No. 21-954

IN THE

Supreme Court of the United States

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

Petitioners,

v.

STATE OF TEXAS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a consumer advocacy organization with members in all 50 states. Public Citizen appears on behalf of its members before Congress, administrative agencies, and the courts to advocate for policies that benefit the public. And it is often involved in litigation either challenging or defending agency actions under the Administrative Procedure Act (APA).

This amicus brief focuses on the second question presented in this case, which concerns the legal status of the Secretary of Homeland Security's October 2021 memorandum (October Memorandum) terminating the Migrant Protection Protocols (MPP), a policy that limited entry into the United States for people seeking admission to the United States through the land border with Mexico. The Secretary issued that memorandum after, and in response to, the district court's decision to vacate and remand his June 2021 memorandum (June Memorandum) terminating MPP. The court of appeals concluded that the October Memorandum was not final agency action and, thus, accorded it no legal effect.

Public Citizen submits this brief to explain that the court's decision, if accepted by this Court, would hamstring the ability of federal agencies to respond promptly to adverse court decisions, because they would have no assurance that their corrective actions would be recognized by the courts. This consequence would make agencies less responsive to adverse court

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[1] This brief was not written in whole or in part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for both parties have consented in writing to its filing through blanket consents submitted to the Court.

decisions and frustrate their ability to carry out their statutory responsibilities.

SUMMARY OF ARGUMENT

Respondents' amended complaint sought judicial review of the June Memorandum terminating MPP. Pet. App. 151a. Concluding that respondents' statutory and APA claims had merit, the district court granted injunctive relief, vacated the June Memorandum, and remanded the matter to the Department of Homeland Security (DHS). *Id.* at 212a. In response, the agency took two actions. First, it appealed the district court's judgment. Second, "[p]ursuant to the District Court's remand," it "once more assessed whether MPP should be maintained, terminated, or modified." *Id.* at 259a. After "examin[ing] considerations that the District Court determined were insufficiently addressed in the June 1 memo," *id.*, the DHS Secretary issued the October Memorandum, in which he again "determined that MPP should be terminated," *id.* at 260a, and again terminated it.

The October Memorandum is final agency action under the APA. The court of appeals, however, in assessing its jurisdiction over DHS's appeal of the district court's decision regarding the June Memorandum, incorrectly stated that the October Memorandum "did not constitute a new and separately reviewable 'final agency action.'" Pet. App. 23a. The district court's vacatur of the June Memorandum (which was not stayed pending appeal) nullified the Secretary's initial decision to terminate MPP. With MPP back in place (unless and until its vacatur were subsequently reversed on appeal), DHS was required to undertake a new and separate action if it sought to terminate the program. That is what DHS did in the October

Memorandum. The court of appeals' reasons for refusing to recognize the October Memorandum as final agency action cannot be reconciled with bedrock administrative-law principles. This Court should reverse.

I. The APA establishes the procedures by which courts review final agency action and authorizes them to set aside agency action that they find to be arbitrary and capricious because the agency failed to engage in reasoned decisionmaking. If a court concludes that the administrative record before the agency when it made its decision does not support the agency's action, the usual remedy is for the court to vacate the action, thereby restoring the *status quo ante*, and to remand the matter to the agency. Only when a court remands *without* vacatur, or stays its judgment or mandate, does the agency action remain in effect pending remand proceedings.

In light of these principles, the October Memorandum is final agency action that is distinct from the final agency action taken in the June Memorandum. As the courts below recognized, the June Memorandum constituted final agency action because it embodied the consummation of DHS's decisionmaking process to terminate MPP and had the effect of changing agency policy toward that end. The October Memorandum stands on the same legal footing: At the time it was issued, the district court's vacatur of the June Memorandum had taken effect, and MPP had been re-established as DHS policy. The October Memorandum reverses that policy by once again terminating MPP. Thus, like the June Memorandum, the October Memorandum is final agency action.

II. The court of appeals' reasons for refusing to recognize the October Memorandum as final agency action lack merit.

First, the court of appeals failed to appreciate the import of the district court's vacatur. The district court did not vacate only the Secretary's *explanation* for terminating MPP; it terminated the underlying *action* as well. Accordingly, when the Secretary issued the October Memorandum, he was not purporting to provide an additional explanation for his prior decision to terminate MPP, but, rather, was taking new action accompanied by a new explanation that responded to the concerns raised by the district court.

The court of appeals wrongly analogized the October Memorandum to the Nielsen memorandum that this Court concluded was a *post hoc* rationalization in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020) (*Regents*). In that case, this Court concluded that the Nielsen memorandum was a *post hoc* rationalization because DHS had adopted it as an elaboration of its rationale for the action under review *before* the vacatur of that action had taken effect. Here, by contrast, the Secretary issued the October Memorandum *after* the district court's vacatur of the June Memorandum had become effective. Because offering a *post hoc* rationalization for action that has already been set aside would be nonsensical, the Secretary's only option for addressing the deficiencies identified by the district court was to take new agency action, which is what the October Memorandum represents.

