No. 20-5357
Oral Argument Not Scheduled

United States Court of Appeals
for the
D.C. Circuit

Alejandro Mayorkas, et al,

Appellants,

v.

P.J.E.S,

Appellee.

On appeal from an order entered by the United States District Court for the District of Columbia, No. 20-cv-2245

Brief Amicus Curiae of the Immigration Reform Law Institute in Support of Defendant–Appellants

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CORPORATE DISCLOSURE STATEMENT

The Immigration Reform Law Institute is a non-profit corporation with no shareholders.

FED. R. APP. P. 29(4)(E) STATEMENT

No party's counsel authored the brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and no one contributed money that was intended to fund preparing or submitting the brief.

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. United States Dep't of Homeland Sec.*, 942 F.3d 504 (D.C. Cir. 2019); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010). IRLI has represented a wide variety of plaintiffs in immigration matters, ranging from American workers who have been displaced by foreign workers to foreign workers who have not been paid by their employers. Consequently, IRLI is dedicated to assisting the courts in maintaining a rational immigration system for the benefit of its clients.

STATEMENT OF THE CASE

Amicus adopts Appellants' statement of the case. Op. Br. 5–15.

SUMMARY OF THE ARGUMENT

The district court's opinion sacrifices the public health and security of the nation on an altar of faulty word parsing. By holding that the power to prohibit the introduction of aliens from countries affected by pandemic does not encompass the power to remove aliens from those countries once they set foot in the United States, the district court implied the absurdity that Congress granted to the executive a power—*viz.*, to prohibit the introduction of aliens at a land border—that the executive has no way to exercise. Needless to say, so absurd a reading of a statute is to be avoided.

Also, the power to ban the introduction of people from countries affected by epidemic lies solely with public health officials. By adopting the magistrate judge's report finding that the law establishing this power was overridden by later-enacted immigration laws, the district court, *sub silentio*, found that the later laws repealed the earlier by implication. Repeals by implication, however, are strongly disfavored, and the rare conditions for their existence are not present here.

ARGUMENT

I. Based on an absurd statutory reading, the district court eviscerated a vital national power.

The public health provisions of 42 U.S.C. §§ 264–65 authorize the executive branch to prohibit the introduction of people or property from countries where the Centers for Disease Control have determined there exists a communicable disease. These provisions were enacted in the Public Health Service Act, Pub. L. No. 78-410, §§ 361–62, 58 Stat. 682, 704 (1944). Subsequent enactments of immigration provisions address the removal of aliens, 8 U.S.C. § 1231, and efforts to combat the trafficking of children, 8 U.S.C. § 1232. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 214, 66 Stat. 163, 202; William Wilburforce Trafficking Victims Protection Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5073.

To combat the current global pandemic, the Department of Health and Human Services promulgated the regulation Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16,559 (Mar. 24, 2020) pursuant to 42 U.S.C. § 265. Previous regulations had not addressed the introduction of people into the United States. 85 Fed. Reg. at 16,560.

Federal statutes recognize that blocking the admission of disease from abroad is a key means of slowing the spread of an epidemic within the United States. *E.g.*, 7 U.S.C. §§ 7712, 8302, 42 U.S.C. §§ 264–65. The Homeland Security Council noted in 2005 that "[t]he most effective way to protect the American population is to contain an outbreak beyond the borders of the U.S." *National Strategy for Pandemic Influenza*, Nov. 2005.[1] A study on internal border controls and the spread of influenza found that, absent other control measures, "stopping at least 99% of travel would be required to significantly increase time available for vaccine production and distribution." James G. Wood, *et al.*, *Effects of Internal Border Control on Spread of Pandemic Influenza*, Emerg Infect Dis. 2007 Jul; 13(7): 1038–1045.[2]

Despite the vital nature of this public health power, the district court held that the power to prohibit the introduction of all aliens from a given country during a health emergency does not encompass the power to remove such aliens who have crossed the border. Mem. Op. 25–28**.** Even given the district court's erroneous interpretation of the word *introduction*, Mem. Op.

