No.

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.

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-10806

STATE OF TEXAS; STATE OF MISSOURI,
PLAINTIFFS-APPELLEES

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA; UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, ACTING COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION; UNITED STATES CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; UR M. JADDOU, DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, DEFENDANTS-APPELLANTS

[Filed: Dec. 13, 2021]
Revised: Dec. 21, 2021

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:21-cv-67

Before: BARKSDALE, ENGELHARDT, and OLDHAM, *Circuit Judges*.

ANDREW S. OLDHAM, *Circuit Judge*:

This case concerns the Migrant Protection Protocols ("MPP" or the "Protocols"), which the Secretary of the Department of Homeland Security ("DHS") created on December 20, 2018. On January 20, 2021, DHS suspended the MPP program (the "Suspension Decision"). On June 1, 2021, DHS permanently terminated MPP (the "Termination Decision"). DHS explained these two decisions in a series of increasingly lengthy memoranda; the first contained just a few sentences, while the last spanned 39 single-spaced pages. Texas and Missouri (the "States") challenged both the Suspension Decision and the Termination Decision in federal court.

After a full bench trial, the district court determined that the Termination Decision violated both the Administrative Procedure Act (the "APA") and an immigration statute, 8 U.S.C. § 1225. The district court therefore vacated the Termination Decision and ordered DHS to implement the Protocols in good faith or to take a new agency action that complied with the law.

DHS chose not to take a new agency action. It instead chose to notice an appeal and defend its Termination Decision in our court. DHS also asked us to stay the district court's injunction while the appeal was pending. We denied that motion, and the Supreme Court affirmed our denial. The Government thereafter vigorously defended the Termination Decision before our court.

Then, on the Friday before oral argument—October 29, 2021—DHS issued *two more* memoranda (the "October 29 Memoranda" or "Memoranda") to explain the Termination Decision. These much longer documents purported to "re-terminate" MPP—or at the very least, promised to do so after the lifting of the district court's injunction. A few hours later, the Government informed our court that, in its view, the October 29 Memoranda had mooted this case. Never mind that a case is moot only when the controversy between the parties is dead and gone, and the controversy between these parties is very much not dead and not gone. Never mind that the new memoranda simply reaffirmed the Termination Decision that the States had been challenging all along. And never mind that the Government's theory of mootness would allow an administrative agency to permanently avoid judicial review by issuing an endless litany of new memos to "moot" every adverse judicial ruling. The Government boldly proclaimed that DHS's unilateral decision to issue new memoranda *required* us to give DHS the same relief it had previously hoped to win on appeal—namely, vacatur of the district court's injunction and termination of MPP.

DHS's proposed approach is as unlawful as it is illogical. Under Supreme Court and Fifth Circuit precedent, this case is nowhere near moot. And in any event, the vacatur DHS requests is an equitable remedy, which is unavailable to parties with unclean hands. The Government's litigation tactics disqualify it from such equitable relief.

The Government also raises a slew of reviewability arguments, contending that no court may *ever* review the Termination Decision. DHS claims the power to

implement a massive policy reversal—affecting billions of dollars and countless people—simply by typing out a new Word document and posting it on the internet. No input from Congress, no ordinary rulemaking procedures, and no judicial review. We address and reject each of the Government's reviewability arguments and determine that DHS has come nowhere close to shouldering its heavy burden to show that it can make law in a vacuum.

On the merits, the Termination Decision was arbitrary and capricious under the APA. That Act, among other things, requires courts to set aside agency actions that overlook relevant issues or inadequately explain their conclusions. We anchor our analysis to a recent Supreme Court decision that applied this doctrine in the immigration context. Under that precedent, this is not a close case.

The Termination Decision is independently unlawful because it violates 8 U.S.C. § 1225. That statute (among other things) requires DHS to detain aliens, pending removal proceedings, who unlawfully enter the United States and seek permission to stay. It's true that DHS lacks the capacity to detain all such aliens. Congress, however, created a statutory safety valve to address that problem. Another part of § 1225 allows DHS to return aliens to contiguous territories, like Mexico, while removal proceedings are pending. That safety valve was the statutory basis for the Protocols. DHS's Termination Decision was a refusal to use the statute's safety valve. That refusal, combined with DHS's lack of detention capacity, means DHS is not detaining the aliens that Congress required it to detain.

The Government insists that a third provision (in § 1182) lets DHS parole aliens into the United States on a case-by-case basis. The idea seems to be that DHS can simply parole every alien it lacks the capacity to detain. But that solves nothing: The statute allows only case-by-case parole. Deciding to parole aliens *en masse* is the opposite of *case-by-case* decisionmaking.

* * * * *

This opinion has five parts. Part I.A, *infra* pages 6-10, addresses this case's factual background. Part I.B, *infra* pages 10-13, summarizes its statutory background.

Part II addresses our jurisdiction. We start with final agency action. Part II.A, *infra* pages 13-29, pinpoints the final agency action under review. The final agency action is DHS's June 1 Termination Decision. We have jurisdiction to review that Termination Decision, rather than one or the other of DHS's ever-growing collection of MPP memos.

