No. 21-954

IN THE
Supreme Court of the United States

JOSEPH R. BIDEN, JR., *et al.*,
Petitioners,

v.

STATE OF TEXAS, STATE OF MISSOURI,
Respondents.

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

BRIEF OF INDIANA AND EIGHTEEN OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. § 1225 requires the Department of Homeland Security (DHS) to return eligible aliens to a contiguous foreign territory when it would be otherwise unable to meet its mandatory obligation to detain such aliens.

2. Whether the court of appeals erred by concluding that the Secretary's latest memoranda do not prevent review of the Secretary's initial decision to terminate the Migrant Protection Protocols (MPP).

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Utah, Virginia, and West Virginia respectfully submit this brief as *amici curiae* in support of the respondents, the States of Texas and Missouri.

The United States has near-exclusive authority over immigration law to the exclusion of the States. *Arizona v. United States*, 567 U.S. 387, 394–97 (2012). But "[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States." *Id.* at 397. States cannot enforce immigration law on their own, despite immigration policy's effect on (and thus importance to) the States. *Id.* at 394–403. So while "[t]he National Government has significant power to regulate immigration," the Court has made clear that "[w]ith [this] power comes responsibility." *Id.* at 416.

Illegal immigration across the southwest border levies significant costs on States and their citizens. In recent years, States have borne costs related to education, healthcare, and other government-assistance programs serving the rising influx of illegal aliens released into the country—not to mention the human costs to vulnerable populations resulting from human trafficking and drug smuggling (particularly dangerous drugs like fentanyl) across the border.

In January 2019, in response to a historic surge of aliens at the southwest border, the Department of Homeland Security issued a memorandum entitled "Policy Guidance for Implementation of the Migrant Protection Protocols." Pet. App. 275a n.15. Exercising the agency's express authority under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, the Migrant Protection Protocols (MPP) require aliens who transit through Mexico and have no legal entitlement to enter the United States to be returned temporarily to Mexico while awaiting the outcome of their removal proceedings. *Texas v. Biden*, No. 2:21-cv-67 (N.D. Tex.), ECF No. 61 at 157; *see also* 8 U.S.C. § 1225(b)(2)(C).

MPP proved highly successful at staunching the flow of illegal aliens across the border. By DHS's own account in its October 2019 memorandum, after implementing MPP, total border encounters had decreased by 64%, and border encounters with aliens specifically from El Salvador, Guatemala, and Honduras decreased by 80%. Pet. App. 160a. DHS further concluded that MPP had a deterrent effect on individuals who would otherwise have come to the United States. *Id.* at 163a; *see also* J.A. 227 (conceding below that "it probably deterred some individuals from coming to the United States").

Notwithstanding that policy success, on President Biden's first day in office, his Administration summarily announced suspension of new MPP enrollments; a few months later, it announced rescission of MPP altogether. Implementation of that decision was

later enjoined by a federal district court, but while MPP was suspended, border encounters surged again from around 78,000 in January 2021 to nearly 179,000 in April 2021 and then to nearly 214,000 in July 2021. *Southwest Land Border Encounters*, U.S. Customs & Border Protection, www.cbp.gov/newsroom/stats/southwest-land-border-encounters (last visited Apr. 13, 2022).

Particularly given the success of MPP, *Amici* States have a strong interest in ensuring that, before ending it, DHS properly considers (and accounts for) the consequences for States and their citizens, which did not occur here. For these reasons, *Amici* States respectfully request the Court to affirm the judgment below.

SUMMARY OF THE ARGUMENT

A critical component of the U.S. immigration system is to prevent entry of aliens who are "not clearly and beyond a doubt entitled to be admitted" until they are found to have lawful grounds for admission after removal proceedings. 8 U.S.C. § 1225(b)(2)(A). The United States can lawfully block entry either by detaining aliens pending removal proceedings, or, for aliens who arrived "from a foreign territory contiguous to the United States," by "return[ing] the alien to that territory" pending removal proceedings. *Id.* § 1225(b)(2)(C). MPP uses the second option and directs DHS to return to Mexico—pending the outcome of removal proceedings—aliens crossing the southwest border who have no manifest legal entitlement to enter the United States.

The Biden Administration, however, desires less-restrictive immigration policies than Congress has authorized and has taken unlawful action to permit immediate entry of aliens with no "clear and beyond a doubt" right to be here. Rather than detain such aliens or return them to Mexico pending removal proceedings, the Biden Administration "paroles" such aliens en masse and permits them to enter the country while awaiting removal proceedings. But federal law allows the Secretary to "parole" aliens "into the United States temporarily . . . *only* on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A) (emphasis added).

