

No. 21-954

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*In the Supreme Court of the United States*

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

v.

STATE OF TEXAS, ET AL.,  
*Respondents.*

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT*

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**BRIEF OF PROFESSOR BENJAMIN EIDELSON  
AS AMICUS CURIAE IN SUPPORT OF REVERSAL**

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**INTEREST OF AMICUS CURIAE\***

Benjamin Eidelson is an assistant professor of law at Harvard Law School. His recent academic work has sought to illuminate aspects of this Court’s administrative-law jurisprudence, including the reasoned explanation requirement and the bar on *post hoc* rationalizations. See Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 Yale L.J. 1748 (2021). He also served as co-counsel for the respondents who advocated the approach to these issues that this Court embraced in *DHS v. Regents*, 140 S. Ct. 1891 (2020).

*Amicus*’s sole interest here is to aid the Court in resolving the second question presented by clarifying the applicable legal standards, and especially by underscoring the critical differences between this case and *Regents*.

**SUMMARY OF ARGUMENT**

The Fifth Circuit reasoned that Secretary Mayorkas’s October Memorandum had no bearing on this litigation because it was “not a full-on new agency action.” Pet. App. 125a. As the court of appeals saw it, this Court had faced a “strikingly similar” agency process in *Regents* and had announced a “demanding standard” for treating a successive memorandum as “anything more than [a] *post hoc* rationalization[.]” Pet. App. 44a. The States urge the same

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\* All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. Harvard University provides financial support for faculty research that defrayed printing and filing costs, but the brief represents the views of *amicus* alone. No other entity (including a party or counsel for a party) made a monetary contribution intended to fund the preparation or submission of this brief.

reasoning in this Court. Br. in Opp. 18-19. But this analysis manifests grave confusions about both the nature of agency action and the scope of the bar on *post hoc* rationalizations—confusions that this Court can and should dispel here.

First, there is no serious doubt that the October Memorandum constitutes a self-complete agency action under the APA. In that memorandum, the Secretary wrote that he was “hereby terminating MPP.” Pet. App. 263a. By definition, such a “statement . . . prescrib[ing] . . . policy” is a “rule,” which is a paradigmatic form of “agency action.” 5 U.S.C. §551(4), (13). Put in the terms of the Fifth Circuit’s analogy to court judgments (Pet. App. 22a), the October Memorandum plainly incorporated a distinct, superseding “judgment,” not merely an augmented explanation (akin to an amended “opinion”) for an earlier one.

Second, *Regents* could hardly be less helpful to the States here. Nobody doubted for a moment in that case that, had Secretary Nielsen framed her memorandum as rescinding DACA anew, that action on her part would have been legally effective (subject, of course, to possible judicial review of its own conformity with the APA). The *Regents* majority refused to treat Nielsen’s memorandum as such a superseding action only because, “by its own terms,” it was not one. 140 S. Ct. at 1908. In fact, Nielsen made a tactical choice *not* to take a superseding action precisely in order to avoid the kinds of consequences—such as resetting the litigation over the adequacy of the agency’s explanation—that ought to have followed from Mayorkas’s contrary decision here.

Third, *Regents* demonstrates that the distinction between a new, superseding agency action and an augmented explanation for an old one is substantive and consequential. And once that distinction and its functional

justifications are understood as this Court has explained them, the Fifth Circuit's and the States' allegations that Secretary Mayorkas failed to "consider[] MPP afresh" (Br. in Opp. 18) are revealed as irrelevant. The prohibition on *post hoc* rationalizations serves accountability-forcing and integrity-promoting functions that simply do not depend for their efficacy on the "open-mindedness" (Pet. App. 29a) that an agency head exhibits before taking a new, superseding agency action. So, if the district court's identification of certain omissions in the June Memorandum did little to shake Secretary Mayorkas's confidence in the ultimate merits of his favored border-management policy, that would be neither suspect nor surprising. Likewise, there was nothing improper about his taking a superseding action furthering that policy while also seeking appellate relief from independently erroneous aspects of the district court's judgment. The Court should therefore correct the Fifth Circuit's suggestions that the October Memorandum is anything less than an ordinary agency action with full legal effect.