Then we turn to mootness in Part II.B, *infra* pages 29-46. The October 29 Memoranda have no present legal effect, so they can't moot the case. *See* Part II.B.1, *infra* pages 30-32. Independently, the Government has not shown they do anything to cure the Termination Decision's unlawfulness, so again, they can't moot the case. *See* Part II.B.2, *infra* pages 32-39. And they constitute (at most) voluntary cessation, so yet again, they can't moot the case. *See* Part II.B.3, *infra* pages 39-45. And ordinary appellate principles bar our review of the merits of the October 29 Memoranda in any event. *See* Part II.B.4, *infra* pages 45-46.

Part II.C, *infra* pages 46-63, addresses the States' standing. The district court based its standing analysis on factual findings that were not clearly erroneous. *See* Part II.C.1, *infra* pages 46-52. Given those findings and the States' entitlement to special solicitude in the analysis, we hold the States have standing. *See* Part II.C.2, *infra* pages 52-63.

Part III then addresses and rejects a host of non-jurisdictional objections to the reviewability of the Termination Decision. Part III.A, *infra* pages 63-65, holds the States have a cause of action. Part III.B, *infra* pages 65-88, holds the APA does not preclude our review of the Termination Decision. Part III.B.1, *infra* pages 66-68, holds the immigration statutes don't insulate the Termination Decision from review. Part III.B.2, *infra* pages 68-88, holds that *Heckler v. Chaney*, 470 U.S. 821 (1985), does not bar review either. That's largely because *Heckler*, far from forbidding judicial review of agency rules, powerfully supports it. Background principles of English and American law, the Supreme Court's precedents, and our own court's precedents all point toward that same conclusion. *See* Part III.B.2.a, *infra* pages 69-85. Even if *Heckler* applied to some rules, it wouldn't apply to the Termination Decision. *See* Part III.B.2.b, *infra* pages 85-87. And even if *Heckler* were *presumed* to apply, that presumption would be rebutted by the clear statutory text at play in this case. *See* Part III.B.2.c, *infra* pages 87-88.

Part IV, *infra* pages 88-106, evaluates the merits. The Termination Decision was arbitrary and capricious under the APA for all sorts of reasons, and the Government's arguments to the contrary are meritless. *See* Part IV.A, *infra* pages 88-97. And the Decision was

contrary to 8 U.S.C. § 1225. *See* Part IV.B, *infra* pages 98-106.

Part V, *infra* pages 106-17, considers the remedy. Because the case is not moot, we will deny the Government's motion to vacate the district court's judgment. Even if the case were moot, the Government's litigation tactics would require the same result. *See* Part V.A, *infra* pages 106-09. And the district court didn't abuse its discretion by vacating the Termination Decision. *See* Part V.B, *infra* pages 109-11. Nor did it abuse its discretion by imposing a permanent injunction. *See* Part V.C, *infra* pages 111-17.

In sum, we hold that the Termination Decision violates both the Administrative Procedure Act and the immigration statutes. The Government's motion to vacate the judgment and remand for further proceedings is DENIED. The district court's judgment is AFFIRMED.

I.

A.

This story began on December 20, 2018. On that day, DHS implemented the MPP program in response to a surge of unlawful entries along the Nation's southern border. *See Texas v. Biden* (*Biden I*), __ F. Supp. 3d __, 2021 WL 3603341, at *4 (N.D. Tex. Aug. 13, 2021). Before MPP, resource constraints forced DHS to release thousands of undocumented aliens into the United States and to trust that those aliens would voluntarily appear for their removal proceedings. Under MPP, DHS instead returned certain undocumented aliens to Mexico for the duration of their removal proceedings.

MPP's goal was "to ensure that certain aliens attempting to enter the U.S. illegally or without documentation . . . will no longer be released into the country, where they often fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim." *Id.* at *5 (quotation omitted). Congress expressly authorized the MPP program by statute. *See* 8 U.S.C. § 1225(b)(2)(C).

In December 2018, Mexico agreed to admit MPP enrollees so such aliens could be held outside the United States pending their removal proceedings. *Biden I*, 2021 WL 3603341, at *5. In January 2019, "DHS began implementing MPP, initially in San Diego, California, then El Paso, Texas, and Calexico, California, and then nationwide." *Ibid.* In February 2019, U.S. Immigration and Customs Enforcement issued guidance on MPP to its field offices, anticipating the expansion of MPP across the border. *Ibid.* "By December 31, 2020, DHS had enrolled 68,039 aliens in . . . MPP." *Ibid.*

On January 8, 2021, DHS and Texas finalized a Memorandum of Understanding (the "Agreement"). *Id.* at *6-7. The Agreement required Texas to provide information and assist DHS to "perform its border security, legal immigration, immigration enforcement, and national security missions." *Id.* at *6 (quotation omitted). In return, DHS agreed to consult Texas and consider its views before taking actions that could modify immigration enforcement. *See id.* at *6-7. DHS also agreed to "provide Texas with 180 days' written notice of any proposed action subject to the consultation requirement," *id.* at *7 (quotation omitted), so that Texas would have an opportunity to comment on the proposal. The

Agreement further required DHS to consider Texas's input "in good faith" and, if it decided to reject Texas's input, to "provide a detailed written explanation" of its reasons for doing so. *Ibid.* (emphasis omitted).

