No. 21A21

In the
Supreme Court of the United States

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

Applicants,

v.

STATE OF TEXAS, ET AL.,

On Application for a Stay of the Injunction Issued by the United States District Court for the Northern District of Texas and for an Administrative Stay

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF TEXAS AS AMICI CURIAE IN SUPPORT OF APPLICANTS

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MOTION FOR LEAVE TO FILE[i]

Amici curiae respectfully move for leave to file a brief in support of the government and its stay application; to file the enclosed brief without 10 days' advance notice to the parties of amici's intent to file; and to file in unbound format on 8½-by-11-inch paper. *See* Sup. Ct. R. 37.2(a). Respondents do not oppose the filing of this brief, and the government takes no position on it.

1. Statement of Movants' Interest. The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and 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.

The district court issued an order vacating the termination of the "Migrant Protection Protocols" (MPP) and requiring the federal government to reinstitute the program, and the court of appeals denied the government's request for a stay. Amici respectfully submit that their brief will assist the Court in evaluating Respondents' claims and the lower courts' reasoning, particularly in light of amici's experience with the provisions of the Immigration and Nationality Act that are at issue and their

[i] No counsel for any party authored the amicus brief in whole or in part, and no person or entity other than amici, their members, or their counsel made a monetary contribution intended to fund its preparation or submission. Sup. Ct. R. 37.6.

implementation in practice. The ACLU has litigated numerous cases involving immigrants' rights, including cases addressing MPP. *See, e.g.*, *Innovation Law Lab v. Mayorkas*, 3:19-cv-807 (N.D. Cal.); *Nora v. Mayorkas*, 1:20-cv-993 (D.D.C.). The ACLU has also litigated numerous other cases involving immigration detention before this Court. *See, e.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *Zadvydas v. Davis*, 533 U.S. 678 (2001). Amici have a strong interest in the outcome of this litigation and respectfully submit that their perspective will aid this Court's deliberations. Accordingly, amici respectfully request the Court's leave to file the attached brief.

2. Statement Regarding Brief Form and Timing. Given the expedited consideration of this matter of significant national interest, amici respectfully request leave to file the enclosed brief without 10 days' advance notice to the parties of intent to file and to file in unbound format on 8½-by-11-inch paper. The court of appeals denied the government's emergency motion for a stay on August 19, 2021. The application to this Court for a stay was filed on August 20, 2021. That day, the Court set a deadline of 5 p.m. on August 24, 2021, for Respondents' brief and issued an administrative stay that expires at 11:59 p.m. on August 24, 2021. This accelerated timing justifies the request to file the enclosed amicus brief without 10 days' advance notice to the parties of intent to file and in unbound format.

CONCLUSION

Amici respectfully request that the Court grant leave to file the enclosed brief in support of the stay application; to file the enclosed brief without 10 days' advance

notice to the parties of amici's intent to file; and to file in unbound format on 8½-by-11-inch paper.

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Dated: August 23, 2021

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and 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. Amici have a strong interest in the outcome of this litigation and respectfully submit that their perspective will aid this Court's deliberations.

INTRODUCTION

As the government has explained in its application, the decisions below are deeply flawed and a stay of the district court's order is amply justified. Amici write to underscore two points.

First, amici write to elaborate further on the power to "parole" noncitizens from detention. The existence of that authority is fatal to the statutory reasoning adopted below. As the government explains, Stay App. 21-25, the district court's conclusion that 8 U.S.C. § 1225 *requires* the government to restart the "Migrant Protection

[1] Amici were unable to give ten days' advance notice of intent to file this brief, as noted in the accompanying motion for leave to file. *See* Sup. Ct. R. 37.2(a). No counsel for any party authored the amicus brief in whole or in part, and no person or entity other than amici, their members, or their counsel made a monetary contribution intended to fund its preparation or submission. Sup. Ct. R. 37.6.

Protocols" (MPP) is wrong for many reasons. But, in particular, the order rests on the false premise that the immigration laws provide the Department of Homeland Security (DHS) with only two options regarding individuals who arrive at the border seeking asylum: either detain every individual, or forcibly return them to Mexico before giving them a hearing. Because DHS lacks capacity to detain everyone, the district court held, the agency is required to return noncitizens to Mexico pursuant to § 1225(b)(2)(C) and must restart MPP.

The premise of that reasoning is simply false. As demonstrated by the consistent practice of the government over many years, Congress never put the Executive Branch to this binary choice. Instead, DHS has parole power to release people seeking asylum on a case-by-case basis pending removal proceedings. And that broad power, enacted by Congress and implemented through regulations, has been exercised by every administration for decades. Because of the parole authority, the agency in fact has a third option available beyond the binary choice the district court posited. And without that false binary choice, the district court's decision requiring DHS to restart MPP falls apart.