Worse still, in defending the legality of both terminating MPP and granting wholesale parole to aliens crossing the southwest border, the Executive Branch offered post hoc rationalizations and claimed its "fresh look" at the issue insulated the June 2021 MPP termination from judicial review. Even as DHS appealed the district court's injunction, the United States purported to "re-terminate" MPP with two new explanatory memoranda, as if doing so would moot this case and justify a do-over in the district court. The Fifth Circuit appropriately rejected that effort and upbraided the United States for the attempt. Pet. App. 34a–45a.

Unfortunately, that episode underscores this Administration's general disregard for the APA on politically hot issues. The Court recently heard a case involving the Administration's use of a nationwide district court injunction—an injunction the Solicitor General believes to be unlawful—to circumvent the APA's notice-and-comment rulemaking procedures to rescind the "public charge" rule. *See* Federal Resp'ts Br. 5–7 & n.3 & Oral Arg. Tr. 76–78, *Arizona v. San Francisco*, No. 20-1775 (U.S.). It is also considering a case where the United States sought a lower-court stay of a decision where it *prevailed* to insulate that victory—which confers massive regulatory power on EPA to regulate the energy sector—from the Court's review. *See* Federal Resp'ts Br. in Opp. 15–18, *West Virginia v. EPA*, No. 20-1530 (U.S.).

The Court should not permit the United States to benefit from such litigation tactics—in this case or any other.

ARGUMENT

I. DHS Cannot Avoid Section 1225(b)(2)'s Detention Mandate Through En Masse Parole Under Section 1182(d)(5)(A)

The INA generally prohibits the release into the United States of aliens who arrive at the border without a clear entitlement to admission. Indeed, the Court has already held that § 1225(b)(2) "mandate[s] detention of applicants for admission until [removal] proceedings have concluded." *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018). Only one narrow exception under § 1225(b)(2) permits release of an applicant for admission into the country before removal proceedings have concluded—parole afforded under 8 U.S.C. § 1182(d)(5)(A). *Jennings*, 138 S. Ct. at 844 ("That express exception to detention implies that there are no *other* circumstances under which aliens detained under § 1225(b) may be released."); *see also id.* at 837, 845–46 (explaining that § 1226 does not apply to aliens within the scope of § 1225(b)).

The limited scope of the United States' parole authority under § 1182(d)(5)(A) ultimately precludes termination of MPP. To implement the plain text of the INA with respect to aliens claiming asylum at the border, the Executive Branch has three options: First,

it can detain them as required by § 1225(b)(2)(A). Second, it can exercise its contiguous-territory-return authority and return the aliens to Mexico (or Canada). 8 U.S.C. § 1225(b)(2)(C). Third, in very limited circumstances, after individualized case review, it can parole aliens under § 1182(d)(5)(A). The United States would prefer to parole all (or nearly all) aliens arriving at the border claiming asylum, but it does not have authority to do so. And because it lacks sufficient detention capacity, the United States' only remaining legal option is contiguous-territory return (*i.e.,* MPP).

A. The United States has no authority to parole applicants for admission en masse

The United States' reliance on § 1182(d)(5)(A) to parole aliens at the border without individualized assessments is grievously misguided. That provision authorizes parole only in narrow circumstances and only on a case-by-case basis.

Parole authority under § 1225(b)(2) is narrow and exclusive. *See Jennings*, 138 S. Ct. at 844. Under the plain statutory text, DHS may parole an applicant "on a case-by-case basis" but only for "urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). And the statute also sharply limits the duration of any parole: Parole may last only until "the purposes of such parole shall . . . have been served." *Id.* At that point, "the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to

be dealt with in the same manner as that of any other applicant for admission to the United States." *Id.*

The terms "urgent humanitarian reasons" or "significant public benefit" plainly connote pressing, extraordinary circumstances. *See Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, U.S. Citizenship & Immigr. Servs., www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-for-individuals-outside-the-united-states (last visited Apr. 13, 2022) (explaining that, in granting parole for "urgent humanitarian reasons," U.S. Citizenship and Immigration Services officers consider, among other things, whether the "the circumstances are pressing" and whether the alien's reason for being in the country "calls for immediate or other time-sensitive action").

