Nos. 23-11528, 23-11644

In the United States Court of Appeals for the Eleventh Circuit

STATE OF FLORIDA,

Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellants.

OPPOSITION TO APPELLANTS' MOTION FOR ADMINISTRATIVE STAY AND STAY PENDING APPEAL

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
NOS. 3:21-CV-1066, 3:23-CV-9962

ASHLEY MOODY
Attorney General of Florida

HENRY C. WHITAKER
Solicitor General
DANIEL W. BELL
Chief Deputy Solicitor General
DARRICK W. MONSON
Assistant Solicitor General
ZACHARY GROUEV
Solicitor General Fellow

JAMES H. PERCIVAL
Chief of Staff
NATALIE P. CHRISTMAS
JOSEPH E. HART
Counselors to the Attorney General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
(850) 410-2672 (fax)
henry.whitaker@myfloridalegal.com

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellee certifies that the following is a complete list of interested persons not included in Defendants-Appellants' Motion:

Bell, Daniel

Brodeen, Karen

Coody, Jason R.

Crapo, Matt A.

Fabian, Sarah B.

Faruqui, Bilal A.

Fudim, Elissa P.

Garland, Merrick

Jaddou, Ur M.

Johnson, Tae D.

Miller, Troy

Monson, Darrick

Moyle, Marie A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

For more than two years, the Department of Homeland Security has authorized the mass-release into the United States of migrants encountered at the southern border, flouting congressional directives to detain aliens who enter the country unlawfully and to parole them only on a "case-by-case" basis, and only "temporarily." 8 U.S.C. § 1182(d)(5)(A). These expedited appellate proceedings concern the two most recent iterations of that policy—"Parole + ATD" and "Parole with Conditions"—under which DHS has released into the country as many as 100,000 aliens per month under the guise of granting "case-by-case" parole, with no reasonable prospect of returning them to custody. *See Biden v. Texas*, 142 S. Ct. 2528, 2554 (2022) (Alito, J., dissenting) (observing that 27,000 grants of parole in one month implies that DHS is violating § 1182(d)(5)(A)).[1]

After 18 months of litigation culminating in a four-day bench trial, on March 8, 2023, the district court vacated Parole + ATD as contrary to Section 1182(d)(5)(A) and the Administrative Procedure Act. App.148. In closing arguments and post-trial briefing, DHS had warned—as it does now—of "disastrous consequences . . . the day after the policy was ended." App.496, 635, 193 (cleaned up). The district court thus

[1] *See* U.S. Customs and Border Protection, *Custody and Transfer Statistics FY2023*, https://tinyurl.com/hd3fhxf8 (under tab titled "U.S. Border Patrol – Disposition and Transfers") (130,425 aliens paroled in December 2022 under Parole + ATD); Supp.App.158–59 (8,807 aliens released in less than two days under Parole with Conditions).

stayed its ruling for seven days so that DHS could seek emergency relief. App.149. DHS did not. Instead, it waited 58 days to appeal. It has since come to light that DHS had in fact stopped using Parole + ATD the week before the trial had even begun. App.211.

Two months later, DHS contrived the "emergency" that occasions the present stay requests. The agency had long known that the Title 42 order would expire on May 11. But DHS apparently did not even try to shore up the unlawful parole policy it now insists is so critical to a post-Title 42 world until May 10. That day, DHS slapped a fake moustache and ill-fitting wig on its invalidated Parole + ATD policy—now calling it "Parole with Conditions"—and began mass-releasing migrants under the same statute, in the same manner, only faster. When a DHS spokesman spilled the beans to a reporter, Florida immediately sued to vindicate the district court's prior judgment.

The district court rightly enjoined Parole with Conditions as a poorly disguised end-run around its judgment. In Florida's follow-on suit, DHS once again cried wolf, tripling down on its earlier, debunked predictions by forecasting that the end of Title 42 would herald a massive increase in the number of border encounters. App.215. As the district court found, however, those projections fared no better than the last. *See* App.162–63.

The Court should reject DHS's belated request to stay the district court's original vacatur judgment and to stay the follow-on injunction. In both cases, the district court correctly recognized that DHS may not lawfully use parole as a principal method for processing and releasing aliens who unlawfully enter this country. The district court also

did not clearly err in declining to credit DHS's latest cries of disaster, and DHS's antics in this litigation are reason enough to deny it a stay on the equities.