On Inauguration Day, the Biden Administration announced its Suspension Decision. In it, DHS stated that it would suspend further enrollments in MPP. DHS's Acting Secretary wrote, "[e]ffective January 21, 2021, the Department will suspend new enrollments in the Migrant Protection Protocols (MPP), pending further review of the program. Aliens who are not already enrolled in MPP should be processed under other existing legal authorities." *Ibid.* (quotation omitted).

On February 2, 2021, DHS sent a letter to Texas purporting to terminate the Agreement "effective immediately." *Ibid.* Because it believed that the letter did not comply with the Agreement's required consultation-and-explanation procedures, Texas interpreted the February 2 letter "as a notice of intent to terminate" the Agreement. *Ibid.*

On April 13, 2021, the States sued, challenging DHS's Suspension Decision. *Id.* at *1. The States claimed that the Suspension Decision violated the APA, the Immigration and Nationality Act ("INA"), the Constitution, and the Agreement. *See ibid.* On May 14, the States moved for a preliminary injunction that would enjoin DHS from enforcing and implementing the Suspension Decision. *Ibid.*

On June 1, 2021, before briefing on the preliminary injunction had concluded, DHS announced its Termination Decision. The district court concluded that the Termination Decision mooted the States' complaint

about the Suspension Decision, and the court allowed the States to amend their complaint and to file a new preliminary injunction motion. *Ibid.* The parties agreed to consolidate the preliminary injunction hearing with the trial on the merits under Federal Rule of Civil Procedure 65(a)(2). *Id.* at *2.

Following the bench trial, the district court issued a 53-page memorandum opinion and order, concluding that the States were entitled to relief on their APA and statutory claims. *Biden I*, 2021 WL 3603341. The court made many findings of fact that will be relevant here. *See* Part II.C.1, *infra* pages 46-52. Based on those findings, the court concluded that the States had Article III standing, that the Termination Decision constituted final and reviewable agency action under the APA, and that the States were within the INA's zone of interests. *Biden I*, 2021 WL 3603341, at *11, 13, 17. The court then concluded that DHS's Termination Decision was arbitrary and capricious, and therefore unlawful, under the APA. *Id.* at *17-18. It also concluded terminating MPP, in circumstances where DHS lacked adequate detention capacity, caused DHS to violate 8 U.S.C. § 1225(b). *Id.* at *22-23. Based on those conclusions, the district court vacated the Termination Decision, "permanently enjoined and restrained [DHS] from implementing or enforcing" it, and ordered DHS "to 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 [1225] without releasing any aliens because of a lack of detention resources." *Id.* at *27 (emphases omitted).

DHS appealed. On August 17, 2021, the Government requested an emergency stay. *See* FED. R. APP. P. 8. A panel of our court denied that request and expedited the appeal. *Texas v. Biden (Biden II)*, 10 F.4th 538, 560-61 (5th Cir. 2021) (per curiam). The Supreme Court affirmed that denial. *Biden v. Texas (Biden III)*, __ S. Ct. __, 2021 WL 3732667 (Aug. 24, 2021) (mem.).

On September 29, DHS announced its intention "to issue [a] new memo terminating MPP." DEP'T OF HOMELAND SEC., DHS ANNOUNCES INTENTION TO ISSUE NEW MEMO TERMINATING MPP (2021), https://perma.cc/MM95-6KUD, screenshotted at *infra* page 25. On October 29, on the Friday before our court was set to hear oral argument, DHS issued two new memoranda (collectively, the "October 29 Memoranda" or "Memoranda"). *See* DEP'T OF HOMELAND SEC., TERMINATION OF THE MIGRANT PROTECTION PROTOCOLS (2021) ("October 29 Cover Memorandum"), https://perma.cc/45CS-DRHR; DEP'T OF HOMELAND SEC., EXPLANATION OF THE DECISION TO TERMINATE THE MIGRANT PROTECTION PROTOCOLS (2021) ("October 29 Explanation Memorandum"), https://perma.cc/4KT6-T82Z. The October 29 Memoranda did not purport to alter the Termination Decision in any way; they merely offered additional reasons for it.

Hours after the release of the October 29 Memoranda, the Government filed a 26-page Suggestion of Mootness and Opposed Motion to Vacate the Judgment Below and Remand for Further Proceedings ("Suggestion of Mootness"). It argued the October 29 Memoranda mooted this appeal, and it moved our court to vacate the district court's judgment (and injunction) and

remand for further proceedings. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950) (explaining the propriety of this remedy for certain cases mooted on appeal). In the alternative, the Government asked us to hold this appeal in abeyance with respect to the § 1225 claim and remand the APA portion of the appeal to the district court, with instructions to vacate and reconsider that part of the opinion. We carried those motions with the case and gave each party additional time at oral argument to address the issue. We deny the Government's motions in Part II.B, *infra* pages 29-46, and Part V.A, *infra* pages 106-109.