Indeed, the Executive Branch has "generally construed 'humanitarian' paroles (HPs) as relating to urgent medical, family, and related needs and 'significant public benefit['] paroles (SPBPs) as limited to persons of law enforcement interest such as witnesses to judicial proceedings." U.S. Dep't of Homeland Sec., *Memorandum of Agreement Between USCIS, ICE and CPB for the Purpose of Coordinating the Concurrent Exercise of the Secretary's Parole Authority Under INA § 212(d)(5)(A) with Respect to Certain Aliens Located Outside of the United States*, at 2, www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf (last visited Apr. 13, 2022), *quoted in* Cong. Rsch. Serv., *Immigration Parole* 4 (Oct. 15, 2020), bit.ly/35dE6VQ; *see also Memorandum of Agreement*,

supra, at 2 ("Parole is an extraordinary measure, sparingly used only in urgent or emergency circumstances . . . .").

Under DHS regulations, parole may be appropriate for an alien who has a "serious medical condition[] in which continued detention would not be appropriate" or for a woman who has "been medically certified as pregnant." 8 C.F.R. § 212.5(b)(1)–(2). Additionally, parole may also be appropriate for "[a]liens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States." *Id.* § 212.5(b)(4).

The United States asserts that, "[i]n making" a parole determination, "DHS must of course account for its actual detention capacity." Pet. Br. 36. But nothing in § 1182(d)(5)(A) confers authority to parole aliens simply because DHS lacks resources to satisfy § 1225(b)(2)(A)'s detention mandate. The lack of detention capacity hardly qualifies as an "urgent humanitarian reason." Even the United States believes that this parole ground is generally reserved for "pressing" circumstances "that call[] for immediate or other time-sensitive action" to protect an individual alien's "welfare and wellbeing." *Humanitarian or Significant Public Benefit Parole*, *supra*.

Nor does parole due to a lack of detention capacity bestow a "significant public benefit." That authority "focuses on the public benefit in extending parole," not on the benefit to the federal government. *Id.* For ex-

ample, "a beneficiary's participation in legal proceedings may constitute a significant public benefit, because the opportunity for all relevant parties to participate in legal proceedings may be required for justice to be served." *Id.*

The United States' capacious "public benefit" theory would blow up both Congress's general directive that aliens with pending asylum claims be kept out of the U.S. interior and its limited "case-by-case" exceptions. The United States interprets §§ 1225(b)(2) and 1182(d)(5)(A) together to say, in effect, "for aliens who apply for asylum at the border, detain them or return them pending a hearing, or if that's too hard or contrary to your policy preferences, give them immediate entry." In other words, it acts as if Congress delegated to DHS the broad power to decide the extent to which asylum applicants should be granted entry into the U.S. pending adjudication of their claims.

In that regard, many regulations purporting to create additional grounds for parole plainly do not comport with § 1182(d)(5)(A). Section 212.5(b)(3) allows parole of minors, but that is the result of a 1997 consent decree. 8 C.F.R. § 212.5(b)(3); *see Flores v. Rosen*, 984 F.3d 720 (9th Cir. 2020). Section 212.5(b)(5) purports to allow DHS to parole "[a]liens whose continued detention is not in the public interest as determined by" various DHS officials, and Section 212.5(c) purports to allow DHS officials to "parole into the United States temporarily in accordance with [§ 1182(d)(5)(A)], any alien applicant for admission, under such terms and conditions . . . as he or she may

deem appropriate." But that portion of 8 C.F.R. § 212.5 was promulgated before a 1996 amendment to § 1182(d)(5) imposed the "case-by-case," "urgent humanitarian," and "significant public benefit" restrictions on the parole authority, Pub. L. No. 104-208, 110 Stat. 3009–689 (1996)—and its "public interest" language tracks statutory text no longer in effect, 47 Fed. Reg. 30044 (1982). DHS never amended that part of the regulation to track the limits of the amended § 1182(d)(5)(A), which by its plain terms does not confer such general authority.

Moreover, such a broad, standardless delegation of admission authority would prompt serious non-delegation questions. *See, e.g.*, *Nat'l Fed'n Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) ("The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials."); *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) ("[T]his Court has held that a delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority." (citation omitted)). At the very least, one would expect such broad power over a major policy determination affecting the vast majority of asylum claimants at the border to be delegated through a clear statement, not through a narrowly cast authority to undertake case-by-case assessments. *See, e.g.*, *Nat'l Fed'n Indep. Bus.*, 142 S. Ct. at 665 (majority opinion); *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489

(2021); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

Indeed, the history of the Executive Branch's parole authority demonstrates that free-wheeling parole programs led Congress to enact meaningful parole restrictions. The INA originally gave the Attorney General discretion to "parole into the United States temporarily under such conditions as he may prescribe . . . any alien applying for admission to the United States." Pub. L. No. 82-414, 66 Stat. 163, 188 (1952). Years later, Congress passed the Refugee Act of 1980, which added section 1182(d)(5)(B), prohibiting the Executive Branch from paroling refugees unless "compelling reasons in the public interest with respect to that particular alien require" parole. Pub. L. No. 96-212, 94 Stat. 102, 108 (1980). And then in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress amended section 1182(d)(5)(A) to allow parole "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." Pub. L. No. 104-208, 110 Stat. 3009–689 (1996).