STATEMENT

A. Statutory background

The Immigration and Nationality Act (INA) "establishes a comprehensive scheme for aliens' exclusion from and admission to the United States." *Moorhead v. United States*, 774 F.2d 936, 941 (9th Cir. 1985). Most relevant here, a DHS component, Customs and Border Protection (CBP), manages that comprehensive scheme at the southern border. CBP both runs the ports of entry (where lawful entry is supposed to occur), and, through the U.S. Border Patrol, patrols the land between ports of entry.

Aliens who enter the United States unlawfully in between ports of entry are among those considered to be "applicants for admission." 8 U.S.C. § 1225(a)(1). The INA provides for such aliens to be placed in removal proceedings, which come in two flavors—expedited removal proceedings, *see* 8 U.S.C. § 1225(b)(1), and ordinary removal proceedings, 8 U.S.C. §§ 1225(b)(2), 1229a. Section 1225(b) "mandate[s] detention of applicants for admission" pending completion of those proceedings. *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018). DHS initiates ordinary removal proceedings by issuing an alien a "notice to appear." 8 C.F.R. § 1239.1(a).

The statute contains a narrow exception to those detention mandates. DHS may parole applicants for admission under 8 U.S.C. § 1182(d)(5)(A), but only "temporarily," "on a case-by-case basis," and only for "urgent humanitarian reasons or significant

public benefit." *See Jennings*, 138 S. Ct. at 837. The alien "shall forthwith return or be returned to the custody from which he was paroled" once "the purpose of the parole has been served." *Id.* (quoting 8 U.S.C. § 1182(d)(5)(A)).

B. Factual background

At issue here is the Biden Administration's attempt to transform parole from a narrow safety valve into a primary processing mechanism for mass-releasing aliens into this country.

The district court's findings reflect that, soon after inauguration, the Biden Administration set about adopting policies that ballooned the number of migrants unlawfully flowing over the southern border into the United States, such as eliminating all of DHS's family-unit detention capacity. App.57–58. The Administration also eliminated mandatory immigration detention, except where DHS deemed the alien a public-safety or flight risk. App.76–78. As the district court put it, "[c]ollectively, these actions were akin to posting a flashing 'Come In, We're Open' sign on the southern border." App.58.

The resulting tsunami of aliens unlawfully flowing into the country over the southern border necessitated other policy changes starting in March 2021. Traditionally, DHS released applicants for admission by issuing them a "notice to appear," thus initiating an ordinary removal proceeding against the alien under 8 U.S.C. § 1229a. DHS would then release the alien under 8 U.S.C. § 1226(a), which generally permits release

of certain aliens in removal proceedings.[2] Finding even the mere issuance of a notice to appear too burdensome, though, in March 2021 DHS instead began mass-releasing aliens by issuing them a "notice to report," without even initiating a removal proceeding. App.64, 232–33.

After Florida caught wind of this so-called "prosecutorial discretion" policy, Florida in September 2021 sued to invalidate it. Supp.App.29–51. DHS made no attempt to defend that policy in response to Florida's suit. Instead, DHS revoked the policy and unveiled in its place the first iteration of Parole + ATD—a reference to "Alternatives to Detention." That policy invoked DHS's parole authority to justify essentially the same mass-release practices, though limited to family units. App.200–02.

Eight months later, DHS abandoned that policy too, a fact Florida learned of only after a DHS witness admitted in a deposition that Parole + ATD was no longer limited to family units. Supp.App.101–12. Its replacement was a second iteration of Parole + ATD—this one no longer limited to family units and having no explicit instructions that an alien was to report to ICE for issuance of a notice to appear. App.234–37.

Meanwhile, as DHS delayed judicial review of its mass-release policies by constantly moving the goalposts, DHS was releasing close to 100,000 aliens per month

[2] The district court concluded that this practice too is unlawful, App.112–24, but that conclusion is not at issue here.

into the United States.[3] The district court held a bench trial beginning on January 9, 2023. App.41. It held that Parole + ATD violated Section 1182(d)(5)(A) in multiple respects. App.129–35. The court thus vacated the policy but stayed its order sua sponte for seven days to permit appellate stay litigation. App.149.

DHS did not immediately seek a stay or appeal. Instead, on the eve of ending Title 42, DHS issued a "Parole with Conditions" policy that the district court found was "materially indistinguishable" from the vacated Parole + ATD policy. App.174.