Finally (and separately), the Court should take care that its opinion in this case not credit or tacitly endorse the premise that the June Memorandum was inadequately explained in the first place. The Fifth Circuit has already taken the Court's order denying a stay in this case to vindicate its aggressive reading of *Regents'* implications for arbitrary-and-capricious review. But that reading is both wrong and dangerous. It would transform the reasoned explanation requirement from the safeguard of agencies' accountability that this Court took it to be in *Regents* into something more nearly the opposite: an open invitation for courts to "second-guess[] [an agency's] weighing of risks and benefits" and thereby "substitute[] [their] judgment for that of the agency." *Dep't of Commerce v. New York*,

139 S. Ct. 2551, 2571 (2019). The Court should not condone that transformation. And while the reasoned explanation issue is no longer squarely before the Court, the Court (or some of its Members) might find this an appropriate case in which to sound a note of caution about the consequential misreading of *Regents* that the decision below reflects.

## ARGUMENT

### I. THE OCTOBER MEMORANDUM IS A LEGALLY EFFECTIVE AGENCY ACTION, NOT A *POST HOC* RATIONALIZATION.

#### A. The October Memorandum Is An Agency Action “Of Its Own” Terminating MPP.

In concluding that the October Memorandum was not an agency action “of [its] own” (Pet. App. 45a) or “not a full-on new agency action” (Pet. App. 125a), the Fifth Circuit essentially discarded the conceptual apparatus of administrative law. Appealing instead to “common sense,” the court decided that the “challenged action” in this case was actually “the *Termination Decision*”—that is, Secretary Mayorkas’s “June 1 decision to terminate MPP”—and not the contemporaneous memorandum *embodying* that decision. Pet. App. 22a. The court then reasoned that, although Secretary Mayorkas said in October that he was “hereby terminating” MPP (Pet. App. 263a), he in fact “merely continued . . . the Termination Decision” that he had made at the time of his first memorandum in June. Pet. App. 30a. Mayorkas issued a new explanatory memorandum, in other words, but he could not have taken a meaningfully distinct *action* or *decision* because (in the court’s view) he did not reassess the merits of terminating MPP with sufficient “open-mindedness” to truly “reopen” the underlying “Decision” itself. Pet. App. 29a-30a.

The court’s proposed distinction between capital-D “Decisions” and the documents in which they are embodied is as alien to administrative law as it is incoherent. As to administrative law, the APA defines “agency action” to include a “rule,” meaning (as relevant here) “an agency *statement* of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. §551(4), (13) (emphasis added). The statement, in other words, *is* the action. If there were an abstract, continuous “Termination Decision” of the kind that the court imagined—persisting from June through October and existing independent of any particular verbal expression—that “Decision” might not even be “agency action” (5 U.S.C. §551(13)), let alone a “final agency action” subject to judicial review (5 U.S.C. §704).

More fundamentally, the Fifth Circuit’s distinction simply makes no sense. Insisting that “the Termination Decision itself (not a memo) . . . terminat[ed] MPP” (Pet. App. 22a) is like insisting that a priest married a couple through his Marriage Decision (not by pronouncing them married), that a testator bequeathed her property through her Will Decision (not by executing her will), or that an employee resigned through her Resignation Decision (not by tendering her letter of resignation). Legal acts, in short, are characteristically taken *through* the performance of particular speech acts by people with authority.<sup>1</sup> For an agency head to state in an official

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<sup>1</sup> The classic treatment of the general point is J.L. Austin’s aptly named *How To Do Things With Words* (1962). As Austin put it: “In these examples it seems clear that to utter the sentence (in, of course, the appropriate circumstances) is not to *describe* my doing of what I should be said in so uttering to be doing or to state that I am doing it: it is to do it.” *Id.* at 6.

memorandum that he is “hereby terminating” or “hereby rescind[ing]” an agency policy is as straightforward an example as one could imagine (Pet. App. 263a, 359a). So, with due respect, it is the Fifth Circuit’s conception of agency action that rests on “faux-metaphysical” confusions (Pet. App. 41a), not the statute’s.