Second, the court of appeals erred in invoking the D.C. Circuit's "reopening" doctrine to assess whether the October Memorandum is final agency action. That

doctrine is used to determine whether an agency has triggered a new period for seeking judicial review of an *existing* agency policy. Thus, it comes into play only when the agency has restated its *existing* policy, in the absence of any judicial order or legislation requiring it to reconsider an action. Here, by contrast, the October Memorandum *alters* the agency's existing policy by terminating MPP, which the district court's vacatur of the June Memorandum had reinstated. A policy change of this sort is necessarily made through final agency action, and the court of appeals misapplied the reopening doctrine to conclude otherwise.

Third, the court erred when it concluded that the October Memorandum does not have legal effect. The October Memorandum superseded the June Memorandum and, thereby, eliminated DHS's interest in having the reasoning of the June Memorandum upheld on appeal. The court further erred in concluding that the October Memorandum could have no legal effect because the district court enjoined DHS to implement MPP. The injunction expressly contemplates that DHS will be able to rescind MPP by taking final agency action in compliance with the requirements of the APA. DHS did so in the October Memorandum—creating, like any final agency action, the potential for an APA challenge to the lawfulness of that new action.

Finally, the court also erred in suggesting that DHS was required to dismiss its appeal for the October Memorandum to be treated as final agency action. Because the district court's injunction imposed continuing obligations on DHS, the agency's interest in seeking reversal of the district court's judgment survived its rescission of the June Memorandum. Contrary to the court of appeals' suggestion, DHS was not required to pursue relief from the injunction under

Federal Rule of Civil Procedure 60(b) for the October Memorandum to be given legal effect. Moreover, an agency does not have to dismiss its appeal before taking an action that potentially moots it, nor does its failure to dismiss its appeal after taking such action vitiate an otherwise valid agency action.

III. This Court should ensure that agencies, when faced with an adverse court decision, have the flexibility to pursue an appeal and undertake corrective agency action simultaneously. If, as the court of appeals suggests, an agency that pursues an appeal risks having the legal effect of its corrective action disregarded, the agency could be deterred from acting expeditiously after its preferred policy option is vacated on judicial review. Alternatively, the agency whose rule was vacated as arbitrary and capricious for failure to provide an adequate explanation or to consider all pertinent facts could be incentivized to adopt a different rule on remand—not because a different approach is optimal, but only so that it could point to a substantive change that would preclude a court from treating its subsequent action as a *post hoc* rationalization. In either case, the outcome would undermine Congress's judgment to grant the agency the discretion to determine how best to implement important statutory objectives and, accordingly, would be contrary to foundational principles of administrative law.

ARGUMENT

I. The October Memorandum is final agency action.

A. "The APA 'sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts.'" *Regents*, 140 S. Ct. at 1905 (quoting *Franklin v. Massachusetts*,

505 U.S. 788, 796 (1992)). The focus of judicial review under the APA is "agency action," defined "to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns, Inc.* 531 U.S. 457, 478 (2001); *see* 5 U.S.C. § 551(13) (defining "agency action"). The APA provides that persons "adversely affected or aggrieved by agency action [are] entitled to judicial review thereof," 5 U.S.C. § 702, and that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review," *id.* § 704. *See generally Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61–64 (2004).

The APA further authorizes reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In deciding whether an agency has acted arbitrarily or capriciously, courts consider whether its action is the product of "reasoned decisionmaking." *Regents*, 140 S. Ct. at 1905 (internal quotation marks omitted); *see Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

The APA directs reviewing courts to "review the whole record or those parts of it cited by a party" in making that determination. 5 U.S.C. § 706. As this Court has explained, the "whole record" refers to the "full administrative record that was before the [agency] at the time [it] made [its] decision," and thus excludes "*post hoc* rationalizations" developed after the agency took the action under review. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–20 (1971) (internal quotation marks omitted).

Generally, if the agency action "is not sustainable on the administrative record made, then the [agency's] decision must be vacated and the matter remanded to [it] for further consideration." *Camp v. Pitts*, 411 U.S. 138, 143 (1973); *see* 5 U.S.C. § 706(2)(A) (providing that a reviewing court "shall ... set aside" unlawful agency action); *see also Am. Pub. Gas Ass'n v. U.S. Dep't of Energy*, 22 F.4th 1018, 1030 (D.C. Cir. 2022) (stating that "vacatur is the normal remedy when a rule is found unlawful" (internal quotation marks omitted)). A reviewing court's vacatur, or setting aside, of agency action "restore[s] the *status quo ante*." *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 672 (D.C. Cir. 2008). Accordingly, when a court vacates an agency decision to rescind a rule, the court's judgment has the "effect of reinstating the rule[] previously in force." *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983).