[1] Available at https://www.hsdl.org/?view&did=457407

[2] Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2878213/

at 25–27, this remains an absurd holding. Congress did not authorize the executive to undertake the physical task of preventing or impeding the geographical entry of persons into the United States. Rather, it gave the executive the authority to *prohibit* their introduction. The leading definition of *prohibit* is "[to] forbid by law." *Prohibit*, Black's Law Dictionary (11th ed.). If the statute did not give the executive the authority to expel aliens who had violated its prohibition by crossing the border, the executive would have no way to exercise its authority to prohibit introduction at a land border at all, and Congress's grant of that authority would have been only an empty gesture. It is absurd to conclude that Congress granted such an illusory power.

Absurd interpretations of statutes are, of course, to be avoided. "If there arise out of [acts of parliament] collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void." 1 William Blackstone, Commentaries 91. And mindfulness of absurd consequences is—and always has been—an essential element of reading a text, notwithstanding the plainest statutory language. "[T]he language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent." *Caminetti v. United*

States, 242 U.S. 470, 490 (1917) (emphasis added). Reading statutes to avoid absurd consequences "demonstrates a respect for the coequal Legislative Branch, which we assume would not act an in absurd way." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring). Thus, "[w]e are authorized to deviate from the literal language of a statute only if the plain language would lead to absurd results, or if such an interpretation would defeat the intent of Congress." *United States v. Rodriguez-Rios*, 14 F.3d 1040, 1044 (5th Cir. 1994). Here, even if the language of the statute plainly had the meaning the district court gave it, the absurd consequence that Congress granted the executive a merely nominal and illusory power to prohibit the introduction of aliens at a land border should be rejected.

Finally, for the reasons discussed above, the district court's interpretation is not only absurd, but dangerous, gravely undermining both national security and the public health of the nation.

II. Subsequent immigration provisions did not repeal the public health statute by implication.

The authority to seal the borders in the event of a public health crisis is not a shared power. The Immigration and Nationality Act provides for the exclusion of individual aliens on health-

related grounds. Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067 (codified at 8 U.S.C. § 1182). The Act does not, however, provide the Department of Homeland Security with authority to close the border with countries in a pandemic health emergency. That power lies with the public health services that have the authority to prohibit the "introduction" of "persons." Public Health Service Act., Pub. L. No. 78-410, § 362, 58 Stat. 682, 704 (1944) (codified at 42 U.S.C. § 265). Likewise, the Secretary of Agriculture has the similar authority to ban the importation of plants (7 U.S.C. § 7712) and animals (7 U.S.C. § 8303). Congress has not constrained the border control authority of the public health (or Department of Agriculture) by the limitations imposed on the Department of Homeland Security.

The magistrate judge's report found that the enactments in Title 8 governing the Department of Homeland Security and the admission of aliens took precedence over the earlier public health provisions. Magistrate Judge's Report and Recommendations, Docket 65 at 32–36. While the district court's opinion did not mention this issue, it adopted the magistrate judge's report. Mem. Op. at 49.

"It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 168 (1976).

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible."

Morton v. Mancari, 417 U.S. 535, 551 (1974) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)). Furthermore, the courts treat allegations of partial repeal by implication in the same manner as allegations of total repeal by implication. *E.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984); *Hunter v. FERC*, 711 F.3d 155, 159 (D.C. Cir. 2013).

Under this general rule of statutory construction, the provisions of Title 42 have not been repealed by subsequent enactments in Title 8. Instructively, the Supreme Court declined to find a repeal by implication in *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007). The Clean Water Act (1972) gave the Environmental Protection Agency authority to issue permits for the discharge of pollutants into navigable waters. *Defs. of Wildlife v. United States EPA*, 420 F.3d 946, 950 (9th Cir. 2005). The same Act permitted states to apply to the Environmental Protection Agency to administer the permit program within their borders. *Id.* Furthermore, the Clean Water Act *mandated* that the Environmental Protection Agency approve such applications if nine conditions were met. *Id.* Sub-

sequently, in 1973, Congress enacted the Endangered Species Act. *Id*. The Endangered Species Act required agencies to ensure that their actions would not adversely affect threatened species. *Id*. at 950–51. The *Defs. of Wildlife* plaintiff challenged the transfer of a permit process to Arizona under the Clean Water Act on the grounds that the transfer did not conform to the requirements of the Endangered Species Act. *Id*. at 955.

The Ninth Circuit vacated the permit process transfer, even though the nine requirements of the Clean Water Act had been satisfied. *Id*. at 978. The Ninth Circuit held that the requirements of the Endangered Species Act also applied, effectively creating a tenth requirement for the application process. *Id*. at 975; *Defs. of Wildlife v. United States EPA*, 450 F.3d 394, 404 n.2 (9th Cir. 2006) ("[T]he very definite, unqualified language of the after-enacted Endangered Species Act must still prevail.") (Berzon, J., concurring in denial of rehearing *en banc*).