Both policies establish thresholds for certain levels of decreased detention capacity or increased border encounters before a Border Patrol sector becomes eligible to use the policy. App.206, 236. Both policies permit the use of parole to enhance DHS's operational efficiency and to account for a lack of detention capacity. App.207 (authorizing parole when Border Patrol thinks resources are better spent elsewhere because its "resources are finite"), 235 (referring to Parole + ATD as a "processing mechanism" with various operational benefits). Neither policy does anything to ensure that parolees return to custody after parole, and both policies claim that they are to be used "sparingly." App.206, 235. Parole with Conditions requires parolees to schedule an appointment with ICE or request a notice to appear by mail within 60 days, App.203,

[3] *See* U.S. Customs and Border Protection, *Custody and Transfer Statistics FY2023*, https://tinyurl.com/hd3fhxf8 (under tab titled "U.S. Border Patrol – Disposition and Transfers").

while Parole + ATD terminated either after 60 days or when an alien was issued a notice to appear, *see* Mot. at 11–12.

Concerned that DHS appeared to be operating a vacated policy, Florida sued again. The district court promptly granted a temporary restraining order, noting that "DHS cannot . . . adopt a functionally identical policy as the one the Court vacated" and "expect a different outcome." App.177.

Then—more than 60 days after the original vacatur order—DHS moved to stay both the vacatur order and the TRO pending appeal. The district court denied the motion to stay the vacatur order as "borderline frivolous," in light of DHS's delay. App.150–52.

As for the TRO, the district court declined to credit DHS's assertions of irreparable harm. App.192. The court granted DHS's request to convert its TRO into a preliminary injunction but declined to stay either order. App.186–87 n.3, 184–99.

DHS appealed both orders and now asks the Court to stay them pending appeal.

ARGUMENT

A district court's decision not to stay its own order is "entitled to considerable deference." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers). Overcoming that deference requires a movant to prove: (1) likely success on the merits; (2) irreparable harm absent a stay; (3) that a stay will not "substantially injure the other parties interested in the proceeding"; and (4) that the public interest favors a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009). DHS comes nowhere near

meeting this "especially heavy burden." *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers).

I. DHS Is Unlikely to Succeed on the Merits of Either Appeal.

DHS is unlikely to obtain reversal of either the district court's vacatur of the Parole + ATD policy or its injunction against the Parole with Conditions policy.

A. Florida Has Standing to Challenge the Parole Policies.

To establish Article III standing, Florida must show that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

"States are not normal litigants for purposes of invoking federal jurisdiction." *West Virginia v. Dep't of Treasury*, 59 F.4th 1124, 1136 (11th Cir. 2023). As a sovereign state, Florida is entitled to "special solicitude" when asserting a procedural right and an injury to its quasi-sovereign interests. *See Massachusetts v. EPA*, 549 U.S. 497, 519–20 (2007). The APA provides Florida a procedural right to challenge the policies. *Texas v. United States (DAPA)*, 787 F.3d 733, 752 (5th Cir. 2015), *aff'd by an equally divided court*, *United States v. Texas*, 579 U.S. 547 (2016). And the policies harm Florida's interest in preventing individuals with no legal right to be in its territory from entering and using public funds—"the defining characteristic of sovereignty." *Arizona v. United States*, 567 U.S. 387, 417 (2012) (Scalia, J., concurring in part and dissenting in part).

Florida demonstrated that DHS's *en masse* parole policies cause the State "economic detriment"—"the epitome of an injury in fact"—that a favorable ruling would redress. *Chiles v. Thornburgh*, 865 F.2d 1197, 1209 (11th Cir. 1989). The district court found that more than 100,000 aliens released between January 2021 and July 2022 came to Florida, and that those aliens cause increased costs for Florida through public education, "costs of incarceration, unemployment benefits, and emergency Medicaid." App.82, 85–86, 93–94. That is injury in fact. *See Chiles*, 865 F.2d at 1209; *DAPA*, 787 F.3d at 748.