Courts have recognized that, in certain circumstances, immediate vacatur of agency action may be disruptive or otherwise unwarranted and, therefore, have employed various means in such cases to allow agency actions found to violate APA standards to remain in effect temporarily pending further agency proceedings. For example, the D.C. Circuit and other courts have held that "remand without vacatur is a useful arrow in a court's remedial quiver," which courts will employ "depend[ing] on the seriousness of the [action's] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Am. Pub. Gas Ass'n*, 22 F.4th at 1030 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)); *see also Texas Ass'n of Mfrs. v. U.S. Consumer Prod.*

Safety Comm'n, 989 F.3d 368, 389 (5th Cir. 2021) (granting remand without vacatur). Even when a court concludes that vacatur is the appropriate remedy, it may stay its judgment or mandate for a period of time to give the agency an opportunity to address the court's decision before the agency's action is undone. *See*, *e.g.*, *Chamber of Commerce of U.S., Inc. v SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006) (withholding issuance of mandate for 90 days); *United Food & Commercial Workers Union, Local No. 663 v. USDA*, 532 F. Supp. 3d 741, 782 (D. Minn. 2021) (staying order of vacatur for 90 days); *NAACP v. Trump*, 298 F. Supp. 3d 209, 245–46 (D.D.C. 2018) (*NAACP I*) (staying order of vacatur for 90 days), *judgment aff'd*, *Regents*, 140 S. Ct. 1891. A reviewing court may also stay its judgment to allow the agency to obtain appellate review before a vacatur takes effect. *See* Fed. R. Civ. Pro. 62; *e.g.*, *NAACP v. Trump*, 321 F. Supp. 3d 143, 145–46 (D.D.C. 2018) (*NAACP III*) (granting partial stay pending appeal).

B. Under the foregoing principles, issuance of the October Memorandum represents final agency action that is distinct from issuance of the June Memorandum.

1. DHS initiated MPP in December 2018. The following month, then-Secretary Nielsen issued a memorandum providing "guidance for implementation of MPP." Pet. App. 157a–58a. In January 2021, the new administration suspended new enrollments in MPP and undertook a review to consider terminating or modifying it. *Id.* at 347a–48a. After completing that review, the Secretary issued the June Memorandum formally "terminating the MPP program." *Id.* at 348a.

In the district court, the parties disputed whether the June Memorandum constituted final agency action. Pet. App. 180a–82a. Because the June Memorandum undisputedly was "agency action" within the broad definition in 5 U.S.C. § 551(13), the court focused on whether it was "final." Pet. App. 181a. Applying the two-prong test set forth in *Bennett v. Spear*, 520 U.S. 154 (1997), the court considered whether the June Memorandum (1) "marks the consummation of the [agency's] decisionmaking process" and (2) "produces legal consequences and determines rights and obligations." Pet. App. 181a. The parties agreed that *Bennett*'s first prong was satisfied. *Id.* With regard to the second prong, which the government disputed, the court explained that the June Memorandum "had the immediate legal consequence of 'terminating the MPP program,'" and "of rescinding" Secretary Nielsen's memorandum on MPP. *Id.* The court also explained that the June Memorandum directed DHS personnel to commence the process of terminating MPP and precluded line officers from using MPP. *Id.* at 182a.

The court of appeals affirmed the determination that the June Memorandum was final agency action. Pet. App. 15a–19a. The court held that the June Memorandum consummated the agency's decisionmaking process, rejecting DHS's argument that the decision "isn't final until the agency applies it 'in a particular situation.'" *Id.* at 16a. The court also concluded that the June Memorandum had legal consequences and determined rights and obligations because it "bound DHS staff by forbidding them to continue the program in any way from that moment on." *Id.* at 17a.

2. Like the June Memorandum, the October Memorandum constitutes an action by the agency to change its policy regarding the manner in which it

would exercise its authority towards applicants for admission arriving by land through Mexico. Thus, like the June Memorandum, the October Memorandum is "final" agency action.

When the Secretary issued the October Memorandum, the June Memorandum was not in effect. After holding that the June Memorandum "was arbitrary and capricious and in violation of the APA," Pet. App. 200a, and that respondents' "statutory claim is meritorious as well," *id.* at 202a, the district court expressly declined to remand to the agency without vacating the June Memorandum, *id.* at 203a–209a. Instead, it issued a judgment setting the June Memorandum aside. *See id.* at 212a–13a, 364a. The vacatur took effect on August 24, 2021, after the government's requests for a stay pending appeal were denied. *See id.* at 213a (staying vacatur until August 20, 2021); Order of Aug. 20, 2021, No. 21A21 (S. Ct.) (extending stay until August 24, 2021); Pet. App. 214a (denying application for stay). Accordingly, when the Secretary adopted the October Memorandum, the MPP program had been "reinstat[ed]" by the district court's vacatur and was "in force" at the agency, just as it was when the Secretary issued the June Memorandum. *Action on Smoking & Health*, 713 F.2d at 797; *see also Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757–58 (D.C. Cir. 1987) ("[W]hen the District Court vacated the Secretary's *1981* wage-index rule, it necessarily reinstated the Secretary's *1979* rule, which required the Secretary to reimburse providers using a formula that included federal-hospital data."), *aff'd*, 488 U.S. 204 (1988).

