United States District Court
Northern District of Texas
Amarillo Division

STATE OF TEXAS, *Plaintiff*, v. ALEJANDRO MAYORKAS, in his official capacity as Secretary of Homeland Security, *et al.*, *Defendants*.	Case No. 2:22-cv-00094

IMMIGRATION REFORM LAW INSTITUTE'S BRIEF OF *AMICUS CURIAE*
IN SUPPORT OF
PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

IRLI is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases in the interests of United States citizens, and to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including: *Wash. All. Tech Workers v. U.S. Dep't Homeland Security*, 50 F.4th 164 (D.C. Cir. 2022); *Trump v. Hawaii,* 138 S. Ct. 2392 (2018); and *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016).

SUMMARY OF ARGUMENT

Texas challenges an interim final rule, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 Fed. Reg. 18,078 (Mar. 29, 2022) (the "Interim Final Rule" or "IFR"), that makes changes to the federal asylum system. These changes, which include the transfer of authority for the final adjudication of asylum claims from immigration judges to asylum officers, and the expansion and abuse of alien parole, violate the Immigration and Nationality Act ("INA"), the Administrative Procedure Act, and the Appointments Clause of the United States Constitution.

IRLI supports Plaintiff's arguments, and submits this *amicus* brief in furtherance of Plaintiff's Appointments Clause arguments. The Appointments Clause plays a key role in ensuring the proper separation of powers among the three branches of the federal government. Under the Clause, certain governmental actions must be carried out by officers of the United States, and will be invalidated if carried out by others. Generally, actions that, by statute, bear the authority of the United States must be performed by an officer of the United States. In the INA, final grants or denials of asylum bear the authority of the United States. The IFR thus violates the Appointments Clause because it transfers the authority to perform these actions from properly-appointed

officers—namely, immigration judges—to career government employees—namely, asylum officers. Accordingly, this Court should deny Defendants' motion to dismiss.

ARGUMENT

The Appointments Clause safeguards democratic accountability by providing that actions that by statute bear the authority of the United States may only be performed by properly-appointed officers of the United States. The IFR violates the Clause by allowing asylum officers, who are mere employees rather than properly-appointed officers of the United States, to make final grants or denials of asylum—both actions that, by statute, bear the authority of the United States.

I. The Appointments Clause safeguards democratic accountability.

The Appointments Clause, U.S. Const., Art. II, §2, cl. 2, sets out "more than a matter of 'etiquette or protocol;' it is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 125 (1976) (per curiam)). It serves as part of the system of checks and balances created by the Framers by ensuring that no single branch can both establish and fill a position in the federal government. *See, e.g., Maghareh v. Azar*, No. 4:19-cv-00238, 2020 U.S. Dist. LEXIS 97349, at *9 (S.D. Tex. Apr. 8, 2020) ("The Supreme Court has explained that the Appointments Clause guards against 'one [governmental] branch[] aggrandizing its power at the expense of another branch' and 'also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.'") (quoting *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991)); *Buckley*, 424 U.S. at 122 ("The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."). It also "prevents Congress from

dispensing power too freely; it limits the universe of eligible recipients of the power to appoint." *Freytag*, 501 U.S. at 880.

Further, "by limiting the appointment power, [the Framers] could ensure that those who wielded it were accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884. The Appointments Clause "'preserve[s] political accountability' through direction and supervision of subordinates—in other words, through a chain of command." *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021) (quoting *Edmond*, 520 U.S. at 659).

> The people do not vote for the "Officers of the United States." Art. II, § 2, cl. 2. They instead look to the President to guide the "assistants or deputies . . . subject to his superintendence." The Federalist No. 72, p. 487 (J. Cooke ed. 1961) (A. Hamilton). Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *Id.*, N. 70, at 476 (same). That is why the Framers sought to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong., at 499 (J. Madison).

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497-98 (2010).

The importance of the Appointments Cause is reflected in the fact that even seemingly harmless violations of the separation of powers are checked by the courts. *See Stern v. Marshall*, 564 U.S. 462, 503 (2011) ("We cannot compromise the integrity of the system of separated powers . . . even with respect to challenges that may seem innocuous at first blush."). This level of accountability is necessary because "[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring). *See also Boyd v. United States*,

116 U.S. 616, 635 (1886) ("[I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure."). So much the more, then, should the IFR be checked, because in it Defendants have flagrantly violated the requirements of the Clause.

II. The IFR allows asylum officers to perform actions bearing the authority of the United States.

"[A]uthority pursuant to the laws of the United States," *Buckley*, 424 U.S. at 126, is exercised when one "performs more than ministerial tasks." *Freytag*, 501 U.S. at 881-82. Tasks involving "significant discretion when carrying out . . . important functions," *Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018), have been held to bear the significant authority of the United States. Where a government worker's "decisions have considerable consequences," *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1337 (D.C. Cir. 2012), such worker is exercising the significant authority of the United States. Accordingly, the "focus[] [is] on the extent of power an individual wields in carrying out his assigned functions." *Lucia*, 138 S. Ct. at 2051.