DHS resists these findings without acknowledging its burden to show that they are clearly erroneous. *See City of Vestavia Hills v. Gen. Fid. Ins. Co.*, 676 F.3d 1310, 1313 (11th Cir. 2012). And DHS misreads the record in claiming (at 8) that those findings rest on evidence that precedes Parole + ATD by "nine months." The first iteration of Parole + ATD began in November 2021. App.200. The evidence to which DHS refers compared the numbers of immigrant students in Florida public schools from the 2020–21 schoolyear, before Parole + ATD, with the numbers of immigrant students from the 2021–22 schoolyear, after Parole + ATD went into effect, and revealed about a 17,000-student increase. App.93–94; Supp.App.131, 134–37.

Because the Parole with Conditions policy functions to release aliens into the United States at an even more rapid pace, the district court also did not clearly err in finding that Florida would likely suffer the same injury from that policy. App.161, 178. Indeed, in the less than two days Parole with Conditions was in effect, DHS released

8,807 aliens—a rate higher than any month Parole + ATD policy was operable.[4] Supp.App.158–59.

The district court's findings reflect that aliens processed at the southern border necessarily make it to Florida, the nation's third-largest state, and cause the State to expend funds, which is traceable to the policies and remedied by vacating them or enjoining their use. *See Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs,* 781 F.3d 1271, 1280–81 (11th Cir. 2015) (agreeing that a plaintiff's injury need not "be traced to specific molecules of pollution emitted by the alleged polluter," only "that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged" (quotations omitted)). Though released aliens must independently choose to enter Florida, a "predictable" result of the policies is that at least some of the more than 100,000 aliens released per month will do so. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019). And even if vacatur and an injunction does not completely resolve Florida's injury, partial redress establishes standing. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021).

[4] 8,807 releases in two days amounts to nearly 134,000 in one month based on an average month length of 30.4 days. The highest monthly total under Parole + ATD was 130,425 in December 2022. U.S. Customs and Border Protection, *Custody and Transfer Statistics FY2023*, https://tinyurl.com/hd3fhxf8 (under the tab titled "U.S. Border Patrol – Dispositions and Transfers").

B. The Parole Policies Are Unlawful.

In enacting 8 U.S.C. § 1182(d)(5), Congress gave DHS narrow authority to "parole into the United States temporarily . . . only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." Congress added those limits in 1996 because of its "concern that parole . . . was being used by the executive to circumvent congressionally established immigration policy." *Cruz-Miguel v. Holder*, 650 F.3d 189, 199 n.15 (2d Cir. 2011). The statute further clarifies that "when the purposes of such parole shall . . . have been served the alien shall forthwith return or be returned to . . . custody." 8 U.S.C. § 1182(d)(5)(A). DHS's parole policies violate these requirements.

1. Perhaps most striking, neither policy acknowledges that paroled aliens must be returned to custody once parole's purposes have been served. The policies contain no provision for returning parolees to custody. DHS's contention (at 12) that parole terminates automatically by regulation upon service of a charging document is beside the point. Termination of parole is not return to custody. In fact, DHS made clear that under Parole + ATD aliens would *not* be returned to custody even after a charging document issued. Supp.App.122; *see also* App.250. Worse still, under Parole with Conditions, an alien may cause parole to be terminated by requiring service of their charging documents by mail, with no heed whatsoever for returning to custody. App.203, 207.

2. Although both policies pay lip service to the need for individualized determinations, both focus on creating a new "processing mechanism," App.204, 235, to alleviate congested detention space and increase operational efficiency. That violates the statute's requirement to consider the case-specific situation of each individual alien. Congress established the "case-by-case" requirement to prevent use of parole as precisely the type of "programmatic policy tool" DHS seeks to employ here. *Texas v. Biden*, 20 F.4th 928, 947 (5th Cir. 2021), *rev'd on other grounds Biden v. Texas*, 142 S. Ct. 2528 (2022).

DHS's implementation of the parole policies confirms that they provide for programmatic release. Under Parole + ATD, DHS released as many as 130,000 aliens in a single month[5] after as little as 15 minutes of processing. App.132. Similarly, in less than two days DHS used Parole with Conditions to release 8,807 aliens—nearly half of all aliens encountered at the border on May 10–11.[6] Supp.App.152, 158–59. And DHS's

[5] *See* U.S. Customs and Border Protection, *Custody and Transfer Statistics FY2023*, https://tinyurl.com/hd3fhxf8 (under tab titled "U.S. Border Patrol – Disposition and Transfers").