B.

The two statutory provisions at the heart of this case come from 8 U.S.C. § 1225(b)(2). Section 1225(b)(2)(A) provides:

> Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

Section 1225(b)(2)(C) provides:

> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

These provisions apply, by their terms, to "applicant[s] for admission"—that is, to aliens who are seeking entry

into the United States. The former provides the default rule: Aliens who are "not clearly and beyond a doubt entitled to be admitted . . . shall be detained" while removal proceedings are pending. § 1225(b)(2)(A); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) ("Read most naturally, §§ 1225(b)(1) and (b)(2) thus mandate detention of applicants for admission until certain proceedings have concluded."). And the latter explains one permissible alternative to detention—return to a contiguous foreign territory. § 1225(b)(2)(C).

Parole is also relevant to this case. Section 1182(d)(5) both grants discretion to parole certain aliens and limits that discretion in important ways. *See Jennings*, 138 S. Ct. at 837 (explaining the connection between this provision and § 1225(b) detention). Parole began as an administrative invention that allowed aliens in certain circumstances to remain on U.S. soil without formal admission. *See* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 299 (9th ed. 2021). Congress codified the practice when it initially enacted the Immigration and Nationality Act (the "INA") in 1952, giving 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." Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163, 188 (1952).

Throughout the mid-twentieth century, the executive branch on multiple occasions purported to use the parole power to bring in large groups of immigrants. *See* ALEINIKOFF et al., *supra*, at 300. In response, Congress twice amended 8 U.S.C. § 1182(d)(5) to limit the scope of the parole power and prevent the executive

branch from using it as a programmatic policy tool. First, in the Refugee Act of 1980, Congress added § 1182(d)(5)(B), which prevents 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. Second, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Congress amended § 1182(d)(5)(A) by providing that parole may be granted "*only* on a case-by-case basis for urgent humanitarian reasons or significant public benefit." Pub. L. No. 104-208, 110 Stat. 3009, 3009-689 (emphasis added).

As it stands today, then, the § 1182(d)(5) parole power gives the executive branch a limited authority to permit incoming aliens to stay in the United States without formal authorization when their particular cases demonstrate an urgent humanitarian need or that their presence will significantly benefit the public. The power must be exercised on a case-by-case basis. Quintessential modern uses of the parole power include, for example, paroling aliens who do not qualify for an admission category but have an urgent need for medical care in the United States and paroling aliens who qualify for a visa but are waiting for it to become available. ALEINIKOFF et al., *supra*, at 299. Parole terminates "when the purposes of . . . parole shall, in the opinion of the Attorney General, have been served." 8 U.S.C. § 1182(d)(5)(A). At that point, DHS must treat the former parolee "in the same manner as . . . any other applicant for admission to the United States." *Ibid.*

The second source of parole power is in § 1226(a). Section 1226(a) provides its own detention-and-parole scheme that applies to aliens who have *already* entered the United States—in contradistinction to the *applicants for admission* covered by § 1225(b)(2) and § 1182(d)(5). *See Jennings*, 138 S. Ct. at 837 (explaining § 1226 "generally governs the process of arresting and detaining" inadmissible aliens who are already "inside the United States"); *see also* Part IV.B, *infra* pages 98-106 (explaining the distinction). This provision generally requires DHS to obtain an administrative warrant before arrest. *See* § 1226(a) ("On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."). DHS may release such "arrested alien[s]" on either bond (at least $1,500) or conditional parole (subject to restrictions). § 1226(a)(2)-(3).

II.

We start, as always, with jurisdiction. First, we hold DHS's June 1 Termination Decision constitutes "final agency action." Second, we hold DHS's October 29 Memoranda did not moot this case. Third, we hold the States have standing to sue.

A.

The APA allows judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. For an agency action to qualify as final, the action must (1) "mark[] the consummation of the agency's decisionmaking process" and (2) either determine "rights or obligations [or produce] legal consequences." *Texas v. EEOC*, 933 F.3d 433, 441 (5th

Cir. 2019) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). Our circuit considers this "a jurisdictional prerequisite of judicial review." *Louisiana v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 584 (5th Cir. 2016).

We begin by analyzing the June 1 Termination Decision on its own terms. We conclude the Decision was final agency action. Then, we address a new finality argument—based on the October 29 Memoranda—that the Government raises for the first time in its Suggestion of Mootness.

The Government says the Termination Decision didn't consummate DHS's decisionmaking process. That's because a policy statement isn't final until the agency applies it "in a particular situation" to an affected person or entity. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014) (quotation omitted). And the Government hints DHS has not yet made "the return decision" in any "individual case." It's hard to tell what this means. Perhaps the Government is suggesting that, somehow, DHS's Termination Decision has not affected a single undocumented alien. But that would be absurd: DHS enrolled over 68,000 aliens in MPP when it was in effect and returned more than 55,000 of those to Mexico. *Biden I*, 2021 WL 3603341, at *5-6. As the district court found, MPP's termination altered that status quo and caused DHS to return fewer aliens to Mexico (and to instead release and/or parole them into the United States). *Id.* at *8. If MPP's termination did *nothing at all* to change the outcome in any given case, one can only imagine why the Government bothered to appeal a district court decision about an entirely nuga-

tory policy choice. We therefore conclude that the Termination Decision was the consummation of the agency's decisionmaking process.