In fact, the Fifth Circuit’s own analogy to court judgments (Pet. App. 22a) nicely underscores the same point. The court observed that “[a] judgment, not the opinion announcing that judgment, has a binding effect”; it then reasoned that “DHS’s Termination Decision is analogous to the judgment of a court, and its memos are analogous to a court’s opinion explicating its judgment.” *Ibid.* That comparison is reasonable enough, but it refutes the court’s picture of a free-floating “Termination Decision” hovering above the June and October memoranda. Judgments, just like agency actions, are rendered and issued *through words*. See, e.g., this Court’s Rule 45 (explaining the issuance of a “certified copy of the judgment, prepared and signed by this Court’s Clerk”); Pet. App. 363a (“IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.”). An agency head’s declaration that a policy is “hereby terminat[ed]” is effective in the same way as an appellate court’s pronouncement that a lower court’s decision “is affirmed.” And nobody would question that a court’s second judgment, rendered after the first was vacated or withdrawn, was an actual, self-complete judgment. So, too, with the termination decision rendered through and incorporated in the October Memorandum; it was an agency action “of its own,” not a mere explication of a “Decision” taken in June.

**B. The October Memorandum Is Not A *Post Hoc* Rationalization Under *Regents*.**

The States nonetheless insist that “the [October Memorandum] can be viewed only as impermissible *post hoc* rationalizations.” Br. in Opp. 18 (quoting *Regents*, 140 S. Ct. 1909). The Fifth Circuit, too, thought that the “multiple-memorandum agency process” at issue in *Regents* was “strikingly similar to the process here.” Pet. App. 44a. The Government failed to show that the October Memorandum “actually cure[s] the States’ APA-based injuries,” the court explained, because it did not show that the new materials were anything more than “*post hoc* rationalizations under the demanding standard announced [in *Regents*].” Pet. App. 44a. And picking up the same theme, the States now urge this Court to hold the agency accountable for once again failing to “turn square corners in dealing with the people.” Br. in Opp. 18-19 (quoting *Regents*, 140 S. Ct. at 1909).

All of this fundamentally misunderstands how the litigation and agency decision-making unfolded in *Regents* and the logic of this Court’s response. In fact, what was remarkable in *Regents* was precisely Secretary Nielsen’s choice *not* to do what Secretary Mayorkas did here. When the district court vacated the first DACA rescission memorandum as inadequately explained, it fully anticipated that the agency might respond by rescinding DACA anew on different (or simply more developed) grounds. See *NAACP v. Trump*, 315 F. Supp. 3d 457, 465 & n.6 (D.D.C. 2018), *aff’d*, *Regents*, 140 S. Ct. 1891. And nobody suggested that there would have been anything suspicious or “*post hoc*” about such a decision. See generally *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Had the agency taken that familiar course, moreover, no order of the district court would have stood in the way of its carrying the

new rescission into effect immediately. To the surprise of the plaintiffs and Judge Bates, however, the agency returned to the court with a request that the order vacating the *original* memorandum be “revise[d]”—so as to now “leave in place” that agency action—in light of a new, carefully worded memorandum that “decline[d] to disturb the [first] memorandum’s rescission” but “provide[d] further explanation’ for *that* action.” *Regents*, 140 S. Ct. at 1908 (emphasis added).<sup>2</sup>