[6] DHS suggests (at 11, 14) that the district court should have ignored DHS's own data reflecting the number of aliens released under the parole policies because the figures fall outside the administrative record. But the lack of the evidence in the record "effectively frustrates judicial review." App.127–28 n.30 (quoting *Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs*, 87 F.3d 1242, 1246 n.1 (11th Cir. 1996)). Because the evidence is undisputed, highly probative, and contradicts both policies' assertions that they will be used sparingly, the district court did not abuse its discretion in considering the evidence. *See Marllantas, Inc. v. Rodriguez*, 806 F. App'x 864, 866 (11th Cir. 2020) (decision whether to go beyond the administrative record reviewed

own declarant in this Court touts the 15-minute processing time as a reason why DHS needs to operate the two policies. Decl. of Raul L. Ortiz at 4, 15. It defies imagination that DHS can in 15 minutes discern exceptional case-by-case circumstances in more than 100,000 cases a month. *See Biden*, 142 S. Ct. at 2554 (Alito, J., dissenting) (27,000 aliens paroled in one month "gives rise to a strong inference that the Government is not really making these decisions on a case-by-case basis").

3. The policies also fail to limit the exercise of case-by-case discretion to aliens with "urgent humanitarian" needs or whose presence provides a "significant public benefit." Both provide as the relevant case-by-case considerations: immigration status, criminal history, compliance history, community ties, and role as caregiver. App.207, 237. The Parole + ATD policy also mentions "other humanitarian or medical factors," App.237, confirming that it authorizes parole beyond the "urgent" needs specified in the statute. The only limit is that the parolee cannot be a national-security, flight, or public-safety risk or an unaccompanied minor. App.208, 237. In other words, while Section 1182(d)(5) creates only a narrow class of aliens who are eligible for parole, DHS's parole policies invert that rule, creating only a narrow class who are not.

---

for abuse of discretion). That is doubly the case for Parole with Conditions because DHS had not produced the administrative record when the district court ruled.

The Parole with Conditions policy even more explicitly authorizes parole for reasons beyond statutory authorization. The policy authorizes parole if "processing personnel and resources are necessary to process other noncitizens . . . or accomplish enforcement actions that are immediately critical." App.207. But the statute requires *paroling* the alien to result in a public benefit—as when an alien is witness in a criminal case. *See* 8 C.F.R. § 212.5(b)(4).

DHS suggests (at 10) that its "policies and longstanding regulatory authority" support allowing it to parole aliens "whose detention is not in the public interest" and even invokes *Chevron* deference. That ignores Congress's decision in 1996 to narrow the statute from permitting parole of aliens "in the public interest" to the current, narrower language in specific response to what it viewed as Executive Branch abuse of the parole authority. *See Texas*, 20 F.4th at 947 (comparing the statutes). As the district court explained, DHS's boundless interpretation of the parole statute is contrary to the statute's plain terms and therefore entitled to no deference. App.134.

C. The Parole Policies Are Arbitrary and Capricious.

The district court correctly held that Parole + ATD is arbitrary and capricious.

It was arbitrary and capricious for DHS to fail to consider or justify the backlog Parole + ATD would create in immigration proceedings. App.136–38, 343 (every 90 days Parole + ATD is in effect, it adds years and multiple millions of dollars in backlog). Although DHS accuses the district court (at 14) of "disregard[ing]" contrary "evidence

in the administrative record acknowledging and addressing the issue," it cites no specific evidence in support. *See* Mot. at 14 (citing the entire administrative record).

DHS also unreasonably failed to acknowledge or explain the expansion of the Parole + ATD policy beyond family units to single adults. App.139; *see FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021) (agency action must be "reasonably explained"). In response, DHS denies (at 15) that Parole + ATD was limited to family units. That is false. App.201 ("USBP may consider use of Parole + ATD on a case-by-case basis *for FMUs* . . . ." (emphasis added)); Supp.App.67 (DHS asserting in its motion to dismiss that Parole + ATD "appl[ied] only to family units").

The assertion in both parole policies that they would be used sparingly despite mounting evidence to the contrary was also arbitrary and capricious. App.138–39, 206, 235. DHS quibbles with the district court's reliance on evidence outside the administrative record in making this determination, but the district court did not abuse its discretion in considering DHS's own parole data. *See supra* 12 n.6. And anyway, courts may consider evidence beyond the administrative record when evaluating whether an agency "considered all the relevant factors and important aspects of the problem." *Bidi Vapor LLC v. FDA*, 47 F.4th 1191, 1202 (11th Cir. 2022).