For example, the Supreme Court has determined that special trial judges of the federal tax court and administrative law judges at the Securities and Exchange Commission exercise such significant authority and thus are inferior officers of the United States. This finding was based on those positions' functions such as taking testimony, conducting hearings, ruling on evidence admissibility, and the power in at least some situations to issue final decisions. *See Freytag*, 501 U.S. at 881; *Lucia*, 138 S. Ct. at 2052. Similarly, "Immigration Judges and [Board of Immigration Appeals] members . . . qualify as officers[]" because they "exercise significant authority within our immigration system." *Duenas v. Garland*, 78 F.4th 1069, 1072, 1073 (9th Cir. 2023). This "substantial authority" includes "conduct[ing] adversarial hearings in removal proceedings" and "substantive appellate review of . . . removal determinations[.]" *Id*. at 1073.

In *Arthrex*, the Supreme Court held that administrative patent judges, although properly appointed as inferior officers, were in fact exercising the power of principal officers. The Supreme Court explained that these judges issued unreviewable final decisions without "the necessary supervision" of a properly appointed executive officer. *Arthrex*, 141 S. Ct. at 1982. The court further explained that these judges were "exercising executive power" despite the judicial nature of their duties. *Id*. (quoting 1 Annals of Cong. 499, 611-612 (J. Madison) (1789)). Finally, these judges did not face "threat of removal" because they were only subject to for-cause terminations. *Id*.

The IFR created a new process for defensive asylum claims that granted asylum officers the "power to render a final decision on behalf of the United States' without any . . . review by their nominal superior or any other principal officer in the Executive Branch." *Arthrex*, 141 S. Ct. at 1981 (quoting *Edmond*, 520 U.S. at 665). It directs asylum officers to act as fact-finder by interviewing asylum applicants and establishing a record in lieu of a proper application for asylum. 87 Fed. Reg. 18078, 18085. The IFR also empowers the asylum officer to decide whether the alien applicant is legally eligible for asylum (or any other relief from removal), and if so, to grant the application, without further review. 87 Fed. Reg. 18078, 18085. The immigration judge is bound by the asylum officer's decision to grant the application, and such grant is not reviewed unless specifically ordered by the director of United States Citizenship and Immigration Services ("USCIS"). *Id.* at 18112-18113. Under the IFR, asylum officers thus perform actions similar to those of administrative law judges, who have been found to "exercise significant authority in part because their initial decisions can and do become final without plenary agency review." *Bandimere v. SEC*, 844 F.3d 1168, 1180 n.25 (10th Cir. 2016).

The power to grant asylum, especially without review, is surely a significant exercise of the authority of the United States that has considerable consequences. An alien who receives asylum is entitled to certain benefits: "[*f*]*irst*, he cannot be removed . . . *Second*, he can work in the United States. *Third*, he may travel abroad as long as the Attorney General consents." *Ruiz-Perez v. Garland*, 49 F.4th 972, 979 (5th Cir. 2022) (internal quotation marks and citations omitted). Perhaps the greatest advantage of a grant of asylum is the opportunity to request adjustment of status from asylee to lawful permanent resident. *See Ali v. Barr*, 951 F.3d 275, 280 (5th Cir. 2020) ("[T]he Attorney General 'may adjust' an asylee 'to the status of an alien lawfully admitted for permanent residence' if the asylee meets certain requirements.") (quoting 8 U.S.C. § 1159(b); *Amrollah v. Napolitano*, 710 F.3d 568, 571 (5th Cir. 2013) ("An alien who has been granted asylum is eligible for an adjustment of status to that of permanent resident if, after being physically present in the United States for at least one year, he is otherwise 'admissible . . . as an immigrant under this chapter at the time of examination for adjustment.'") (quoting 8 U.S.C. § 1159(b)(5)).

The new process endows an asylum officer with authority that is significant and, where asylum is granted, unreviewable. Under the IFR, asylum officers clearly perform actions bearing the authority of the United States.

III. Asylum officers are mere employees, not officers of the United States.

The Appointments Clause "divides federal government personnel into three categories: principal Officers, inferior Officers, and non-Officer employees," *Burgess v. FDIC*, 871 F.3d 297, 300 (5th Cir. 2017), and "lays out the permissible methods of appointing" each kind of officer. *Braidwood Mgmt. v. Becerra*, 627 F. Supp. 3d 624, 639 (N.D. Tex. 2022). *See also United States v. Germaine*, 99 U.S. 508, 509 (1878) (describing the two types of "officers of the United States"