That unusual choice dictated the proceedings that followed. Under longstanding precedents of this Court and the D.C. Circuit, an agency seeking to vindicate a prior action may sometimes offer an amplified articulation of that action’s actual, contemporaneous grounds, but it may not inject new ones. *See, e.g., Camp v. Pitts*, 411 U.S. 138, 143 (1973); *AT&T Info. Sys., Inc. v. Gen. Servs. Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987); *see also* Brief for the D.C. Respondents 50-51, *Regents*, 2019 WL 4748381 (citing additional cases). Applying those precedents, *Regents* held that the agency would need to take a new *action* in order to rest on its proffered new *reasons*. But because Secretary Mayorkas plainly did take such a new action, nothing in *Regents* or the case-law on which it built saps that action of effect or stops him from defending it on the basis of its own contemporaneously articulated justifications.

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<sup>2</sup> The Fifth Circuit thus erred in reasoning that, if the October Memorandum represented a superseding agency action taken in response to the district court’s remand, the path that “would have run parallel to DHS’s path in *Regents* itself” would have involved “return[ing] to the district court with its second memorandum, wait[ing] for the district court’s ruling, and appeal[ing] that ruling.” Pet. App. 51a. In fact, the agency needed relief from the D.C. district court in *Regents* only because it had chosen *not* to take a superseding agency action.

**C. *Regents'* Distinction Between New Actions And New Explanations Serves Important Values That Strongly Favor The Government Here.**

Despite these significant differences between this case and *Regents*, the States and the Fifth Circuit have suggested that the October Memorandum should not be treated as a new action unless a court determines that Secretary Mayorkas “*really* open[ed] the decision back up and reconsider[ed] it” (Pet. App. 24a) or, put differently, “returned to the issue ‘afresh’” (Br. in Opp. 17). Unless the new action is approached with the requisite “open-mindedness” (Pet. App. 29a), the thought goes, *Regents'* distinction between new actions and new explanations for old actions becomes purely formalistic: An agency can secure the benefits of a “new” action simply by making a “self-serving recital” that it is taking one (Br. in Opp. 18). The Fifth Circuit’s strained appeal to the “reopening” doctrine (Pet. App. 23a-30a) seems calculated to give doctrinal expression to that intuition. *Accord* Br. in Opp. 19.

But this reasoning reflects a basic misunderstanding of the “[t]he functional reasons for requiring contemporaneous explanations,” *Regents*, 140 S. Ct. at 1909, and thus of how that requirement serves its actual objectives. In cases such as this one, the problem with after-the-fact explanations is not (or at least, not mainly) that the decisionmakers who advance them are unlikely to have considered the issues on a blank slate. For significant policy decisions, after all, that is nearly always the case anyway—and properly so. *See, e.g., Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019) (“Agency policymaking is not a ‘rarified technocratic process, unaffected by political considerations or the presence of Presidential power.’” (quoting *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981))); *Motor Vehicle Mfrs. Ass’n of U.S., Inc.*

*v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part) (“As long as [an] agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.”); *see also Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2379 (2020) (rebuking a court of appeals for condemning an agency rule on the *ad hominem* ground that the agency’s decision-making “[did] not reflect any real open-mindedness”).

The main problems with belated explanations, rather, lie elsewhere. First and foremost, insisting on contemporaneous explanations “promotes agency accountability.” *Regents*, 140 S. Ct. at 1909 (citation omitted). Second, the same practice “instills confidence that the reasons given are not simply ‘convenient litigating position[s].’” *Ibid.* (citation omitted). And finally, “[p]ermitting agencies to invoke belated justifications . . . can upset the orderly functioning of the process of review.” *Ibid.* (citation omitted). Attending to these three concerns clarifies the contours of the bar on *post hoc* rationalizations and confirms that, while each had force in *Regents*, none impugns the October Memorandum here.<sup>3</sup>

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<sup>3</sup> *Post hoc* explanations also bypass any processes (such as notice-and-comment) through which Congress required the agency to act. And when they are advanced by agency lawyers, they fail to give any “assurance that the grounds for agency policy have been embraced by the most politically responsive and public actors within the agency,” Kevin M. Stack, *The Constitutional Foundations of Cheney*, 116 *Yale L.J.* 952, 993 (2007). But these concerns do not apply when belated explanations come from the top and the action at issue was itself taken by mere memorandum—as was true both here and in *Regents*. *See Benjamin Eidelson, Reasoned Explanation and Political Accountability in the Roberts Court*, 130 *Yale L.J.* 1748, 1768-71 (2021).