The plain text of the INA establishes an immigration system under which very few applicants for admission are allowed to enter the United States pending completion of their removal proceedings. Yet under the United States' view, the Executive Branch has the prerogative to supplant Congress's will by rescinding MPP without increasing its capacity to detain domestically and simply using its narrow parole authority to parole en masse all those whom it cannot

(or does not want to) detain pending removal proceedings.

Congress has decided that aliens who present themselves at the border claiming asylum should not enter the country pending adjudication of their claims—except for those who (1) clearly and beyond doubt are entitled to entry, or (2) individually demonstrate urgent-humanitarian or significant-public-benefit grounds for parole. DHS may not by its own policy-based diktat override that exercise of Congress's core naturalization authority.

B. The existence of other programs is not a basis for allowing the United States to parole en masse under Section 1182(d)(5)(A)

The *amici* States supporting the United States suggest that DHS's en masse parole authority is implied by other categorical parole programs, namely for refugees and those seeking family reunification. Amicus Br. of Illinois et al., at 10–17. If anything, those programs underscore the need for the Judiciary to keep the Executive within the limits imposed by Congress.

First, the sheer volume of recent paroles—orders of magnitude greater than before—shows how DHS's presumed authority over admissions is of an entirely different character than programs for refugees and family reunification. Notably, between Fiscal Year 1998 and Fiscal Year 2003, "the annual total number of parolees ranged from about 235,000 to about 300,000." Cong. Rsch. Serv., *supra*, at 5. Yet between

January 21, 2021, and February 28, 2022, the United States released at least 757,857 aliens into the United States. *See Texas v. Biden*, No. 2:21-cv-67 (N.D. Tex), ECF No. 119-1 at 12 (from January 2021 to November 2021, U.S. Customs and Border Protection (CBP) released at least 403,360 aliens); *id.* ECF No. 124-1 at 6 (in December 2021, CBP released at least 55,626 aliens); *id.* ECF No. 129-1 at 5 (in January 2022, CBP released at least 46,186 aliens); *id.* ECF No. 133-1 at 6 (in February 2022, CBP released at least 39,069 aliens); *id.* ECF No. 119-2 at 18, 20 (from January 2021 to November 2021, ICE released at least 161,542 aliens); *id.* ECF No. 124-2 at 4 (in December 2021, ICE released at least 19,173 aliens); *id.* ECF No. 129-2 at 4 (in January 2022, ICE released at least 16,387 aliens); *id.* ECF No. 133-2 at 4 (in February 2022, ICE released at least 15,974 aliens).

Second, DHS itself does not mention other parole programs to justify its "public benefit" parole authority here. *See* Pet. Br. 29–36. It is thus unclear how other programs relate to § 1182(d)(5)(A) or whether they may be justified on other grounds. *See, e.g.*, 8 U.S.C. § 1182(d)(5)(B) ("The Attorney General may not parole into the United States *an alien who is a refugee* unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted

as a refugee under section 1157 of this title." (emphasis added)).

Third, the validity of other parole programs is being litigated in other cases. *See, e.g.*, *Texas v. Biden*, No. 2:22-cv-14 (N.D. Tex.) (challenging the Central American Minors program, under which aliens from El Salvador, Guatemala, or Honduras unlawfully present in the United States may have their minor children join them).

Fourth, even if refugee status meets the "urgent humanitarian" parole qualification, or if family reunification meets the "significant public benefit" qualification, that says nothing about the legality of DHS's unlimited categorical determination that admitting *all* asylum applicants to the United States confers a public benefit because it saves detention space. As the release numbers above indicate, DHS's argument represents complete subversion of Congress's decision that border-crossing asylum seekers generally should be detained or returned to a contiguous country pending adjudication of the application. The obvious effort to undermine Congress's restrictions on executive authority warrants greater judicial scrutiny.