With respect to the question of final agency action, the October Memorandum stands on the same footing as the June Memorandum. The October Memorandum

is not of a "tentative or interlocutory nature," but "mark[s] the 'consummation' of the agency's decisionmaking process" conducted in response to the vacatur and remand of the June Memorandum. *Bennett*, 520 U.S. at 178 (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). The Secretary explained that he "assessed whether MPP should be maintained, terminated, or modified," "examined considerations that the District Court determined were insufficiently addressed" in the June Memorandum, and "carefully consider[ed] the arguments, evidence, and perspectives presented by those who support re-implementation of MPP, those who support terminating the program, and those who have argued for continuing MPP in a modified form." Pet. App. 259a–60a. At the completion of that review, the Secretary "ruled definitively" that MPP must be terminated, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 598 (2016) (internal quotation marks omitted), thus rendering his "last word on the matter in question," *Am. Trucking Ass'ns*, 531 U.S. at 478 (internal quotation marks omitted).

In addition, "legal consequences will flow" from the October Memorandum, *Bennett*, 520 U.S. at 178 (internal quotation marks omitted), in the same way the court of appeals held that legal consequences would flow from the June Memorandum. The October Memorandum, like the June Memorandum, "terminate[s] MPP." Pet. App. 263a. In addition, "[e]ffective immediately," the October Memorandum "supersede[d] and rescind[ed]" prior agency actions relating to MPP—that is, "the June 1 memorandum, Secretary Nielsen's January 25, 2019 memorandum, and any other guidance or other documents prepared by the Department to implement MPP." *Id.* at 263a-64a. Although the

district court's injunction precluded DHS from putting the termination of MPP into immediate effect, the October Memorandum is still final *agency* action because it provides that "the termination of MPP will be implemented as soon as practicable after a final judicial decision to vacate the … injunction." *Id.* at 264a. The October Memorandum thus "alter[s] the legal regime to which [DHS] is subject," *Bennett*, 520 U.S. at 178, by requiring the agency to terminate MPP upon dissolution of the district court's injunction.

II. The court of appeals' reasons for declining to recognize the October Memorandum as final agency action lack merit.

The court of appeals declined to recognize the October Memorandum as final agency action, largely because the court failed to appreciate the import of the district court's vacatur of the June Memorandum. Once that vacatur took effect, DHS's subsequent decision to terminate MPP necessarily represented new agency action. Accordingly, the court of appeals' refusal to treat the October Memorandum as final agency action should be reversed.

A. The court of appeals erred by regarding the October Memorandum as a further explanation for the June Memorandum, rather than as a new agency action.

1. To support its conclusion that the October Memorandum is not final agency action, the court of appeals conceptualized the Secretary's actions as follows: In June 2021, the Secretary decided to terminate MPP (what the court described as the "Termination Decision"); simultaneously, the Secretary explained the "Termination Decision" by issuing the June Memorandum; then, in October 2021, the Secretary issued

the October Memorandum as a further explanation of his decision in June to terminate MPP. Pet. App. 22a. The court analogized the "Termination Decision" to a court judgment, and the June and October Memorandums as "a court's opinion[s] explicating its judgment." *Id*. Under this view, the only final agency action at issue occurred when the Secretary decided to terminate MPP in June.

The flaw in the court's reasoning is that it ignores the effect of the district court's vacatur of what the court of appeals called the "Termination Decision." The district court's judgment did not merely set aside the Secretary's explanation for terminating MPP, while leaving the underlying agency action in place. Rather, the district court vacated the June Memorandum "in its entirety" and remanded "to DHS for further consideration." Pet App. 212a. The district court, moreover, declined to exercise its authority to remand without vacatur, *id*. at 203a–09a, and both the court of appeals and this Court rejected the government's requests for a stay of the judgment pending appeal, *id*. at 214a, 215a–53a. The decisions denying stays and allowing the vacatur to take effect would themselves have no practical effect if the vacatur applied only to the Secretary's explanation for his action and not to the action itself.

Accordingly, after the district court's vacatur took effect in August 2021, there was no extant "Termination Decision" for which the Secretary could provide a further explanation. Rather, the October Memorandum embodies a new agency action terminating MPP, taken in response to, and addressing the deficiencies identified in, the district court's decision.