1. “Requiring a new decision before considering new reasons promotes agency accountability,” *Regents* explained, because it “ensur[es] that parties and the public can respond fully and in a timely manner to an agency’s exercise of authority.” 140 S. Ct. at 1909 (citation omitted). As I have argued at length elsewhere, this analysis reflects an “accountability-forcing” conception of the reasoned explanation requirement: “It takes the political nature of many significant executive-branch decisions entirely for granted, then uses the main lever at the courts’ disposal—the power to invalidate agency actions as inadequately reasoned—to try to ensure that those political choices are justified in a manner that facilitates political accountability for them.” Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 Yale L.J. 1748, 1757 (2021); *see id.* at 1761-85 (detailing how, in various respects, *Regents* exemplified this logic).

From that point of view, *Regents* and this case are like night and day. As is now well known, the DACA rescission was accompanied by “a sustained and conspicuous effort by the [agency] to disclaim responsibility for any discretionary choice.” *Id.* at 1767. The centerpiece of that effort was the wholesale exclusion of policy-based reasoning from the original rescission memorandum and accompanying public messaging. *See id.* at 1761-64. When the agency’s buck-passing legal rationale ran into trouble in court, however, Secretary Nielsen sought to invoke the very discretionary justifications whose political price the administration had earlier refused to pay. And, critically, she sought to make that switch *without* taking a new, superseding rescission action that could have immediately altered the real-world status quo, reset the litigation, and

prompted a new public reckoning over the administration’s (now avowedly discretionary) policy. *See id.* at 1764-67. That is why the “important value[]” of “agency accountability . . . [to] the public” would have been “markedly undermined” by “allow[ing] DHS to rely on reasons offered nine months after [it] announced the rescission.” *Regents*, 140 S. Ct. at 1909. At the same time, Justice Kavanaugh was surely correct that the Court’s ruling left the agency free to “relabel and reiterate the substance of the Nielsen Memorandum” if it so chose. *Id.* at 1935 (Kavanaugh, J., dissenting in part). That is because *Regents*’ holding regarding the Nielsen Memorandum required precisely that the agency’s chosen “substance” come in the form of a new, superseding “exercise of authority”—one for which the agency could then be held accountable “fully and in a timely manner” by Congress and the public. *Regents*, 140 S. Ct. at 1909.<sup>4</sup>

So Secretary Mayorkas did here exactly what *Regents* had rightly demanded: He paired his new reasons for terminating MPP with a new action terminating MPP. Demanding still more from the agency would not, as *Regents* did, “force [the] administration into explaining itself in ways that facilitate, rather than frustrate, the natural political repercussions of its choices.” Eidelson, *supra*, at 1752. Quite the opposite: It would subvert the same “important value[] of administrative law,” *Regents*, 140 S. Ct.

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<sup>4</sup> Although Justice Kavanaugh and the Solicitor General predicted that “the only practical consequence of the Court’s decision” would thus be “some delay,” 140 S. Ct. at 1935, that proved not to be the case. Faced with the need to publicly own the discretionary rescission described in the Nielsen Memorandum, the administration flinched and opted to preserve DACA instead. *See* Eidelson, *supra*, at 1818-19.

at 1909, by prolonging the court-ordered maintenance of a politically controversial policy that the politically accountable officials have long and openly proclaimed not to “align with this Administration’s values” (Pet. App. 261a). *Cf. Dep’t of Commerce*, 139 S. Ct. at 2571 (emphasizing the deference due to an agency’s head discretionary judgment “call[ing] for value-laden decisionmaking and the weighing of incommensurables”).<sup>5</sup>