II. The United States' Unlawful Attempt to Implement an En Masse Parole Policy Imposes Significant Costs on States

The result of open-ended parole is to saddle States with the ever-increasing costs of illegal immigration. When the Executive Branch refuses to enforce immi-

gration laws as written, the States are the ones footing the bill for social services like healthcare, education, and government assistance for immigrants released into the United States during the pendency of their removal proceedings—and often indefinitely. Between Fiscal Year 2008 and Fiscal Year 2019, 32% of aliens referred for credible-fear review and asylum proceedings absconded into the United States and were ordered removed *in absentia*. *Texas v. Biden*, No. 2:21-cv-67 (N.D. Tex), ECF No. 31-1 at 5, 270; *see also* Executive Office for Immigration Review Adjudication Statistics, Credible Fear and Asylum Process: Fiscal Year (FY) 2008–FY 2019, www.justice.gov/eoir/file/1216991/download. The upsurge in illegal immigration caused by lax enforcement multiplies the burdens on States arising from services, human trafficking, and illicit drug importation.

1. From January 2019 through December 2020, DHS returned over 68,000 aliens to Mexico following enrollment in MPP. Pet. App. 347a. And during the COVID-19 pandemic, DHS primarily used Title 42 authority, rather than MPP, to expel 102,234 aliens in 2020 and 111,174 in the beginning of 2021. *Texas v. Biden*, No. 2:21-cv-67 (N.D. Tex), ECF No. 61 at 660. But in the last year, the United States has released into the States unprecedented numbers of aliens; between January 2021 and February 2022, approximately 757,857 aliens were released into the United States. *See supra* Section I.B.

In response to the influx of aliens, States must increase their spending on healthcare, education, and

other services. Plaintiff States face costs from immigration parolees in public education to school-age aliens, driver's license applications and provisions, state-funded healthcare services and benefits, and law enforcement and correctional costs. Pet. App. 171a–174a.

All States face similar burdens through their social-services, healthcare, and education programs.

- Paroled aliens are eligible for healthcare programs like Medicaid, *see, e.g.*, *Indiana Health Coverage Program Policy Manual*, Ind. Family & Soc. Servs. Admin., www.in.gov/fssa/ompp/files/Medicaid_PM_2400.pdf (last visited Apr. 13, 2022), and government-assistance programs, *see, e.g.*, *SNAP/TANF Program Policy Manual*, Ind. Family & Soc. Servs. Admin., www.in.gov/fssa/dfr/files/2400.pdf (last visited Apr. 13, 2022).

- Paroled school-age children will enroll in public school. *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that undocumented school-age children are entitled to free public education). The cost is hardly de minimis. In fiscal year 2020, Indiana spent $9,193.68 per student. Ind. Dep't of Educ., *Finances*, https://inview.doe.in.gov/state/1088000000/finance (last visited Apr. 13, 2022); *see also, e.g.*, Fla. Dep't of Educ., *Every Student Succeeds Act, 2019–20 Per-pupil Expenditures – District and State*, www.fldoe.org/core/fileparse.php/

7507/urlt/2021District-State-PerPupil.pdf (last visited Apr. 13, 2022) (Florida spent over $8,000 per student from 2020–21).

- Paroled aliens may also enroll in States' programs serving non-English speakers. Indiana Department of Education spent $27,252,979.74 and served 68,040 students in its Non-English Speakers Program in 2021–2022. Ind. Dep't of Educ., *2021–2022 NESP Allocations by LEA*, www.in.gov/doe/files/2021-2022-NESP-Allocations-Table.pdf.

2. States also face monetary and human costs associated with human trafficking, drug smuggling, and other criminal activity—all of which increase when the United States refuses to enforce immigration laws. *See* James O. Finckenauer & Jennifer Schrock, *Human Trafficking: A Growing Criminal Market in the U.S.* (2001), www.ojp.gov/pdffiles1/nij/218462.pdf ("The Southwest border continues to serve as the biggest point of illegal entry into the U.S., largely because traffickers are able to get aliens across without documents."); Andrew R. Arthur, *Border Disaster Offers Opportunities for Drug Traffickers*, Ctr. for Immigr. Studies (Dec. 3, 2021), https://cis.org/Arthur/Border-Disaster-Offers-Opportunities-Drug-Traffickers (describing "the 'significant vulnerabilities' that the increase in the migrant flow has created for drug smugglers to exploit").

The most vulnerable populations are at even greater risk of becoming victims of human trafficking.

"[S]exual violence has become an inescapable part of the collective migrant journey." Manny Fernandez, *'You Have to Pay With Your Body': The Hidden Nightmare of Sexual Violence on the Border*, N.Y. Times (Mar. 3, 2019), www.nytimes.com/2019/03/03/us/border-rapes-migrant-women.html. As they attempt to travel through South American countries and Mexico on their way to the border, women encounter criminals willing to exploit their vulnerability. *Id.* A 2019 review of police reports and court records in border States revealed more than 100 documented reports of sexual assault of undocumented women along the border in the past two decades, "a number that most likely only skims the surface," as many cases go unreported or unexamined. *Id.*

Cases of violence and abuse happen not only during the journey to the border; "[m]uch of it happens after women reach the supposed safety of the United States." *Id.* Most victims do not report abuse because they face threats of further violence or exposure of their immigration status. *Id.*; *see also Texas v. Biden*, No. 2:21-cv-67 (N.D. Tex), ECF No. 31-2 at 111 ("Foreign nationals who don't speak English and are undocumented can easily be marginalized and isolated," and "[f]ear of deportation can keep victims from reporting to law enforcement.").