The court of appeals' analogy to judicial opinions in support of a judgment suffers from a similar error. The court's analogy assumes a situation in which a district court issues two opinions in support of a single judgment. The correct analogy, however, would be to a situation in which a district court issues one opinion and judgment, the judgment is vacated on appeal and the case remanded to district court, and the district court then issues a new opinion and judgment on remand. In that scenario, the district court has unquestionably issued two distinct opinions in support of two distinct judgments.

In the same way, DHS here has taken two separate agency actions to terminate MPP—the first in June and the second in October, after the June action was vacated and remanded to the agency. Thus, the Secretary's action on remand is akin to the action on remand taken by the Securities and Exchange Commission (SEC) in this Court's seminal *Chenery* cases: *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) (*Chenery I*), and *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947) (*Chenery II*). In *Chenery I*, this Court reviewed an SEC order limiting the rights of certain fiduciaries who purchased preferred stock pending a corporate reorganization. 318 U.S. at 81, 85. The Court held that the SEC had relied solely on equitable principles to support its decision, but those principles were not "sufficient to sustain its order." *Id.* at 89. On remand, the SEC "reexamined the problem, recast its rationale and reached the same result." *Chenery II*, 332 U.S. at 196. In *Chenery II*, this Court upheld the SEC's order, explaining that "[t]he fact that the Commission had committed a legal error in its first disposition" conferred "no vested right" on the challengers; rather; "[a]fter the remand was made, the [SEC] was *bound*

to deal with the problem afresh, performing the function delegated to it by Congress." *Id.* at 200–01 (emphasis added).

Here, the Secretary was in the same position when the district court's vacatur took effect, and the October Memorandum is his attempt to "deal with the problem afresh." The court of appeals, accordingly, was wrong to treat the October Memorandum as mere explanation, rather than as a new agency action.

2. Relying on *Regents*, the court of appeals suggested that the October Memorandum could not "be anything more than [a] *post hoc* rationalization[] of the [June] Termination Decision." Pet. App. 45a. The court considered *Regents* relevant because, there, DHS had issued two memorandums justifying rescission of an agency policy: the Duke memorandum in September 2017 and the Nielsen memorandum in June 2018, both of which sought to justify rescission of the Deferred Action for Childhood Arrivals (DACA) program. *See Regents*, 140 S. Ct. at 1907. *Regents* concluded that the Nielsen memorandum "was by its own terms not a new rule implementing a new policy," but instead an "elabora[tion] on the reasons for the initial rescission." *Id.* at 1908. As such, the Court explained, the Nielsen memorandum constituted an "impermissible '*post hoc* rationalization'" to the extent that it offered justifications for the rescission that went beyond "the agency's original reasons" for its action. *Id.* (quoting *Overton Park*, 401 U.S. at 420).

The court of appeals' reliance on *Regents* ignores critical differences in the two cases regarding the timing of the agency memorandums. The DACA rescission was challenged in multiple circuits. *See Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018)

(granting preliminary injunction); *Regents of Univ. of Cal. v. DHS*, 279 F. Supp. 3d 1011 (N.D. Cal.) (same), *aff'd*, 908 F.3d 476 (9th Cir. 2018); *Casa De Maryland v. DHS*, 924 F.3d 684 (4th Cir. 2019) (finding Duke memorandum arbitrary but staying mandate). Only one challenge, however, led DHS to issue the Nielsen memorandum: In *NAACP*, the district court, after finding the DACA's rescission as explained in the Duke Memorandum "arbitrary and capricious," vacated the rescission, but "stay[ed] its order of vacatur for 90 days … to afford DHS an opportunity to better explain its view that DACA is unlawful." *NAACP I*, 298 F. Supp. 3d at 249; *see also id.* at 245–46.

"The District Court's remand thus presented DHS with a choice: rest on the Duke Memorandum while elaborating on its prior reasoning, or issue a new rescission bolstered by new reasons absent from the Duke Memorandum." *Regents*, 140 S. Ct. at 1908. DHS chose "the first path," *id.*, when it issued the Nielsen memorandum approximately two months into the 90-day stay period, *see NAACP v. Trump*, 315 F. Supp. 3d 457, 460–63 (D.D.C. 2018) (*NAACP II*). Rather than take "new administrative action," DHS "*declined to disturb* the Duke memorandum's rescission and instead provided further explanation for that action." *Regents*, 140 S. Ct. at 1908 (emphasis added, cleaned up). In response to the Nielsen memorandum, the district court continued the stay of vacatur, *see* Scheduling Order, *NAACP v. Trump*, No. 17-1907 (D.D.C. June 27, 2018), and addressed the Nielsen memorandum, *NAACP II*, 315 F. Supp. 3d 457, *before* allowing any part of its vacatur of the DACA rescission to take effect, *NAACP III*, 321 F. Supp. 3d at 143 (granting partial stay of vacatur pending appeal).