2. *Regents* also observed that the bar on *post hoc* rationalizations serves to “instill[] confidence that the reasons given are not simply ‘convenient litigating position[s].’” 140 S. Ct. at 1909. But that function, too, is tied to the very fact of requiring a superseding agency action (such as Secretary Mayorkas took here); it does not depend on the depth or dispassionateness of the reconsideration precipitating such an action in a particular case. Even “*prior hoc*,” after all, agencies will be highly motivated to formulate and explain their decisions in ways that they think will hold up well in court. *See Dep’t of Commerce*, 139 S. Ct. at 2571 (“It is hardly improper for an agency head to come into office with policy preferences and ideas . . . and work with staff attorneys to substantiate the legal basis for a preferred policy.”). Insofar as *post hoc* explanations are distinctly suspect in this regard, it is only because they may be *further* warped by the felt imperative to defend the precise agency action that is *already on the*

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<sup>5</sup> The States’ comparison (Br. in Opp. 18, 20) to *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), fails for much the same reason. This is plainly not a case where the agency skirted accountability by withholding from the public its real reasons for terminating MPP and offering “contrived” reasons as a “distraction” instead. *Id.* at 2576; *see* Eidelson, *supra*, at 1785-94 (arguing that the pretext rule serves the same “accountability-forcing” function as the bar on *post hoc* explanations).

*books. Cf. Henry J. Friendly, Chenery Revisited*, 1969 Duke L.J. 199, 222-23 (explaining that courts should set aside badly reasoned agency decisions, even when the basic outcome is unlikely to change, because “proceeding on the right path may require or at least permit the agency to make qualifications and exceptions that the wrong one would not”).

Hence the importance of a superseding agency action: When an agency takes such an action, it necessarily abandons all hope (and temptation) of vindicating its last one in further litigation. The agency resigns itself to starting back at square one; the best it can hope for is seeing the *new* action (with its new effective date) eventually upheld. The fact that the adequacy of the October Memorandum still has not even been assessed by the district court in this case attests to the cost of that choice. But the flip side of that cost is that the formulation and explanation of agency policy is not materially more likely to be shaped by litigation convenience, in this post-vacatur posture, than it is when the agency tackles a new, equally legally fraught issue for the first time. And here, too, *Regents* is a case in point: The agency resisted taking a superseding action (and thereby opening the door to possibly salutary modifications) in part because it was loath to “reset th[e] protracted litigation” over its existing policy. Reply Brief 4, *Trump v. NAACP*, 2019 WL 127068 (U.S. 2019). Under those circumstances, it makes sense to worry that any new analysis of the merits of the existing action will represent “simply ‘convenient litigating position[s],’” *Regents*, 140 S. Ct. at 1909. But for the same reason, that worry is misplaced here.

Although the Fifth Circuit made much of the Government’s decision to pursue an appeal in this case in parallel with the agency process (Pet. App. 37a, 51a, 123a-25a),

that fact is likewise irrelevant to the logic of the concern that *Regents* expressed. All that matters is that when Secretary Mayorkas issued the October Memorandum, he abandoned (as he had to) any defense of the June Memorandum; indeed, he rescinded it. Unlike with a genuine *post hoc* explanation, therefore, there is no reason to worry that the process underlying the October Memorandum was distorted to rationalize the precise, extant approach to which the agency was independently committed or which it would have seen some special benefit in preserving. And because the district court’s aggressive exercise of its remedial powers here would have been improper even assuming the invalidity of the June Memorandum—or at least, because the Government could reasonably have thought so—it makes perfect sense that the Government would persist with its appeal regardless (while dropping, as it did, its defense of the June Memorandum itself). *Cf.* Pet. App. 51a (suggesting that the Government “should have voluntarily dismissed this appeal,” thereby apparently acquiescing to the independently erroneous injunction).