Likewise with the second finality prong. The Termination Decision is final agency action under the principle that, "where agency action withdraws an entity's previously-held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action" under the APA. *EEOC*, 933 F.3d at 442 (quotation omitted). DHS withdrew its officers' previously existing discretion on June 1 when it directed "DHS personnel, effective immediately, to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives issued to carry out MPP." DHS also explicitly refused to "maintain[] the status quo or [to resume] new enrollments in the program." The Termination Decision thus bound DHS staff by forbidding them to continue the program in any way from that moment on. *See id.* at 441 (reiterating that binding effect upon the agency is the key inquiry and explaining that "[w]hether an action binds the agency is evident if it either appears on its face to be binding[] or is applied by the agency in a way that indicates it is binding" (quotation omitted)).

The Government again responds by wishing the law said otherwise. On its view, terminating MPP can't be final agency action because the termination "did not end DHS's statutory authority under Section 1225(b)(2)(C) to conduct returns." So the Government doesn't seem to contest that the Termination Decision binds DHS staff. Instead, the idea seems to be that agency action is never final in virtue of its binding effect on agency

staff—but instead is final only if the agency as a whole permanently swears off the entirety of its statutory discretion. We are aware of no case from any court that supports that sweeping proposition.

And our decision in *EEOC* forecloses it. That case explicitly centered its finality analysis on whether "the agency's action binds *its staff*." 933 F.3d at 442 (emphasis added). Thus, our court based its holding ("that the Guidance binds EEOC") largely on the fact that the "Guidance" in question, despite its name, bound EEOC staff. *See id.* at 443. The court also discussed the Guidance's *de facto* creation of safe harbors for private parties. *Ibid.* What it did *not* consider is whether the EEOC could revoke its Guidance in the future. As we explained in the *Heckler* context in *Texas v. United States (DAPA)*, 809 F.3d 134 (5th Cir. 2015), "[r]evocability . . . is not the touchstone for whether agency action is reviewable." *Id.* at 167.

And for good reason. The Government's rule would render any agency action nonreviewable so long as the agency retained its power to undo that action or otherwise alter it in the future. That accords with neither common sense nor the law. *See Sackett v. EPA*, 566 U.S. 120, 127-28 (2012) (concluding the EPA's issuance of a compliance order was final agency action and noting, "[t]he mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal"); *cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-18 (2009) (reviewing an agency action, without discussing finality, in precisely a situation where the agency *had* taken the opposite

stance in the past). Thus, the mere fact the Termination Decision left intact DHS's statutory authority to return aliens to contiguous territories does not undercut its finality.

The Government also asserts the Termination Decision is a general policy statement—and therefore can neither determine rights nor produce obligations or legal consequences. Even if the Termination Decision is merely a "policy statement," this argument ignores our precedent establishing that such statements can nonetheless constitute "final agency action" under the APA. *See Merchs. Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 919-20 (5th Cir. 1993). The Government counters that *Fast Motor Lines* was a case about APA ripeness and "provided no analysis on this issue." To the contrary, however, *Fast Motor Lines* reached the ripeness issue precisely because it had already concluded the agency action in question was final (despite simultaneously being a statement of policy). *Id.* at 920 (concluding the policy statement was final "within the meaning of 5 U.S.C. §§ 551(13) & *704*" (emphasis added)). The inquiry in our circuit does not focus on labels, and it does not rely on a sharp (and false) dichotomy between statements announcing policies and final statements. The inquiry instead centers on whether the action in question determines "rights or obligations" or creates "legal consequences." *Bennett*, 520 U.S. at 178 (quotation omitted). And one way an agency can do that is by binding its own staff. That is exactly what DHS did in the Termination Decision by commanding staff to stop enrolling aliens in MPP and to terminate the program immediately.

2.

In its Suggestion of Mootness, the Government now argues that the October 29 Memoranda change the picture. Even if the June 1 Termination Decision was final agency action at the time, says the Government, it lost that status when DHS issued its new Memoranda.

To begin, we note that the Government could have, but did not, make this argument in its brief. The briefing obviously concluded before October 29. But the Government's brief includes an introductory footnote that reads: "DHS has authorized us to report that the Secretary is reviewing the June 1 Memorandum and evaluating policy options regarding MPP. The result of that review could have an impact on this appeal." So the Government knew DHS was considering a new memorandum. This would lend itself quite naturally, one would think, to an argument of the same sort the Government makes now. Yet the Government omitted the argument from its brief and instead raises it for the first time in its Suggestion of Mootness. That gives us pause. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 27 (1994) ("To allow a party . . . to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system.").[1]

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[1] The Government also argues that the June 1 Termination Decision is no longer ripe for judicial review. The Suggestion of Mootness devotes one sentence to this issue, which was not in the Government's brief. *See La. Power & Light Co. v. Federal Power Comm'n*, 526 F.2d 898, 910 (5th Cir. 1976) (the Government's best case, holding that "matters still pending" before the agency are not

Even so, we will consider the argument. That's partly because the finality of agency action is a jurisdictional issue. And it's partly because the October 29 Memoranda, which were merely possible at the briefing stage, now actually exist.

