U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

January 19, 2022

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Joseph R. Biden, Jr., President of the United States, et al. v. Texas, et al., No. 21-954

Dear Mr. Harris:

Petitioners respectfully oppose respondents' request for a 30-day extension of time to file a brief in opposition to the petition for a writ of certiorari. Respondents' request would significantly delay this Court's resolution of this important case and would severely prejudice the United States, which is experiencing ongoing harm to the Executive Branch's constitutional and statutory authority to manage the border and conduct the Nation's foreign policy as a result of the extraordinary permanent injunction that is the subject of the petition.

This case concerns the Secretary of Homeland Security's decision to stop using a discretionary immigration-enforcement policy first implemented in 2019. That policy, known as the Migrant Protection Protocols (MPP), implemented on a programmatic basis the Secretary's authority under 8 U.S.C. 1225(b)(2)(C), which provides that the Secretary "may" return certain noncitizens to Mexico during the pendency of their immigration proceedings. Under MPP, the Department of Homeland Security—with the Government of Mexico's consent—returned to Mexico certain foreign nationals who arrived in the United States by land from Mexico.

In June 2021, the Secretary issued a decision terminating MPP. The district court vacated the Secretary's termination decision and issued a permanent injunction, concluding that (1) Section 1225 requires DHS to continue using MPP, and (2) the Secretary's decision was insufficiently explained. This Court denied the government's request for a stay of that injunction pending its appeal. See *Biden* v. *Texas*, 2021 WL 3732667, at *1 (Aug. 24, 2021) (No. 21A21). The Court did not endorse the district court's interpretation of Section 1225, but it concluded that the government was unlikely to succeed in overturning the district court's conclusion that the Secretary's explanation was inadequate. See *ibid.*

While the government's appeal was pending, the Secretary addressed the deficiencies the district court had identified in his original explanation by thoroughly reconsidering the matter and issuing a new decision that again terminated MPP. After carefully weighing the full range of MPP's costs and benefits, the Secretary explained, among other things, that MPP is not the best tool for deterring unlawful migration; that MPP exposes migrants to unacceptable risks to their

physical safety; and that MPP detracts from the Executive's foreign-relations efforts to manage regional migration.

On December 13, 2021, the court of appeals affirmed the district court's permanent injunction. In so doing, the court of appeals refused even to consider—or to allow the district court to consider—the Secretary's new termination decision and accompanying explanation. Instead, the court of appeals held that the Secretary's new decision had no legal effect, and it upheld the district court's injunction after concluding that the Secretary's original, superseded explanation was deficient. The court of appeals also held that Section 1225 compels DHS to retain MPP unless and until Congress has appropriated funds for DHS to detain virtually every noncitizen who arrives at the border without entitlement to admission. The court of appeals' unprecedented interpretation suggests that every presidential administration—including the one that adopted MPP—has been in continuous and systematic violation of Section 1225 since the relevant statutory provisions took effect in 1997.

As the petition explains (at 15, 34-35), this Court should hear and decide this case this Term. The district court's extraordinary injunction—compelling the Executive to engage with Mexico to implement a *discretionary* immigration-enforcement program—will remain in place until this Court resolves this case. Respondents' requested extension would preclude the Court from considering the petition at least until its March 18 conference, which would make it difficult for the Court to hear the case this Term if it granted certiorari. That would mean that the critically important issues raised in the petition likely would not be decided until sometime in 2023. In the meantime, the government would be forced to maintain a controversial program that it has already twice determined is not in the best interests of the United States. Moreover, the court of appeals' unprecedented construction of Section 1225 would continue to threaten significant disruption in other cases where parties seek to upend the government's longstanding policies regarding immigration detention and parole.

To facilitate this Court's consideration of the case this Term, the government prepared the petition for a writ of certiorari over the holidays and filed it just 16 days after the court of appeals' decision. The government did not ask this Court to curtail respondents' 30-day response period under Rule 15.3. But the petition explained (at 35) that the government had filed with such speed in order to allow the Court to consider the petition at its February 18 conference, and if the petition is granted, to expedite merits briefing to allow the case to be heard during the Court's April sitting. The Court has already expedited merits briefing to a comparable degree in other cases this Term. See, *e.g.*, *Ramirez* v. *Collier*, 142 S. Ct. 50 (2021) (No. 21-5592) (granting certiorari on September 8, 2021, and directing the Clerk to "establish a briefing schedule that will allow the case to be argued in October or November 2021"). And the Court has previously expedited important cases granted late in a Term for consideration during the same Term. See, *e.g.*, *Department of Commerce* v. *New York*, 139 S. Ct. 953 (2019) (No. 18-966) (granting certiorari on February 15, 2019, and directing that "[t]he case will be set for argument in the second week of the April argument session"); Stephen M. Shapiro et al., *Supreme Court Practice* 13-5, 14-13 & n.25 (11th ed. 2019). The Court should preserve the option of following the same course here, in recognition of the significant foreign-policy and immigration-enforcement implications of the court of appeals' decision.

Respondents' request for an extension does not dispute the substantial reasons for resolving the case this Term, which were described in the petition. Respondents instead simply invoke the press of other business. But that concern does not warrant an extension in light of the need for prompt resolution of the exceptionally important issues at stake here. If the brief in opposition is filed as scheduled on January 28, the government intends to waive its 14-day period for filing a reply brief under Rule 15.5 to permit the case to be distributed on February 2 for consideration at the February 18 conference. Because respondents' requested extension of 30 days would delay the Court's consideration of the petition until at least March 18 and thereby compromise the Court's ability to hear the case this Term if it chooses to do so, that request should be denied.

Sincerely,

Elizabeth B. Prelogar
Solicitor General

cc: See Attached Service List

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