3. Last (and least), *Regents* pointed to the threat that *post hoc* explanations can pose to the “orderly functioning of the process of review.” 140 S. Ct. at 1909 (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)). But as the Court of course recognized (and its citation to *Chenery* confirms), there is nothing “disorderly” about an agency’s taking a successive action after a court vacated its first attempt. *Regents* confronted a “moving target” (*ibid.*) only because the agency sought to defend its *original* action—which had been vacated before the second memorandum even issued—on the basis of its later-articulated reasons (and to introduce those same reasons into other pending appeals regarding the legality of the same, prior action as

well). See Brief for the D.C. Respondents 54-55, *Regents*, 2019 WL 4748381 (arguing that courts “cannot exercise their duty in an orderly fashion if the ‘considerations underlying *the action under review*’ are a perpetual moving target” and detailing how “this case illustrates the disorder threatened by the Government’s approach” (quoting *Chenery*, 318 U.S. at 94; emphasis added)). Here, in contrast, the agency itself rescinded its original memorandum and swore off any effort to revive that agency action in court.

All told, this simply is not a case where the Government has failed to “turn square corners in dealing with the people.” If anything, it is a case where the Fifth Circuit failed to turn square corners in dealing with the people’s chosen policymakers—by substituting condescension for careful analysis, by brushing aside the settled legal frameworks on which agencies justifiably rely, and by caricaturing this Court’s holding and reasoning in *Regents*. “[W]e pay our precedents no respect,” this Court has said, “when we extend them far beyond the circumstances for which they were designed.” *Cooper v. Harris*, 137 S. Ct. 1455, 1481 (2017). The Fifth Circuit paid this Court’s precedent no respect here.

**II. THIS COURT SHOULD TAKE CARE NOT TO IMPLICITLY ENDORSE THE FIFTH CIRCUIT’S AGGRESSIVE APPLICATION OF *REGENTS* TO THE INITIAL AGENCY ACTION IN THIS CASE.**

Because Secretary Mayorkas rescinded the June Memorandum, the question of whether it was adequately explained is no longer live (and the Fifth Circuit thus should not have addressed it). Nonetheless, the lower courts’ holdings on that issue (Pet. App. 102a-113a, 190a-99a) reflect much the same kind of aggressive reading of

*Regents* as does the Fifth Circuit’s treatment of the October Memorandum. This Court should therefore take care to ensure that its opinion in this case cannot be seen as implicitly crediting or acquiescing in the premise that there was actually any violation of the reasoned explanation requirement for Secretary Mayorkas to correct here.

Indeed, some have already taken this Court’s summary order denying a stay in this case—and broadly citing the entire merits discussion in *Regents* in support—as ratifying an unduly aggressive conception of arbitrariness review. Whereas this Court has long underscored the APA’s “narrow standard of review,” *e.g.*, *Regents*, 190 S. Ct. at 1905; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009), the Fifth Circuit has read that summary order as demonstrating that, “after *Regents*,” arbitrariness review “has serious bite.” *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1136 (5th Cir. 2021); *accord* Pet. App. 103a (same); *cf.* Cristina M. Rodríguez, *The Supreme Court, 2020 Term—Foreword: Regime Change*, 135 Harv. L. Rev. 1, 104 (2021) (noting that this Court’s “citation to *Regents* . . . potentially signal[ed] how that decision has empowered courts and hostile litigants to slow or block change”). That “serious bite” standard is sure to work further mischief. Even just with respect to MPP, it raises a red flag about how the lower courts may review the October Memorandum on remand or in further litigation.