The court of appeals, without explicitly acknowledging that the district court misconstrued the statutory scheme, asserted that the district court had meant to say only that parole cannot be used to "simply release every alien described in § 1225 *en masse* into the United States." App. 29a. But that reading of the parole statute, even if correct, can no more justify an injunction than the district court's actual reasoning as stated in the injunction order. Even if the court of appeals were correct about that

limitation on the parole power, there was no finding below or any evidence that such a limitation is being violated. To the contrary, the district court concluded only that *more* noncitizens would be released without MPP—a result the parole statute plainly permits—and the government has never released "every" asylum seeker on parole "*en masse*" nor asserted any intention of doing so.

Thus the lower courts quite clearly failed to provide any logical basis for holding that MPP is mandatory.[2] The district court's statutory analysis was plainly wrong as it improperly set aside the parole authority enacted by Congress. And the court of appeals' statutory analysis, taken at face value, does not even describe how the cessation of MPP entails any violation of § 1225 or the parole statute (or any other provision).[3]

Second, the court of appeals (but not the district court) relied extensively on an agreement signed by Texas and an official of the outgoing administration just days before President Biden's inauguration. That agreement runs afoul of the reserved powers doctrine, which prevents government officials from using contracts to bind future administrations from changing policies and effectively signing away sovereign

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[2] As the Ninth Circuit held, MPP in fact violated the statute by unlawfully returning noncitizens to Mexico who were not subject to the contiguous-territory-return provision. *See Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir.), *cert. granted*, 141 S. Ct. 617 (2020), *and vacated and remanded sub nom. Mayorkas v. Innovation Law Lab*, No. 19-1212, 2021 WL 2520313 (U.S. June 21, 2021), *and vacated as moot sub nom. Innovation Law Lab v. Mayorkas*, 5 F.4th 1099 (9th Cir. 2021) (affirming a nationwide preliminary injunction against MPP).

[3] While the court of appeals did state that the government is "[un]likely to succeed on . . . its § 1225 arguments," App. 28a, that conclusion simply does not follow from its analysis.

powers that belong to the People. The Texas agreement is therefore invalid and unenforceable, and none of its provisions—including its purported stipulations—could properly be relied on to justify the issuance of an injunction. For this reason, as well, the Court should grant a stay.

ARGUMENT

I. NO STATUTE COMMANDS THE USE OF CONTIGUOUS-TERRITORY RETURN.

1. The district court conceded that the text of the contiguous-territory-return statute, 8 U.S.C. § 1225(b)(2)(C), does *not* require MPP or any similar program of contiguous-territory return. App. 66a. Nor could it have held otherwise. The statutory language is plainly permissive—"the Attorney General *may* return"—and Congress has not said anywhere that contiguous-territory return is mandatory, under any circumstances. Nevertheless, the district court held that "terminating MPP necessarily leads to the systemic violation of Section 1225." *Id.* at 78a. The court reached this erroneous conclusion by misreading the statutory scheme; in its view, "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 77a, and if DHS lacks the resources to detain *all* such asylum seekers, *id.*, then the *only* option is the contiguous-territory-return provision, and so MPP is required, *id.* at 78a.

As explained below, Congress did not impose that dilemma on the Executive Branch. Yet the district court's decision depended on this faulty reasoning at every turn, *see id.* at 76a-78a (merits); *id.* at 80a, 85a (declining to remand to the agency for reconsideration without vacatur, and issuing injunction), including in its conclusion

that the decision to terminate MPP was not committed to agency discretion by law—a conclusion that was necessary to even reach Respondents' Administrative Procedure Act claims, *id.* at 66a.

In reality, there is nothing in either the detention or contiguous-territory-return provisions—or anywhere else in the immigration statutes, for that matter—that limits the Executive Branch to a choice between either detaining all people seeking asylum at the border or forcibly returning people to Mexico before hearing their claims. To the contrary, Congress expressly provided that DHS has 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 parole power to release people from detention.