First, we explain that the Government misunderstands the States' challenge. The States are challenging DHS's *Termination Decision*—not any particular memo that DHS might have written in the past or might write in the future. Second, we hold that DHS's October 29 Memoranda did not reopen the actionable Termination Decision and are therefore not themselves final agency action. Third, we hold subsequent events can't render a final agency action retroactively nonfinal.

a.

Begin with the Government's framing of the issue. The Government treats the June 1 Memorandum as the challenged action. It then assumes that the October 29 Memoranda are a final agency action of their own. Thus, it says, the new Memoranda "demonstrate that the June 1 memorandum no longer represents the consummation of the agency's decisionmaking process." So even if the June 1 Memorandum was final at the moment of issuance, the October 29 Memoranda have since supplanted it as DHS's final action under 5 U.S.C. § 704.

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ripe for review). We reject this argument. If the States were now attempting to challenge the October 29 Memoranda, then perhaps it would make sense to argue about the ripeness of that *new* challenge. But the States are challenging the same Termination Decision they have been challenging all along. Further, it's nonsensical to suggest, as the Government does, that the Termination Decision is at once moot (*i.e.*, the time for review has come and gone) *and* unripe (*i.e.*, the time for review has not yet arrived).

For one thing, that framing misunderstands the nature of the challenged action.[2] The States are challenging the *Termination Decision*—not the June 1 Memorandum, the October 29 Memoranda, or any other memo. 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. A judgment, not the opinion announcing that judgment, has a binding effect that settles the dispute before the court. *See* William Baude, *The Judgment Power*, 96 Geo. L.J. 1807, 1844 (2008) (describing the "historical answer" to this question: "*Judgments* become binding law, not *opinions*. Opinions merely explain the grounds for judgments, helping other people to plan and order their affairs."). In the same way, DHS's June 1 decision to terminate MPP had legal effect. The June 1 Memorandum—just like the October 29 Memoranda and any other subsequent memos—simply *explained* DHS's decision.

Thus, as common sense would indicate, the Termination Decision itself (not a memo) consummated the agency's decisionmaking process by permanently terminating MPP. *See Bennett*, 520 U.S. at 177-78. The

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[2] To be fair, both the States and the district court appear at times to fall into this same trap. But final agency action is a jurisdictional inquiry. *See Louisiana*, 834 F.3d at 584. And because we're obligated to get jurisdiction right, we are not constrained by the parties' misunderstanding of the issue. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (noting we must decide jurisdiction first, even when the parties concede it). Nor are we constrained by the district court's misunderstanding. *See, e.g.*, *Cranor v. 5 Star Nutrition, LLC*, 998 F.3d 686, 689 (5th Cir. 2021) (review of a district court's ruling on subject-matter jurisdiction is *de novo*).

Termination Decision (not a memo) created legal consequences by stripping preexisting discretion from DHS's own staff. *See ibid.*; *EEOC*, 933 F.3d at 443. And so the Termination Decision (not a memo) is the "final agency action" reviewable in court. 5 U.S.C. § 704.

b.

The October 29 Memoranda did not constitute a new and separately reviewable "final agency action." Our holding to that effect is dictated by the well-established reopening doctrine.

The D.C. Circuit developed the reopening doctrine as a way to pinpoint an agency's final action in cases where the agency has addressed the same issue multiple times. Suppose, for example, "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." *Nat'l Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd.*, 158 F.3d 135, 141 (D.C. Cir. 1998). What happens if the petitioner's challenge to the agency's action would be untimely if measured from the first agency action but timely if measured from the second?[3]

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[3] Challenges to agency actions are subject to various statutes of limitations. *See, e.g.*, 28 U.S.C. § 2401 (six-year limit on "every civil action commenced against the United States"); *id.* § 2344 (sixty-day limit on petitions for review of agency actions under the Hobbs Act). Section 2401(a)'s six-year limit, for instance, starts ticking when "the right of action first accrues." And "[t]he right of action first accrues on the date of the final agency action." *Wash. All. of Tech. Workers v. DHS*, 892 F.3d 332, 342 (D.C. Cir. 2018) (quoting *Harris v. FAA*, 353 F.3d 1006, 1010 (D.C. Cir. 2004)). Thus, the key step in the timeliness inquiry is to determine when the agency took its "final action."