The Court (or some of its Members) might therefore find this an appropriate case in which to sound a note of caution about the acontextual, judge-empowering reading of *Regents* on display here. At bottom, *Regents* held that DACA’s rescission could not be predicated solely on a legal objection that did not even apply to “[the] policy at the heart of DACA”—and that the agency thus could not skirt

entirely “th[e] difficult decision” of how to weigh the policy’s costs and benefits (including what were alleged to be enormous reliance interests). 140 S. Ct. at 1912-14. By compelling the agency to take “responsib[ility]” (*id.* at 1912) for some such policy-based judgment, this application of the reasoned explanation requirement served the same “accountability-forcing” logic that supported the Court’s rejection of Secretary Nielsen’s *post hoc* rationalizations. Far from obstructing a politically accountable exercise of policymaking discretion, then, *Regents* merely insisted that the administration actually subject itself to political accountability for whatever choice it made. *See* Eidelson, *supra*, at 1773-85. Tellingly, Justices Alito and Kavanaugh would have accepted even the curt policy discussion in the Nielsen Memorandum as sufficient in *Regents*, and no Justice in the majority suggested that they would not have done the same if they had thought that explanation was properly before them. *See Regents*, 140 S. Ct. at 1934 (Kavanaugh, J., dissenting in part); *accord id.* at 1932 (Alito, J., dissenting in part).

It should be clear, then, that *Regents*’ enforcement of the reasoned explanation requirement did not license courts to nitpick even amply explained, openly value-laden exercises of policymaking discretion in search of any cost that was not specifically named—let alone ones that are not “reliance interests” in any ordinary sense—or any failure to address a conceivable policy alternative. *See* Benjamin Eidelson, “*Pay[ing] Our Precedents No Respect*”: *Why the DACA and Remain-in-Mexico Rescissions Are Worlds Apart*, Yale J. Reg. Notice & Comment (Sept. 2, 2021), <https://tinyurl.com/2p8trn7w>. Yet the memorandum that the lower courts deemed insufficient under *Regents* here (Pet. App. 346a-60a) provided vastly more in the way of explicit, granular explanation of the agency’s

reasons for its chosen course than had Secretary Nielsen’s explanation for favoring the rescission of DACA—which, again, no Justice in *Regents* found wanting.

If *Regents* is read to cast doubt on even explanations as thorough as Mayorkas’s initial memorandum was here, it will become a dangerous blueprint for “second-guessing the Secretary’s weighing of risks and benefits” and thereby “substitut[ing] [the court’s] judgment for that of the agency.” *Dep’t of Commerce*, 139 S. Ct. at 2571.<sup>6</sup> Indeed, that deformed version of *Regents* would be tantamount to a “one free remand” rule, whereby every major agency action must be re-explained to namecheck whatever particular cost or hypothetical alternative an unfavorable court can identify after the fact as having received no specific discussion on the first go-round. And *Regents*’ sound and measured gloss on the reasoned explanation requirement would then prove a harm, not a help, to the APA’s aim of making the federal government “accountable to the public” for its important decisions. *Regents*, 140 S. Ct. at 1905 (citation omitted).

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<sup>6</sup> A recent district court ruling regarding DACA itself offers another example of this misreading of *Regents* at work. That court ruled that “if one applies the . . . analysis from *Regents* to DACA’s creation, it faces similar deficiencies,” because the DACA Memorandum did not expressly consider (1) the possibility of adopting DACA but making beneficiaries (alone among deferred-action recipients) ineligible for the benefits that flow from deferred action under separate regulations, or (2) the fact that “the states and their residents” have a so-called “reliance interest” in DHS’s “enforcing the law as Congress had written it.” *Texas v. United States*, 549 F. Supp. 3d 572, 622 (S.D. Tex. 2021), *appeal filed*, No. 21-40680 (5th Cir., Sept. 16, 2021); *cf.* Pet. App. 194a (similarly crediting the States’ “reliance interests in the proper enforcement of federal immigration law”).

**CONCLUSION**

The judgment of the court of appeals should be reversed and the case should be remanded for further proceedings.

Respectfully submitted,

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