The district court acknowledged the statutory parole authority in a footnote. App. 77a n.11. But it stated, without any basis in the statutory text or otherwise, that the parole power was "narrowly prescribed" and does not constitute a broad enough authorization to obviate the asserted need for the mass application of contiguous-territory return through the MPP scheme. *Id.* That is simply wrong. The

parole statute, 8 U.S.C. § 1182(d)(5)(A), provides for release on a case-by-basis "for urgent humanitarian reasons or significant public benefit." Through this plain statutory authorization, Congress left it to the Executive Branch to decide what constituted an "urgent humanitarian" problem or a "significant" benefit to the public. And notably, elsewhere in the Immigration and Nationality Act, Congress has been specific when it intends to more narrowly circumscribe executive authority to release from detention. *See, e.g.*, 8 U.S.C. § 1226(c)(2) (permitting release of certain noncitizens "only" if "necessary" for witness protection purposes). The district court's injunction order read such restrictive language into the parole statute where none exists.

DHS and its predecessor agency have long interpreted the parole authority to grant broad discretion to release, and decades ago promulgated regulations, consistent with that interpretation, to describe situations in which parole would "generally be justified." 8 C.F.R. § 212.5(b). Like the statute, the regulations also provide for broad discretion; for example, one of those categories is "[a]liens 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). Neither of the courts below even acknowledged this regulation, much less explained why they failed to defer to 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 heavily on its conclusion that the 1996 amendment to the parole statute "'specifically narrowed the executive's discretion.'" App. 77a n.11 (quoting *Cruz-Miguel v. Holder*, 650 F.3d 189, 199 (2d Cir. 2011)).[4] But that amendment's primary change was to require that parole decisions be made on a "case-by-case" basis. 8 U.S.C. § 1182(d)(5)(A). It did not set any sort of cap on the number of people DHS can decide to release on parole. Nor did Congress constrain the Executive Branch's broad discretion to determine when parole is warranted "for urgent humanitarian reasons or significant public benefit." *Id.* Accordingly, after the 1996 amendment to the parole statute, the agency incorporated the new "case-by-case" requirement into its regulation, while also maintaining its longstanding regulatory authority to release when "continued detention is not in the public interest," 8 C.F.R. § 212.5(b)(5), which remained consistent with the statute after the 1996 amendment.[5] The district court did not even try to explain why that interpretation is not entitled to *Chevron* deference.

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[4] *Cruz-Miguel* addressed an entirely different 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.

[5] *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)]"). Notably, by contrast, in the same rulemaking the government adopted a separate, narrower regulatory parole authority, but *only* as to particular 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

There is simply no textual basis for the district court's conclusion that the 1996 amendment to the parole statute somehow precludes the government from exercising that discretionary authority to release people covered by § 1225, and therefore triggers a requirement for MPP. Indeed, Congress enacted the relevant provisions of § 1225 at the very same time it amended the parole statute to clarify that the latter should be used on a "case-by-case" basis.[6] In doing so, Congress did not indicate in any way that parole was no longer an option for the Executive Branch for individuals covered by § 1225. Indeed, this Court has explicitly recognized that the government has the power to use the parole statute to release people covered by § 1225, notwithstanding its "mandatory detention" provision prohibiting release through the distinct mechanism of *bond*, which is otherwise generally available under 8 U.S.C. § 1226(a). *Jennings v. Rodriguez*, 138 S. Ct. 830, 842-44 (2018).[7]

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meet a medical emergency" or "necessary for a legitimate law enforcement objective"); 62 Fed. Reg. at 10,320, 10,356.

[6] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C, §§ 302, 602, Pub. L. 104-208, 110 Stat 3009.

[7] The district court also cited content from an agency website that has nothing to do with parole as a mechanism for release from detention, but that instead refers to "parole" in an entirely different sense, namely permitting individuals to physically enter the United States from abroad without legally admitting them. The website stated that "parole" is not "intended 'to replace established refugee processing channels.'" App. 77a n.11 (quoting D. Ct. App. 336). Refugee processing, 8 U.S.C. § 1157, however, is entirely distinct (as a statutory and practical matter) from adjudicating asylum claims, 8 U.S.C. § 1158(a)(1).

The court also relied on a law professor's comment in a newspaper article. App. 77a n.11 (citing AR 184). Even if such "evidence" could be a basis for statutory interpretation, the quotation refers to an Attorney General decision holding that certain asylum seekers would not be eligible for release on bond. AR 181-85. The decision itself emphasized that noncitizens would still be eligible for release on parole, underscoring that the parole power has been recognized and used by *every*

And indeed, since that 1996 amendment, the government has continued to release individuals covered by § 1225 under the parole statute. The court below failed to contend with this consistent practice of five presidential administrations in the 20 years since § 1225's contiguous-territory-return provision was enacted by Congress. No administration or court has ever contended that application of the contiguous-territory-return statute might be mandatory, because of any purported limitation on the parole authority or in *any* circumstance, until the district court did so here. Nothing in its opinion justifies that conclusion.