Here, by contrast, the Secretary had no comparable choice. Once the district court's judgment took effect in August 2021, the agency had no extant action to justify, *post hoc* or otherwise, because vacatur of the June Memorandum took that "agency action 'off the books.'" *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 50 (D.D.C. 2020) (quoting *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 92 (D.D.C. 2007)); *see also Virgin Islands Tel. Corp.*, 444 F.3d at 672 (explaining that vacatur "restore[s] the *status quo ante*."). Absent reversal of the district court's opinion on appeal, the Secretary's only option for addressing the deficiencies identified by the district court was to "'deal with the problem afresh' by taking *new* agency action." *Regents*, 140 S. Ct. at 1908 (quoting *Chenery II*, 332 U.S. at 201). And that is what the Secretary did: He "once more assessed whether MPP should be maintained, terminated, or modified," Pet. App. 259a, and based on that assessment, decided to supersede and rescind the June Memorandum, *id.* at 263a. The October Memorandum thus of necessity and by its express terms represents "new administrative action." *Regents*, 140 S. Ct. at 1908. The court of appeals' suggestion that this case is analogous to the situation in *Regents* is therefore wrong.

B. The reopening doctrine does not apply when the agency takes action to effectuate a policy change.

The court of appeals also ignored the effect of the district court's vacatur when it invoked the "reopening doctrine" to conclude that the October Memorandum does not represent final agency action. Pet. App. 23a–30a.

The reopening doctrine is a principle developed by the D.C. Circuit to assess whether a challenge to

agency action is timely. *See Nat'l Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd.*, 158 F.3d 135, 141 (D.C. Cir. 1998) (*NARPO*) (stating that the reopening doctrine is "an exception to statutory limits on the time for seeking review of an agency decision" (cleaned up)). The doctrine "arise[s] in situations where an agency conducts a rulemaking or adopts a policy on an issue at one time, and then in a later rulemaking restates the policy or otherwise addresses the issue again without altering the original decision." *Id.* If the "later proceeding explicitly or implicitly shows that the agency actually reconsidered the rule, the matter has been reopened and the time period for seeking judicial review begins anew." *Id.* (citing *Public Citizen v. NRC*, 901 F.2d 147, 150 (D.C. Cir. 1990)). By contrast, an agency does not reopen its action, and thus does not restart the time for seeking review, "merely by responding to an unsolicited comment by reaffirming its prior position." *CTIA-The Wireless Ass'n v. FCC*, 466 F.3d 105, 110 (D.C. Cir. 2006) (cleaned up); *see also Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (Roberts, J.) (explaining that "regulations and interpretations that have not been reopened by agency action remain at repose and are not newly reviewable").

The court of appeals determined that the reopening doctrine was relevant to the question whether the October Memorandum "constitute[s] a new and separately reviewable 'final agency action.'" Pet. App. 23a. Based on its review of the context leading up to the issuance of the October Memorandum, *id.* at 24a (citing *Growth Energy v. EPA*, 5 F.4th 1, 21–22 (D.C. Cir. 2021) (per curiam)), the court determined that the October Memorandum "did not come close to reopening DHS's Termination Decision," Pet. App. 28a. As the

government has explained, and contrary to the court's conclusion, the Secretary explicitly "reopened" the question whether MPP should be maintained, modified, or terminated. U.S. Br. 46.

The more fundamental problem with the court's analysis, however, is its assumption that the reopening doctrine applies at all in the circumstances of this case. The reopening doctrine applies only when an agency "restates" an extant rule or policy, typically in the context of a new rulemaking proceeding. *NARPO*, 158 F.3d at 141; *see also Public Citizen*, 901 F.2d at 150 (discussing the "the problem of whether an agency's *restatement* of an existing rule or policy in a rulemaking format makes the rule or policy challengeable anew" (emphasis added)). In that situation, the reopening doctrine permits "a plaintiff to bring an otherwise-stale challenge" if the "agency has considered substantively changing a rule but ultimately *declined* to do so." *Mendoza v. Perez*, 754 F.3d 1002, 1019 n.12 (D.C. Cir. 2014). The doctrine, however, has no role where "there [is] new agency action substantively changing" the agency's rule or policy. *Id.* When such a substantive change occurs, the agency has *ipso facto* taken "final agency action sparking a new period for review." *Id.* at 1019.

Thus, the court of appeals' error is manifest. The June Memorandum substantively changed DHS policy by terminating MPP. The district court's vacatur of the June Memorandum undid the policy change and restored MPP as agency policy as of August 2021. The October Memorandum then responded to the district court's remand by terminating MPP again. At no point in this process did DHS restate an *extant* agency policy without altering the original decision. *NARPO*, 158 F.3d at 141. Instead, both the June and October

Memorandums *altered* existing agency policy by terminating MPP.