The reopening doctrine provides the answer. If "the agency opened the issue up anew, and then reexamined and reaffirmed its prior decision," the agency's second action (the reaffirmance) is reviewable. *NRDC v. EPA*, 571 F.3d 1245, 1265 (D.C. Cir. 2009) (per curiam) (quotation omitted); *see also Wash. All. of Tech. Workers v. DHS*, 892 F.3d 332, 342 (D.C. Cir. 2018) (tying reopening to final agency action); *Impro Prods., Inc. v. Block*, 722 F.2d 845, 850-51 (D.C. Cir. 1983) (similar). In that event, the reaffirmance, rather than the original decision, starts the limitation period. *See NRDC*, 571 F.3d at 1265; *Impro*, 722 F.2d at 850-51. But if the agency merely reaffirmed its decision without *really* opening the decision back up and reconsidering it, the agency's initial action is the only final agency action to review—so the limitation period runs from the first decision by the agency. *See, e.g.*, *Growth Energy v. EPA*, 5 F.4th 1, 21-22 (D.C. Cir. 2021) (per curiam). A reopening has occurred *only* if "the entire context demonstrates that the agency has undertaken a serious, substantive reconsideration of the existing rule." *Id.* at 21 (quotation omitted).

Reversionary Property Owners v. Surface Transportation Board, 158 F.3d 135 (D.C. Cir. 1998), is the seminal case. *See, e.g.*, *CTIA—The Wireless Ass'n v. FCC*, 466 F.3d 105, 110 (D.C. Cir. 2006) (treating it as such). *Reversionary Property Owners* concerned the Interstate Commerce Commission (the "ICC") and its successor agency, the Surface Transportation Board (the "STB"). 158 F.3d at 137-40. Rather than owning whole railroad corridors in fee simple, railroads often hold mere rights-of-way that allow them to run tracks over others' property. *Id.* at 137-38. Sometimes, railroads abandon those rights-of-way. *Ibid.* Before they can

do so, they must get agency permission and notify the public at large by filing a "Notice of Intent." *Ibid.* Sometimes, abandonments cause reversionary property interests to vest in third parties. *Id.* at 137, 139.

In 1986, after notice and comment, the ICC adopted a "rails to trails" rule that allowed some otherwise-abandonable corridors to become public trails instead. *Id.* at 139. Turning a right-of-way into a trail extinguishes third-party reversionary interests in it. *Ibid.* (explaining this is a compensable taking). Even so, the 1986 rule didn't require anyone to notify the holders of reversionary interests directly beforehand. *Id.* at 138-39. Instead, it simply required railroads to publicize a generalized notice in the Federal Register. *See id.* at 139.

The National Association of Reversionary Property Owners ("NARPO") believed each owner of a reversionary interest should get individualized notice before an abandonment or a rails-to-trails conversion. So NARPO asked the ICC to reopen the 1986 notice-and-comment rulemaking and reconsider that issue. *Id.* at 139-40. The ICC did so, but it decided not to implement the change. *Ibid.* And in 1990, the ICC denied NARPO's petition for reconsideration. *Ibid.* All sides agreed: That was a final agency action. *See id.* at 141.

But in 1996, after the ICC had denied NARPO's request for a new rulemaking on the individualized-notice issue, the STB took the reins from the now-defunct ICC and issued a new Notice of Proposed Rulemaking ("NPRM") regarding abandonment procedures. *See id.* at 140-41. After notice and comment, the STB's Final Rule made some changes—but it refused to implement an individualized-notice requirement. *Id.* at 145-46.

Thus, the D.C. Circuit had to determine whether the 1996 NPRM reopened the individualized-notice issue. The court considered three factors and held the 1996 NPRM was not a reopening. First, the court asked whether the NPRM contained either "[a]n explicit invitation to comment on a previously settled matter" or at least "[a]mbiguity" about whether the individualized-notice issue was on the table. *Id.* at 142. The court acknowledged the NPRM had proposed three changes to abandonment-notice procedures—including one that would require railroads to *directly* notify NARPO (and one other group) before abandoning a right-of-way. *Id.* at 141-44. It also noted the NPRM's specific invitation for comments on "improving notice to the public." *Id.* at 145 (quotation omitted). And the court acknowledged the NPRM's broader invitation for "public comments on these proposals, and on any other areas where changes might be made . . . to streamline our abandonment regulations." *Ibid.* (quotation omitted). Despite all that, the court concluded the NPRM's text *unambiguously excluded* the issue of individualized notice. *See ibid.*; *see also Growth Energy*, 5 F.4th at 21-22 (an NPRM inviting comments on "any aspect of [the] rulemaking . . . did not suggest that the agency was undertaking a reconsideration of the relevant matter" (quotation omitted)).