Another population at great risk, "[u]naccompanied and undocumented minors . . . are extremely vulnerable to traffickers and other abusers." *Texas v. Biden*, ECF No. 31-2 at 407. The surge of aliens mov-

ing through Mexico and attempting to cross the border makes investigation and apprehension of abusers more difficult and fuels the illicit market.

States also expend funds to apprehend and incarcerate illegal aliens who commit crimes within their borders. *See, e.g.*, 2020 Annual Report, Ohio Dep't of Rehab. & Corr., https://drc.ohio.gov/Portals/0/ODRC%20FY2020%20Annual%20Report%202%202%281%29.pdf (last visited Apr. 13, 2022) (Ohio spent over $30,000 per inmate in 2020). Although most States do not record or report data with immigration status, an analysis of data from Texas shows that in 2019 Texas officials arrested 36,454 illegal immigrants, and 14,010 illegal immigrants were convicted of crimes in Texas. Alex Nowrasteh, *Criminal Immigrants in Texas in 2019*, Cato Inst. (May 2021), www.cato.org/sites/cato.org/files/2021-05/IRPB-19.pdf. And "[i]n one year alone, the Texas Department of Criminal Justice housed 8,951 illegal alien criminals for a total of 2,439,110 days at a cost of over $150 million." Pet. App. 173a.

3. Unchecked illegal immigration also enables unchecked drug smuggling. Fentanyl from Mexico plagues States, and its dangers are by now well documented. Fentanyl is about 100 times more potent than morphine, and a lethal dose of fentanyl can be as small as two milligrams, such that one kilogram (2.2 pounds) of fentanyl contains up to 500,000 potentially lethal doses. *Facts About Fentanyl*, U.S. Drug Enf't Admin., www.dea.gov/resources/facts-about-fentanyl (last visited Apr. 13, 2022). Fentanyl's concentrated

potency generates higher revenues than other narcotics, which makes it profitable to smuggle even small amounts. A single backpack can easily contain 10 kilograms or more of pure fentanyl with a street value of nearly $20 million and enough potentially lethal doses to kill 5,000,000 Americans. *See* U.S. Dep't of Justice & U.S. Dep't of Drug Enf't Admin., *2017 National Drug Threat Assessment* 62 (Oct. 2017), www.dea.gov/sites/default/files/2018-07/DIR-040-17_2017-NDTA.pdf.

The suspension of MPP in January 2021 coincides with a drastic increase in fentanyl seizures at the border. In January 2022, U.S. Customs and Border Protection reported that in Fiscal Year 2021 it had seized 588 pounds of fentanyl at the Texas-Mexico border—a stunning 1,066% increase in fentanyl seized compared to 2020. *CBP Officers at South Texas Ports of Entry Post Significant Increases in Fentanyl, Cocaine Seized in FY 2021*, U.S. Customs & Border Patrol, Press Release (Jan. 5, 2022), https://www.cbp.gov/newsroom/local-media-release/cbp-officers-south-texas-ports-entry-post-significant-increases-0.

Fentanyl trafficked across the southwest border typically finds its way to Chicago and then to smaller cities around the country. Wilson Center Mexico Institute, *Mexico's Role in the Deadly Rise of Fentanyl* 31–32 (Feb. 2019), www.wilsoncenter.org/sites/default/files/media/documents/publication/fentanyl_insight_crime_final_19-02-11.pdf. Fentanyl misuse is on the rise throughout the country. In recent years, Midwestern states like Indiana have counted more

deaths from fentanyl, non-fatal opioid-related emergency department visits, and fentanyl seizures. *Id.* at 30–31. In the Northeast and Appalachia, the fentanyl endemic is even more acute. States there suffer the highest percentage of opioid overdose deaths involving fentanyl. *Id.*