The Supreme Court reversed. 551 U.S. at 673. The Court noted that the Ninth Circuit's grafting of a tenth requirement from the Endangered Species Act into the permit application process impermissibly created an implicit repeal of the mandate of the Clean Water Act. *Nat'l Ass'n of Home Builders*, 551 U.S. at 663.

Similarly, here, the provisions of Title 42 cannot be wiped out implicitly by the later enactments of Title 8 when there has been no explicit repeal. There are two situations where courts find repeals by implication:

> (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest.

Kremer v. Chem. Constr. Corp., 456 U.S. 461, 468 (1982) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)). Such a finding is rare. *See Branch v. Smith*, 538 U.S. 254, 293 (2003) (O'Connor, J., concurring in part and dissenting in part) (observing the Court had not found an implied repeal outside the antitrust context since 1917, or any implied repeal since 1975).

The first circumstance for finding a repeal by implication is not present here. The executive's powers to prohibit introduction under 42 U.S.C. § 265 are not boundless. That provision can only be invoked when four prerequisites are satisfied: the Centers for Disease Control must determine (1) the existence of a communicable disease in a foreign country; (2) that there is serious danger of the introduction of the disease into the United

States; (3) that the danger from the disease is increased by the introduction of persons or property from that country; and (4) that the suspension of the introduction of such persons or property is required in the interest of public health. *Id*. Accordingly, 42 U.S.C. § 265 is not a provision of general application.

Because § 265 is of limited application, it is not difficult to give effect to both it and the statutory provisions of Title 8. The provisions of the Immigration and Nationality Act (*e.g.*, 8 U.S.C. §§ 1158, 1231, 1232) are of general application and normally apply. In contrast, § 265 only applies in limited circumstances and over limited periods of time. Thus, their interplay flows naturally from the *generalia specialibus non derogant* (general/specific) canon of statutory construction. "[W]here general and specific authorizations exist side-by-side, the general/specific canon avoids rendering superfluous a specific provision that is swallowed by the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). The provisions of Title 42 can, and should, be given full effect.

Neither is the second circumstance for finding repeal by implication present here. The public health provisions and immigration provisions at issue are in different titles of the U.S. Code (8: Aliens and Nationality; 42: The Public Health and

Welfare). Section 265 of Title 42 was created in an act that consolidated the laws relating to the Public Health Service. Public Health Service Act, § 362, 58 Stat. at 704. Clearly, the Immigration and Nationality Act of 1952 as amended does not cover the whole subject of public health. There is some overlap in subject matter, but the Public Health Service Act is not a subset of the Immigration and Nationality Act. In particular, Title 8 does not confer on the Department of Homeland Security the authority to suspend entries from a country on public health grounds. That power solely exists with the public health authorities. 42 U.S.C. § 265. Therefore, neither circumstance for finding a repeal by implication exists here.

Congress's subsequent amendments to the immigration-related provisions of the Public Health Service Act also show a lack of implicit repeal. Section 362 of the Act, authorizing regulations to prevent the introduction of disease from foreign countries and allowing the apprehension of aliens coming from a foreign country, has been amended three times after the enactment of the Immigration and Nationality Act of 1952. The Hawaii Omnibus Act (1960) removed references to the Territory of Hawaii. Pub. L. 86–624, § 29, 74 Stat. 419, 624. The National Consumer Health Information and Health Promotion Act of 1976 redefined *state* to include the District of Columbia. Pub. L.

No. 94–317, § 301, 90 Stat. 695, 707. The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 modified the regulatory requirements governing the apprehension of aliens. Pub. L. No. 107–188, § 142, 116 Stat. 594, 626–27. These repeated amendments to the provision authorizing regulations to prohibit the introduction of aliens to prevent the spread of communicable diseases shows that Congress has not intended the § 362 of the Public Health Service Act to be repealed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted, February 25, 2021

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CERTIFICATE OF SERVICE

I certify that on February 25, 2021 I filed the attached Brief Amicus Curiae of the Immigration Reform Law Institute in Support of Defendant–Appellants with the ECF system that will provide notice and copies to all parties' counsel of record.

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