Although DHS has not yet produced the administrative record for the Parole with Conditions policy, it too was arbitrary and capricious because it was an attempt to circumvent a court order—not a good-faith rulemaking. The district court vacated Parole + ATD and remanded to DHS for further proceedings. DHS declined to

challenge the vacatur order by seeking a stay or expedited appeal—instead simply reissuing materially the same policy under a different name. *See Baez-Sanchez v. Barr*, 947 F.3d 1033, 1035 (7th Cir. 2020) ("We have never before encountered [an agency's] defiance of a remand order, and we hope never to see it again.").

D. DHS Unlawfully Issued the Policies Without Notice and Comment.

The district court correctly rejected DHS's attempts to evade the notice and comment requirements of 5 U.S.C. § 553. The parole policies are not general statements of policy because they are not "merely an announcement to the public of the policy which the agency hopes to implement." *Brown Express, Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979). Rather, the policies establish the methods—including threshold requirements and factors to consider—by which DHS will determine the status of aliens at the border. *See id.* ("[A] change in the method by which an agency will grant substantive rights is not a 'general statement of policy.'").

DHS cannot avoid notice and comment by invoking the "good cause" exception based on the May 11 termination of the Title 42 order. The district court vacated the Parole + ATD policy more than two months earlier and DHS waited until the day before Title 42's termination to issue a new policy. "Good cause cannot arise as a result

of the agency's own delay." *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 114 (2d Cir. 2018).

E. The District Court's Remedies Are Lawful.

1. Contrary to DHS's assertions, 8 U.S.C. § 1252(f)(1)'s remedial restrictions are inapplicable to DHS's parole policies. Vacatur merely voids an unlawful agency action; it does not "enjoin or restrain the operation" within the meaning of that provision. *See Texas v. United States*, 50 F.4th 498, 528 (5th Cir. 2022). Section 1252(f)(1), moreover, applies only to "part IV" (Sections 1221–32) of the INA. But Section 1182(d)(5)—the source of the parole authority at issue here—is in part II.

DHS argues (at 22) that Section 1252(f)(1) still applies because parole is "how the government implements [S]ection 1225(b)'s detention provisions." But one statute does not "implement" a different one. And if Section 1252(f) governed any provision of the INA that incidentally relates to one in part IV, then Section 1252(f)'s express limit to part IV would mean little.

2. Even so, DHS contends (at 23) that the district court should have limited its remedies to "noncitizens indicating a final address in Florida." In pressing this argument, DHS fails to distinguish between the order vacating Parole + ATD and the injunction against enforcing Parole with Conditions. A vacatur order acts on no specific parties: it nullifies the agency action itself. *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *see also E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 681 (9th Cir. 2021); *United States v. Schwarzbaum*, 24 F.4th 1355, 1364–56 (11th Cir.

2022) (equating vacatur of an agency action with an appellate court's vacatur of a lower court's order).

Injunctions, on the other hand, operate on parties to prevent irreparable harm. The proper scope of an injunction is whatever "extent necessary to protect the interests of the parties." *Georgia v. President of the U.S.*, 46 F.4th 1283, 1303 (11th Cir. 2022). As the district court noted, were the injunction limited to aliens who name Florida as their destination, nothing would stop an alien who named another state from traveling to Florida. App.164, 191. Moreover, DHS disregarded the district court's vacatur order and reinstituted a "functionally identical" policy under a different name. App.177. The district court did not err in entering an injunction in aid of its statutory authority to vacate unlawful agency action under the APA.

II. THE EQUITIES WEIGH AGAINST STAYING THE ORDERS.

DHS (at 18–22) argues that the equities support staying the district court's orders but makes no mention of the district court's findings that DHS's latest predictions of disaster lack credibility. App.152–54, 191–93. Those findings are not clearly erroneous. *See Swain v. Junior*, 958 F.3d 1081, 1088 (11th Cir. 2020) (reviewing factual findings for clear error in deciding whether to grant a stay). And besides exaggerating its own harm, DHS trivializes the harm its policies cause Florida and the public.