2. In denying a stay of the district court's injunction, the court of appeals deployed a different, but also erroneous, analysis to try to brush aside the parole statute. Without explicitly noting its divergence from the district court's reasoning, the Fifth Circuit declared that the district court only meant to say that the parole power cannot be used to "simply release every alien described in § 1225 *en masse* into the United States." App. 29a; *see also id*. at 27a.

This is plainly not what the district court said in its order, as to either the statutory limits on the parole power or what DHS actually is doing or will do. To the contrary, the district court found only that in the absence of MPP "*more* aliens will be released and paroled" than were released under MPP. App. 52a (emphasis added). Indeed, the entire premise of the district court's statutory holding is that the government is detaining some people under § 1225, but releasing *some* others because

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administration. *Matter of M-S-*, 27 I.&N. Dec. 509, 516, 518 (A.G. 2019) (citing 8 C.F.R. § 212.5).

it cannot detain *all* of them. *Id.* at 66a (finding that DHS could choose to "detain *every* alien required by Section 1225 . . . [b]ut if it is incapable of detaining *such a large number*, then the statute" requires reinstatement of MPP) (emphases added); *see also id.* at 77a-78a (relying on resource constraints limiting the number of individuals who can be detained).

Neither court's account can establish any statutory violation here. The district court was wrong about what the parole statute allows: Releasing *some* people is precisely what Congress authorized, and the statute nowhere says DHS is barred from releasing *more* people than it did under a prior administration. And under the court of appeals' interpretation of the law, even assuming it is correct, there is no violation of the parole power on the facts of this case. Respondents did not even allege that DHS is releasing "every alien described in § 1225," App. 29a, and there is nothing in the record to suggest that is happening, *see id.* at 52a (district court finding only that "*more* aliens will be released") (emphasis added). Moreover, the court of appeals did not even attempt to explain how such a violation of the parole statute, were it to occur, would require DHS to implement blanket use of contiguous-territory return through MPP.

At bottom, both courts make the same fundamental error in ignoring the fact that Congress provided the Executive Branch with the flexible power to release individuals pursuant to its parole authority in 8 U.S.C. § 1182(d)(5)(A), so there is no logical basis to conclude that limits on detention capacity mandate the use of the discretionary contiguous-territory-return authority in § 1225. This legal error, which

infects the decisions below in multiple ways, fully justifies a stay of the injunction requiring the government to resume MPP.

II. THE AGREEMENT ON WHICH THE COURT OF APPEALS RELIED WAS INVALID AND UNENFORCEABLE.

The court of appeals committed an additional error in relying on an agreement signed by an outgoing DHS official in the final days of the last administration, in which the official promised, among other things, that DHS would not change any immigration policy for at least six months without Texas's consent. Notably, the district court declined to rely on the agreement, concluding it had expired by its own terms. App. 78a. The court of appeals, however, relied on this document in its arbitrary-and-capricious analysis, App. 21a, and in considering whether a stay would be in the public interest, *id.* at 33a, indicating it was "binding" and that DHS had "violated" it, *id.* The court's reliance on this agreement—which was invalid and unenforceable from the moment it was signed—is an independent and serious error and yet another reason to grant a stay.

The agreement's plain purpose was to bind the incoming President and prevent him from setting new policies consistent with his authority conferred by Congress. It pledged to the State of Texas that DHS would indefinitely continue the prior administration's immigration policies "to the maximum extent possible," including on issues as varied as limiting asylum and prioritizing detention over alternatives. Agreement III.A.1, D. Ct. Doc. 1-2. It also purported to grant Texas a 180-day veto period over essentially every policy change the new administration might adopt, including "in any way modifying immigration enforcement"; decreasing officer

deployments, removals, or arrests; "changing the quantity or quality of immigration benefits" for noncitizens; and so forth. Agreement III.A.2, 3. As a remedy, the agreement contemplates Texas suing for "injunctive relief, including specific performance." Agreement VI. To amici's knowledge, no outgoing administration has ever made such a blatant attempt to bind an incoming president with this kind of "contract."