and distinguishing them from federal "agent[s] or employ[ees]"). Under the Appointments Clause, "[p]rincipal Officers must be appointed by the President with the Advice and Consent of the Senate. Inferior Officers may be appointed by the President . . . the Courts . . . or . . . the Heads of Departments." *Burgess*, 871 F.3d at 300 (internal citations and quotation marks omitted). *See also L.M-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 23 (D.D.C. 2020) (explaining that "[p]rincipal officers . . . must be appointed by the President, with the advice and consent of the Senate, and inferior officers must be appointed in the same manner, unless Congress supplants that default rule by vesting the appointment power in the President, a court, or a department head.") (citing *Edmond*, 520 U.S. at 660). Finally, "[n]on-Officer employees are lesser functionaries in the government, and their appointment is not subject to this Clause." *Id*. *See also Lucia*, 138 S. Ct. at 2051 (explaining that "non-officer employees [are] part of the broad swath of lesser functionaries in the Government's workforce."). This constitutional division of labor ensures that only properly appointed officers perform significant duties.

An officer of the United States is someone who "exercis[es] significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126. *See also Edmond*, 520 U.S. at 662 ("The exercise of 'significant authority pursuant to the laws of the United States' marks, not the line between principal and inferior officer . . . but rather . . . as we said in *Buckley*, the line between officer and non-officer.") (quoting *Buckley*, 424 U.S. at 126)). "A government worker is . . . an inferior officer subject to the Appointments Clause if his office entails significan[t] . . . duties and discretion." *Burgess*, 871 F.3d at 302.

Asylum officers, despite their name, are not officers of the United States. They are not principal officers because they are not appointed by the President with the advice and consent of the Senate. Nor are they inferior officers because they are not appointed by the head of a

department to whom they are accountable. Nor, crucially, do they exercise significant authority pursuant to the laws of the United States. The duties of asylum officers specified in the statute are limited to screening aliens to determine whether they have a credible fear of persecution. 8 U.S.C. § 1225(b)(1)(B). A positive credible fear determinations requires referral of the asylum application to an immigration judge, while a negative credible fear determination requires "[r]emoval without further review." *Id.*

In contrast, immigration judges are "attorney[s] whom the Attorney General appoints as . . . administrative judge[s] within the Executive Office of Immigration Review, qualified to conduct specified classes of proceedings, including a [removal] hearing[.]" 8 U.S.C. § 1101(b)(4). Congress mandated that immigration judges would be responsible for conducting adversarial hearings to determine an alien's admissibility and eligibility for relief from removal. 8 U.S.C. § 1229a(a)(1) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."). They perform such significant functions as "administer[ing] oaths, receiv[ing] evidence, and interrogat[ing], examin[ing], and cross-examin[ing] the alien and any witness. The immigration judge may issue subpoenas . . . [and] shall have the authority . . . to [issue] sanction[s.]" 8 U.S.C. §1229a(b)(1). As explained above, such duties are significant and may only be performed by properly appointed officers.

Finally, unlike asylum officers, immigration judges "remain accountable for their conduct. They are inferior officers appointed by the Attorney General, who is in turn appointed by the President," *Duenas*, 78 F.4th at 1072. "Congress has charged the Attorney General with the responsibility of appointing Immigration Judges and members of the BIA. The Attorney General's involvement in this process maintains 'clear lines of accountability—encouraging good appointments and giving the public someone to blame for the bad ones.'" *Id*. at 1072-1073 (quoting

Lucia, 138 S. Ct. at 2056 (Thomas, J., concurring). *See also Arthrex*, 141 S. Ct. at 1980 (explaining that certain administrative "judges were inferior officers because they were effectively supervised by a combination of Presidentially nominated and Senate confirmed officers in the Executive Branch."). Asylum officers lack any such political accountability.

In the IFR, Defendants have decided that "[r]ather than move [aliens] who receive positive credible fear determinations directly into" expedited removal proceedings, as required by the INA, they would create an entirely new process that turns these credible fear interviews into applications for asylum and permits USCIS to "conduct an interview on the merits of the [alien]'s protection claim and issue a final decision." 87 Fed. Reg. 18078, 18085. Any efficiencies achieved by this new process are beside the point. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of a democratic government. . . ." *INS v. Chadha*, 462 U.S. 919, 944 (1983). By delegating actions bearing the authority of the United States to employees who are not properly-appointed officers of the United States, the IFR flagrantly violates the requirements of the Appointments Clause.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be DENIED.

Dated: November 3, 2023 /s/ Gina M. D'Andrea

Gina M. D'Andrea (*pro hac vice forthcoming*)
Christopher J. Hajec (*on the brief*)
Immigration Reform Law Institute
25 Massachusetts Ave NW, Suite 335
Washington, DC 20001
202.232.5590
gdandrea@irli.org

Attorneys for amicus curiae Immigration Reform Law Institute

CERTIFICATE OF SERVICE

I certify that on November 3, 2023, this brief was filed through the Court's CM/ECF system, which served it upon all counsel of record.

/s/ Gina M. D'Andrea