The influx of fentanyl imposes large costs on States. "There is evidence that illicitly manufactured fentanyl . . . is responsible for the recent increase in opioid overdose deaths." Curtis Florence et al., *The Economic Burden of Opioid Use Disorder and Fatal Opioid Overdose in the United States*, Nat'l Ctr. for Biotechnology Information (Oct. 2020), www.ncbi.nlm.nih.gov/pmc/articles/PMC8091480. Individuals who suffer from opioid addiction or overdose require medical care at significant costs. *See id.* In 2017, costs for opioid use disorder and fatal opioid overdose were estimated to be $1.02 trillion. *Id.*; *see also* Feijun Luo et al., *State-Level Economic Costs of Opioid Use Disorder and Fatal Opioid Overdose—United States, 2017*, Ctrs. For Disease Control & Prevention (Apr. 16, 2021), www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7015a1-H.pdf (estimating the state-level costs of opioid use disorder and fatal opioid overdose during 2017). Children born after their mothers used opioids during pregnancy also require expensive care. *See* Sidney E. Zven et al., *Neonatal Abstinence Syndrome Incidence and Health Care Costs in the United States, 2016*, Am. Med. Ass'n (Feb. 2020), https://jamanetwork.com/journals/jamapediatrics/fullarticle/

2756325 (hospital costs for children born with Neonatal Abstinence Syndrome and Neonatal Opioid Withdrawal Syndrome totaled $572.7 million in 2016).

Individuals with addictions may seek treatment at a state-certified opioid treatment facility or while incarcerated, which adds to the costs borne by States. *See, e.g.*, *Opioid Treatment Program*, Ind. Family & Soc. Servs. Admin., www.in.gov/fssa/dmha/addiction-services/opioid-treatment-program/ (last visited Apr. 13, 2022); *Addiction Recovery*, Ind. Dep't of Correction, www.in.gov/idoc/medical/addiction-recovery/ (last visited Apr. 13, 2022) (describing Recovery While Incarcerated program).

More importantly, fentanyl costs lives. In 2020 alone, there were approximately 57,550 fentanyl-related deaths in the United States. Jesse C. Baumgartner & David C. Radley, *The Drug Overdose Toll in 2020 and Near-Term Actions for Addressing It*, Commonwealth Fund (Aug. 16, 2021), www.commonwealthfund.org/blog/2021/drug-overdose-toll-2020-and-near-term-actions-addressing-it. So in one year, fentanyl trafficked through Mexico—"the main hub of transit and production of fentanyl in the hemisphere," Wilson Center Mexico Institute, *supra*, at 12—killed nearly as many Americans as died in the 20 years of the Vietnam War.

The States bear the majority of illegal immigration's costs. By refusing to enforce Congress's immigration laws, the Administration is abdicating its responsibility to protect the States' interests.

III. Even if the United States Could Rescind MPP Without Violating the INA, Its Approach in This Case Violates the APA

Even if the INA allowed the United States to rescind MPP despite its lack of detention capacity, the Fifth Circuit correctly held that the way the United States did so here violates the APA, which requires "set[ting] aside" an agency's action that is "arbitrary" or "capricious." 5 U.S.C. § 706(2)(A).

The United States suspended MPP on Inauguration Day and, after Texas and Missouri sued to challenge that suspension, DHS terminated MPP on June 1, 2021. Pet. App. 346a. Texas and Missouri amended their complaint to challenge the June termination decision, which the District Court held violated the APA. *Id.* at 149a. The United States appealed, and on the eve of oral argument before the Fifth Circuit, the Secretary issued two new memoranda elaborating on the reasons for the termination decision. *Id.* at 257a–345a.

The Fifth Circuit properly refused to consider the reasons provided in the Secretary's October memoranda as nothing more than post hoc rationalizations produced during the United States' appeal of the district court's order. The United States no longer defends the initial reasons for the termination decision articulated in the June memorandum. *See* Pet. Br. 37–42. Even it seems to acknowledge that the actual reasons provided at the time the agency acted fall short of the APA's

requirements. That tacit acknowledgement alone should be enough to justify affirmance of the Fifth Circuit and district court.

A. The APA prohibits the United States from justifying administrative action with post hoc rationalizations

One of the APA's bedrock requirements is that federal agencies "engage in 'reasoned decision-making.'" *Dep't of Homeland Sec. v. Regents of Univ. Cal.*, 140 S. Ct. 1891, 1905 (2020). In evaluating whether an agency has satisfied that requirement, the Court looks to "the grounds that the agency invoked when it took the action," *Michigan v. EPA*, 576 U.S. 743, 758 (2015); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943), and not the agency or appellate counsel's post hoc rationalizations. *Regents*, 140 S. Ct. at 1907–08; *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983).