The court of appeals was thus wrong to characterize the October Memorandum as "merely continu[ing], rather than reopen[ing], the Termination Decision." Pet. App. 30a. The October Memorandum could not "continu[e]" the Secretary's earlier decision to terminate MPP because that termination was no longer in effect; the district court's vacatur of the June Memorandum had reinstated MPP. *Cf. Alaska v. USDA*, 772 F.3d 899, 900 (D.C. Cir. 2014) (Kavanaugh, J.) (holding that reinstatement of a repealed rule after an intervening court decision triggered new statute-of-limitations period for seeking judicial review). Only a new final agency action could terminate MPP after the district court's judgment went into effect. In these circumstances, where the agency alters the *status quo* rather than "declin[ing] to do so," the reopening doctrine plays no role. *Mendoza*, 754 F.3d at 1019 & n.12 (emphasis removed).

C. The court of appeals was incorrect that the October Memorandum had no legal effect.

The court of appeals was wrong when it described the October Memorandum as having "*zero* legal effect." Pet. App. 35a. As the court explained it, the October Memorandum accomplished two things: (1) "immediately" superseding and rescinding the June Memorandum and (2) "terminat[ing] MPP, with that termination 'to be implemented as soon as practicable after a final judicial decision to vacate the … injunction that currently requires good faith implementation and enforcement of MPP.'" *Id.* at 35a (quoting *id.* at 272a). The court believed the rescission of the June

Memorandum to be a "nullity" because the district court "had *already* vacated the Termination Decision." *Id.* Thus, the court correctly recognized that the district court's vacatur "rendered the June 1 Termination Decision void." *Id.* at 36a.

Nonetheless, the court erred in concluding that the district court's vacatur of the June Memorandum left "nothing to rescind." Pet. App. 36a. Because DHS had appealed the district court's judgment, the agency retained an interest in the lawfulness of the June Memorandum so long as it embodied and stated the rationale for the agency's latest action with respect to terminating MPP. *See Global Tel*Link v. FCC*, 866 F.3d 397, 407 (D.C. Cir. 2017) (holding that a case was not moot despite the agency's refusal to defend its decision in litigation because the order "that gave rise to the petitions for review is still in force" and the agency "has never acted to revoke, withdraw, or suspend" the order); *cf. Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2196–97 (2020) (holding that the government's concession of the constitutional question did not warrant dismissal of the case where the agency had not withdrawn the action in dispute). By rescinding the June Memorandum, the agency has abandoned the action it embodied and the rationale it set forth, electing instead to take new action supported by a new explanation that "respond[s] to the [district court's] criticisms." Pet. App. 29a. Accordingly, the October Memorandum's rescission of the June Memorandum is not a "nullity."

The court of appeals also declined to give any legal effect to the October Memorandum's termination of MPP because the district court's injunction precludes immediate implementation of the decision embodied in that Memorandum. Pet. App. 36a. The district

court's injunction, however, does not preclude DHS from taking a new final agency action on remand. To the contrary, the injunction provides that DHS must "enforce and implement MPP *in good faith* until such a time *as it has been lawfully rescinded in compliance with the APA* and until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section 1255 without releasing any aliens *because of* a lack of detention resources." *Id.* at 212a (second emphases added). Because the injunction contemplates that DHS may "lawfully rescind[]" MPP, it necessarily recognizes that DHS must undertake final agency action to do so. Accordingly, to the extent that the court of appeals believed that the October Memorandum cannot be final agency action in light of the injunction, its understanding of the injunction's effects on DHS's authority was mistaken.

D. DHS was not required to abandon its appeal of the district court's injunction before issuing the October Memorandum.

The court of appeals suggested that the October Memorandum should not be "assessed as a response to *the district court's* remand" because the government had not "voluntarily dismissed this appeal and asked *the district court* for relief from the judgment." Pet. App. 51a. To the extent that the court considered DHS's decision not to dismiss its appeal as in conflict with the October Memorandum's status as final agency action, that view is unsound.

The relief ordered by the district court was not limited to vacating the June Memorandum and enjoining its enforcement. *See* Pet. App. 212a. If it had been, then DHS, after superseding and rescinding the June

Memorandum, would no longer have an interest in seeking reversal of the district court's judgment and could be expected to voluntarily dismiss its appeal. Indeed, in that circumstance, if DHS did not voluntarily dismiss its appeal, the court would likely be required to dismiss it as moot. *See*, *e.g.*, *Mine Reclamation Corp. v. FERC*, 30 F.3d 1519, 1522 (D.C. Cir. 1994) ("Although no party asserts that the case is therefore moot, we are obliged to address the issue sua sponte because mootness goes to the jurisdiction of this court.").

