officials." Pet. App. 259a (emphasis added).

The movement of migrants into the country imposes costs on states far from the border. Yet the October Memoranda do not analyze them with any rigor. "[T]he fact that some noncitizens might reside in the United States rather than being returned to Mexico and thus access certain services or impose law enforcement costs is not, in the [DHS] Secretary's view, a sufficiently sound reason to continue MPP." Pet. App. 318a. In the Secretary's judgment, "any marginal costs that might have been inflicted on the States as a result of the termination of MPP are outweighed by the other considerations and policy concerns." Id. And, "the Secretary is unaware of any State that has materially taken any action in reliance on the continued implementation . . . of MPP." Id.

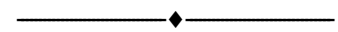
The October Memoranda, however, is attentive to the costs borne by Mexico. By agreeing to accept the return on non-Mexican nationals under MPP, the Government of Mexico "agrees to shoulder the burden of receiving these individuals, facilitating legal status and shelter, and accounting for their safety and security." Pet. App. 325a. These are not all of the burdens on Mexico.

> "Not only does this place a great deal of strain on [Mexico's] ability to provide services for its

> own citizens and lawful residents, it diverts Mexican law enforcement resources from other missions that are important to the United States – including addressing transnational organized crime networks and root causes of migration."

Pet. App. 326a. It is unfortunate that the October Memoranda is not as solicitous to the supposedly "marginal" costs imposed on the States as those on Mexico. The October Memoranda did not sufficiently address these reliance interests, failing one of the requirements of *Regents*.

Finally, the October Memoranda did not meet the more deferential requirements of *Prometheus Radio Project*. Once again, consultations were made primarily with individuals from border communities, a limited group. See Pet. App. 259a. And instead of accepting the INA's requirements of detention and limits to parole authority within its analysis of the problem, it disputes them. Pet. App. 319a-325a. This is not the type of reasoned analysis required by the APA's arbitrary-and-capricious standard.



CONCLUSION

The ruling of the court below should be affirmed.

Respectfully submitted,

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