As the Court explained in *Regents*, once a court finds an agency's explanation inadequate and remands, the agency is presented "with a choice": "rest" on the original explanation "while elaborating on its prior reasoning, or issue a new rescission bolstered by new reasons absent from" the original explanation. 140 S. Ct. at 1908. Should the agency choose the first option of simple elaboration, it is strictly limited to the original reasons. Anything new is an impermissible post hoc rationalization that the courts will not consider. *Id.* at 1908–09. On the other

hand, should the agency choose the second option of "dealing with the problem afresh," the agency "is not limited to its prior reasons but must comply with the procedural requirements for new agency action." *Id.* at 1908 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947)).

Regents thus draws a line between good-faith fresh looks and post hoc rationalizations, with the former requiring adherence to APA procedures and the latter being invalid.

B. The United States' cavalier litigation tactics in this case show that the October memoranda are nothing more than post hoc justifications for terminating MPP

The build-up to the October memoranda and the Administration's litigation tactics—in the district court and the Fifth Circuit—place this case firmly on the post-hoc-rationalization side of the *Regents* line.

1. From the beginning of this Administration, the United States has been forthright about its intention to terminate MPP simply because it did not like the program, and its conduct demonstrates its readiness to do anything—including ignore the APA's requirements—to accomplish that objective. The Administration's "act now, justify later" approach began on Inauguration Day, when it summarily paused MPP. *Texas v. Biden*, No. 2:21-cv-67 (N.D. Tex.), ECF No. 61 at 587. After the States sued because the Administration had not provided *any* explanation for its action, the Administration

permanently terminated MPP, explaining its decision in the June memorandum. Pet. App. 346a. That explanation failed to consider "relevant factors," such as the States' legitimate reliance interests, MPP's benefits, and potential alternatives to MPP. *See id.* at 104a–05a. Accordingly, the district court vacated the termination decision and remanded to the agency. *Id.* at 192a–95a.

Once the district court vacated and remanded, the United States had two choices—appeal or return to the agency drawing board. And if it chose to forgo appeal and return to the agency, the United States had two options under *Regents*: explain further the original reasons for the termination decision or take a fresh, but procedurally proper, look. *See Regents*, 140 S. Ct. at 1908.

2. The United States, however, has tried to create a third option: Appeal, and, while doing so, add to the reasons for its earlier termination decision. That tactic contravened several principles of administrative and appellate procedure, yielding precisely the sort of "moving target" the APA was designed to foreclose. *Id.* at 1909.

After the district court vacated the termination decision, the United States appealed the judgment—purportedly to defend the adequacy of its June termination decision—while at the same time working behind the scenes on a new memorandum to supplement the June termination decision's deficiencies. Sure enough, as soon as the October

memoranda became available, the United States sought to discard its defense of its June termination and vacate the district court's decision entirely. It argued that everything the parties had briefed up to that point—in the United States' own appeal, no less—was now a nullity. *See* Pet. App. 11a.

The Fifth Circuit correctly concluded that the United States' efforts to avoid judicial review violated basic principles of procedure, including the record rule. Pet. App. 52a. The APA directs the reviewing court to "review the whole record or those parts of it cited by a party," 5 U.S.C. § 706, such that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Chenery Corp.*, 318 U.S. at 87. By injecting the October Memoranda into review of its June decision to terminate MPP, the United States flouted the *Chenery* doctrine. The Fifth Circuit properly refused to consider the memoranda, reminding the parties that it is "a court of review, not of first view." Pet. App. 53a (citing *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

In the administrative law context, formalism matters. Insisting on adherence to procedural requirements for new agency action "promotes 'agency accountability.'" *Regents*, 140 S.Ct. at 1909 (quoting *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 (1986)). It does so by "ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority" and by "instill[ing] confidence that the reasons given are not simply

'convenient litigating position[s].'" *Id.* (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)).

The Administration's casual treatment of MPP bears a striking resemblance to the previous Administration's revocation of DACA, which the Court vacated in *Regents*. *See id.* at 1916. In both cases, DHS revoked a prior Administration's immigration policy via informal agency action accompanied by a highly abbreviated explanation which, when challenged in court, the Administration attempted to supplement with more thoroughgoing memoranda. *See id.* at 1907 ("[T]he Government urges us to go on and consider the June 2018 memorandum submitted by Secretary Nielsen as well."). What the Court said then is equally true here: "The basic rule . . . is clear: An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision." *Id.* at 1909–10. Here, as there, the later memoranda "can be viewed only as impermissible *post hoc* rationalizations" not properly before the Court. *Id.* at 1909.

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The Administration's conduct in this and other cases reveals that it cares little for the rules and limits imposed by Congress through the APA. Instead, it decides its course and then tries to justify it later or prevent judicial review altogether. Neither

Regents nor any other of the Court's APA cases condones such a cavalier approach.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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