The district court's injunction, however, reached beyond the June Memorandum. It also required DHS to enforce and implement MPP until certain conditions were met, and it imposed ongoing reporting requirements on the agency. Pet. App. 212a–13a. Therefore, DHS could not voluntarily dismiss its appeal without acquiescing to the mandatory terms of the district court's injunction. *See GTE Sylvania, Inc. v. Consumers Union of U.S.*, 445 U.S. 375, 386 (1980) ("[P]ersons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order."). The agency's interest in seeking reversal of the mandatory duties imposed by the injunction (and review of the erroneous statutory construction they reflect) thus survived the extinguishment of its interest in the validity of the June Memorandum. *Cf. Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 151 (2010) ("[P]etitioners … have standing to challenge the part of the District Court's order enjoining partial deregulation," which was a "part of the judgment that [went] beyond the vacatur of [the agency's] deregulation decision.").

The court of appeals indicated that DHS should nonetheless have dismissed its appeal because it could move the district court for relief from the injunction under Federal Rule of Civil Procedure 60(b) and then appeal any adverse decision. *See* Pet. App. 51a; *see also id.* at 37a, 124a–26a & n.19. In general, however, Rule 60(b) motions are "interpreted … quite narrowly," *Carter v. Fenner*, 136 F.3d 1000, 1005 (5th Cir. 1998), and "'in all but the most exceptional circumstances, a party's neglect to prosecute a timely appeal will bar relief under the rule," *id.* at 1006 (cleaned up) (discussing Rule 60(b)(6)). *See also Horne v. Flores*, 557 U.S. 433, 447 (2009) ("Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests."). Moreover, the court identified no principle of law that requires a party to abandon its right to direct appellate review in favor of pursuing collateral relief. In any event, even if Rule 60(b) constituted a viable *option* for DHS, the court of appeals erred to the extent it suggested that the agency's decision not to pursue that option informs the question whether the October Memorandum constitutes final agency action.

III. The court of appeals' approach would make agencies less responsive to the courts and the public.

When an agency undertakes a "conscious change of course," the necessary implication is that "the agency *believes*" its new policy "to be better" than its old one. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). If a reviewing court nonetheless sets aside the action under the APA, the agency has only two options aside from returning to the *status quo ante*: (1) seeking reversal on appeal and (2) taking new agency action

that addresses the deficiencies identified by the reviewing court.

An agency may reasonably pursue both options simultaneously. An agency may exercise its right to appeal an adverse APA decision based on its view that the district court erred. At the same time, the agency may recognize that success on appeal is not guaranteed and that, in the time it takes to complete the appellate process, the district court's vacatur will have left the agency's prior, suboptimal (from the agency's perspective) policy in effect. Particularly where an agency believes that it can readily address the problems identified by a reviewing court, it may well decide to take new action while its appeal is pending.

Absent a statutory constraint, the pendency of an appeal does not strip the agency of jurisdiction to reconsider its actions. *See Anchor Line Ltd. v. Fed. Mar. Comm'n*, 299 F.2d 124, 125 (D.C. Cir. 1962) ("[T]he pendency of a review petition does not automatically bar reopening of an administrative proceeding."); *cf. Chamber of Commerce*, 443 F.3d at 899 (stating that "the Commission was not disabled from *sua sponte* considering whether to modify the Rule's two conditions" before the court issued its mandate). And as DHS did here (*see* DHS C.A. Motion (Sept. 29, 2021) (JA 51); DHS C.A. Motion (Oct. 29, 2021) (JA 57); *see also* Pet. App. 12a), agencies generally seek to hold appeals in abeyance when they are considering taking further action. *See*, *e.g.*, *Anchor Line*, 299 F.2d at 125 ("It is true that when an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency."); *New Jersey v. EPA*, 989 F.3d 1038, 1044 (D.C. Cir. 2021) (noting that "the court held the petition for review in abeyance pending EPA's

reconsideration"). Yet under the court of appeals' analysis, if an agency takes new action even after its original action has been vacated, it runs the risk that the court will dismiss the agency's action as a *post hoc* rationalization for the earlier action. Moreover, the court suggested that agencies need to abandon their appeals if they wish to ensure that courts will treat their new action as final agency action with legal effect, regardless of whether the new action moots the appeal. That approach would thus discourage agencies from taking expeditious corrective action in response to adverse court decisions.

Further, as noted above (pp. 15–16), a bedrock principle of administrative law is that an agency may, on remand after judicial review, "reexamine[] the problem, recast its rationale and reach[] the same result," *Chenery II*, 332 U.S. at 196, and have its action upheld if its decision is "rooted in … proper and relevant considerations," *id*. at 200. The court of appeals' approach, however, would incentivize agencies to avoid the "same result," not because of their considered determination of what policies they believe "to be better," *Fox Television Stations, Inc.*, 556 U.S. at 515, but to avoid the appearance that they failed to "rethink things," Pet. App. 30a. The end result would be to make agencies less adept at exercising "the type of judgment which administrative agencies are best equipped to make," in contravention of the goals that "justif[y] the use of the administrative process." *Chenery II*, 332 U.S. at 209.

CONCLUSION

For the foregoing reasons, and the reasons stated in petitioners' brief, the decision below should be reversed.

Respectfully submitted,

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