A. The District Court Did Not Clearly Err in Declining to Credit DHS's Assertions of Harm.

1. DHS argues (at 20) that without the parole policies DHS may not be able effectively to process migrants "at some point." But as the district court observed, prior inaccuracies by DHS about irreparable harm makes DHS's latest predictions incredible. *See* App.193. At closing arguments in the Parole + ATD trial, DHS warned that if the court vacated the policy, there would be "disastrous consequences" beginning "the day after" the court's order. Supp.App.140. In its post-trial proposed order, DHS doubled down, repeating the claim of immediate "disastrous consequences." App.635. None of that was true. In a declaration DHS filed in support of its stay motions, a DHS employee revealed that "CBP has not utilized Parole + [ATD] since January 2, 2023,"—seven days before the trial began. App.211. The district court did not clearly err in declining to credit DHS's latest predictions of disaster.

The district court also found that other evidence undermined DHS's assertions of harm. App.192. Not only were those assertions contradicted by the Secretary's own public statements, but they also exaggerated the number of migrants who would cross the border immediately after Title 42's termination. App.163, 192. Instead of resisting those findings, DHS on appeal has simply submitted a new declaration, hoping for a do-over. Even if that were proper, that declaration adds nothing but speculation that "[i]n the event of" increased traffic at the border, "it is possible" that DHS will have no

good options. Decl. of Raul L. Ortiz at 10. Hypotheticals stacked on hypotheticals cannot establish irreparable harm.

2. Even counterfactually crediting those harms, DHS fails to explain why the parole policies are the key to managing large numbers of aliens short of ceasing immigration enforcement altogether. DHS could, for instance, reverse its current policy of doing everything it can to reduce its immigration-detention capacity. *See* App.78–81. It could also exercise its discretion to return aliens encountered at the border pending completion of removal proceedings. *See* 8 U.S.C. § 1225(b)(2)(C).

3. DHS's actions also belie its assertions of imminent harm. DHS has known that the Title 42 order would terminate on May 11 since January 30, 2023—37 days *before* the district court vacated the Parole + ATD policy.[7] Yet DHS waited 65 days to ask the district court to again stay the vacatur order.

DHS dawdled for two months until the day before Title 42 terminated and then issued a virtual carbon-copy of its vacated parole policy. DHS cannot wait until the eleventh hour to address a supposedly impending crisis, ignore a court order it declined to have stayed, and then expect courts to credit its assertions of emergent harm when the scheme backfires. "[A] party may not satisfy the irreparable harm requirement if the

[7] Executive Office of the President, Statement of Administration Policy (Jan. 30, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf.

harm complained of is self-inflicted." 11A Charles Alan Wright et al., Federal Practice and Procedure § 2948.1 (2023).

B. Granting Stays Would Irreparably Harm Florida and the Public.

The public interest in federal agencies following the law is "substantial." *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). And Florida's financial harm, *see* App.86, 93–94, 178–79, is irreparable because the United States' sovereign immunity would prevent any attempt to recover through monetary remedies. *See Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013).

The policies also harm Florida's sovereign interest in controlling its borders. *See Arizona*, 567 U.S. at 417–18 (Scalia, J., concurring in part and dissenting in part). While injuries to a state's sovereign interests are "intangible," they are "concrete." *West Virginia v. U.S. Dep't of the Treasury*, 59 F.4th 1124, 1136 (11th Cir. 2023). And their intangible nature only highlights that they are irreparable.

CONCLUSION

The motions for stays pending appeal should be denied.

Dated: May 24, 2023

Respectfully submitted,

ASHLEY MOODY
Attorney General of Florida

/s/ Henry C. Whitaker

JAMES H. PERCIVAL
Chief of Staff
NATALIE P. CHRISTMAS
JOSEPH E. HART
Counselors to the Attorney General

HENRY C. WHITAKER
Solicitor General
DANIEL W. BELL
Chief Deputy Solicitor General
DARRICK W. MONSON
Assistant Solicitor General
ZACHARY GROUEV
Solicitor General Fellow

Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 410-2672 (fax)
henry.whitaker@myfloridalegal.com

Counsel for the State of Florida

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limits of Federal Rule of Appellate Procedure 27 because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 5,198 words.

2. This document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27, Federal Rule of Appellate Procedure 32(a)(5), and Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

/s/ Henry C. Whitaker
Solicitor General

CERTIFICATE OF SERVICE

I certify that on May 24, 2023, I electronically filed this brief with the Clerk of Court by using the Court's CM/ECF system, which will send a notice of electronic filing to all parties in the case who are registered through CM/ECF.

/s/ Henry C. Whitaker
Solicitor General