As this Court has long held, such an agreement is invalid and unenforceable under the "reserved powers" doctrine. A government may not "enter into an agreement that limits its power to act in the future" where the agreement "surrenders an essential attribute of its sovereignty." *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 23 (1977). "[T]he power of governing is a trust committed by the people to the government, no part of which can be granted away." *Stone v. Mississippi*, 101 U.S. 814, 820 (1879). Thus, "agencies can govern according to their discretion . . . while in power; but they cannot give away nor sell the discretion of those that are to come after them . . . ." *Id.*[8]

[8] Even the states, which are constitutionally bound not to impair the obligation of contracts, cannot be held to a promise to give away sovereign authority. *Id.* at 819-21; *see* U.S. Const. art. I, § 10, cl. 1. This is all the more true for the federal government, which is not subject to the Contracts Clause. *See, e.g.*, *United States v. Winstar Corp.*, 518 U.S. 839, 888-89 (1996) (plurality opinion) (assuming the federal government "may not contract away an essential attribute of its sovereignty") (internal quotation marks omitted); *id.* at 922-23 (Scalia, J., concurring in the judgment) (similar); *N. Am. Commercial Co. v. United States*, 171 U.S. 110, 137 (1898) (the federal government's "exercise of power as a sovereign . . . cannot be contracted away").

This Court has explained that mechanisms that "bind . . . officials to the policy preferences of their predecessors," as the agreement transparently seeks to do, "may thereby 'improperly deprive future officials of their designated legislative and executive powers.'" *Horne v. Flores*, 557 U.S. 433, 449 (2009) (quoting *Frew v. Hawkins*, 540 U.S. 431, 441 (2004)). And tying the hands of future administrations in this way constrains "their ability to fulfill their duties as *democratically-elected* officials." *Id.* (emphasis added). Thus, it also deprives the People of their basic ability to bring about change by voting for officials who promise to alter policy.

The agreement at issue here plainly violates the reserved powers doctrine. It purports to give Texas a veto over "the National Government's constitutional power" to regulate immigration, implicating the "inherent power as sovereign to control and conduct relations with foreign nations." *Arizona v. United States*, 567 U.S. 387, 394-95 (2012). That kind of sovereign function lies at the core of the powers that may not be contracted away under the reserved powers doctrine. *Cf. Stone*, 101 U.S. at 817-21 (power to regulate lotteries); *U.S. Trust Co.*, 431 U.S. at 25 (explaining that certain "purely financial" contracts fall outside the doctrine). That principle forecloses Respondents' view that, through an agreement with a state, the federal government can effectively permit "one state to make policy decisions for other states," Br. of Kentucky, Texas, Missouri, *et al.*, *Montana v. Washington*, No. 22O152 (U.S. filed Mar. 24, 2020), 2020 WL 4450467, at *2, and the nation as a whole.[9]

[9] Respondents' attempt to enforce this agreement also runs afoul of the related doctrine of sovereign immunity. It is "settled that sovereign immunity bars a suit against the United States for specific performance of a contract." *Bowen v.*

The timing of this agreement makes its invalidity especially stark. It was signed by a politically appointed official of the prior administration on January 8, 2021—over two months after the presidential election, the day after Congress certified the results, and just 12 days before the new administration was to be inaugurated. There is no reasonable explanation for this timing except that the very *purpose* of the agreement was to "bind" new administration officials "to the policy preferences of their predecessors," and thus "'improperly deprive [them] of their designated . . . executive powers.'" *Horne*, 557 U.S. at 449.[10]

The agreement is thus plainly invalid, and the court of appeals' reliance on any of its provisions—including pointing to its stipulations in concluding that the MPP termination was arbitrary and capricious, App. 21a, and that a stay was not in the public interest, *id.* at 33a—was erroneous.

Massachusetts, 487 U.S. 879, 921 (1988) (Scalia, J., dissenting) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)). This rule also serves to ensure that the federal government remains responsive to the People: "The Government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of . . . contract right." *Larson*, 337 U.S. at 704. And litigants cannot sidestep this bar by bringing a contract claim disguised in the "plumage" of a suit under, for example, the Administrative Procedure Act. *Int'l Eng'g Co., Div. of A-T-O v. Richardson*, 512 F.2d 573, 580 & n.10 (D.C. Cir. 1975); *see also Robbins v. U.S. Bureau of Land Mgmt.*, 438 F.3d 1074, 1081-82 (10th Cir. 2006).

[10] *Horne* addressed consent decrees, which are often critical to "vigilantly enforce federal law." 557 U.S. at 450. While consent decrees can bind future administrations, they are subject to important safeguards. *See Frew*, 540 U.S. at 437. Courts must, for example, consider and approve (or disapprove) them, including by hearing objections from third parties. *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 525-26, 528-29 (1986). No such procedures applied to this agreement.

CONCLUSION

The Court should grant the stay.

Respectfully Submitted,

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Dated: August 23, 2021