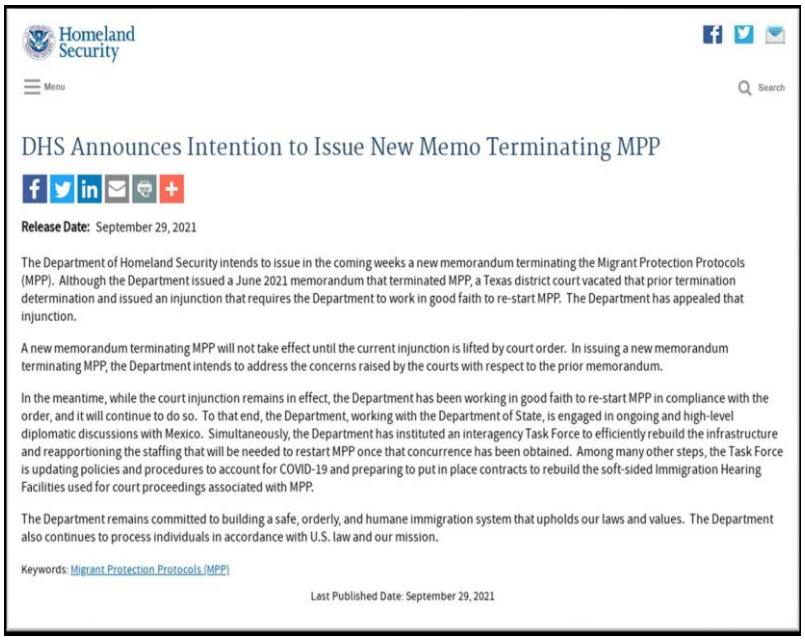
Second, the court considered the "agency's response to comments filed by parties during [the] rulemaking." *Reversionary Prop. Owners*, 158 F.3d at 142. When an agency's "discussion of its policies and rules" regarding a given topic comes "only in response to . . . unsolicited comments," there has likely been no reopening. *Id.* at 143 (quotations omitted). This is especially true when the response "merely reiterate[s]" the agency's

"longstanding policies." *Ibid.* (quotation omitted) (discussing *United Transp. Union-Ill. Legis. Bd. v. Surface Transp. Bd.*, 132 F.3d 71 (D.C. Cir. 1998)). Accordingly, the court noted that STB's Final Rule offered "basically the same rationale" the ICC and STB had given multiple times before. *Id.* at 145. For that reason, the Final Rule's response to NARPO's comments did not "reflect a genuine reconsideration" of the individualized-notice issue. *Ibid.*; *see also CTIA*, 466 F.3d at 112 (reaching the opposite conclusion because, among other things, the final order in question offered "two new justifications" that "constituted the [agency's] first legal rationales for its action to date").

The third factor, and arguably the court's most important, was "the entire context of the rulemaking." *Reversionary Prop. Owners*, 158 F.3d at 144 (quotation omitted) (explaining the preeminence of this consideration); *see also Growth Energy*, 5 F.4th at 21 ("entire context" includes "all relevant proposals and reactions of the agency" (quotation omitted)). Taken as a whole, the context did not suggest the STB was genuinely reconsidering the individualized-notice issue. Instead, the context "was one of making incremental adjustments to existing regulations and updating in light of a statute that did not call the STB's notice provisions into question." *Reversionary Prop. Owners*, 158 F.3d at 145; *see also Am. Rd. & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109, 1115 (D.C. Cir. 2009) (conducting a similarly commonsense inquiry into "the entire context of the rulemaking" and finding no reopening (quotation omitted)).

The conclusion: There was no reopening, the 1996 Final Rule wasn't a final agency action on the individualized-notice issue, and NARPO's suit was untimely. *See Reversionary Prop. Owners*, 158 F.3d at 146.

Under *Reversionary Property Owners* and the reopening doctrine, the October 29 Memoranda did not come close to reopening DHS's Termination Decision. First, we look for "ambiguity" in the closest thing this case has to an NPRM: DHS's September 29 announcement of an intention to issue a new memorandum. *See id.* at 141-45; *P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1023-27 (D.C. Cir. 2008) (demonstrating the flexibility of the *Reversionary Property Owners* factors by adapting them to the combination of an Advance Notice of Proposed Rulemaking and a press release). Here is a screenshot for reference:



Homeland Security

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DHS Announces Intention to Issue New Memo Terminating MPP

Release Date: September 29, 2021

The Department of Homeland Security intends to issue in the coming weeks a new memorandum terminating the Migrant Protection Protocols (MPP). Although the Department issued a June 2021 memorandum that terminated MPP, a Texas district court vacated that prior termination determination and issued an injunction that requires the Department to work in good faith to re-start MPP. The Department has appealed that injunction.

A new memorandum terminating MPP will not take effect until the current injunction is lifted by court order. In issuing a new memorandum terminating MPP, the Department intends to address the concerns raised by the courts with respect to the prior memorandum.

In the meantime, while the court injunction remains in effect, the Department has been working in good faith to re-start MPP in compliance with the order, and it will continue to do so. To that end, the Department, working with the Department of State, is engaged in ongoing and high-level diplomatic discussions with Mexico. Simultaneously, the Department has instituted an interagency Task Force to efficiently rebuild the infrastructure and reapportioning the staffing that will be needed to restart MPP once that concurrence has been obtained. Among many other steps, the Task Force is updating policies and procedures to account for COVID-19 and preparing to put in place contracts to rebuild the soft-sided Immigration Hearing Facilities used for court proceedings associated with MPP.

The Department remains committed to building a safe, orderly, and humane immigration system that upholds our laws and values. The Department also continues to process individuals in accordance with U.S. law and our mission.

Keywords: Migrant Protection Protocols (MPP)

Last Published Date: September 29, 2021

This was DHS's first public announcement since June 1 intimating an intention to issue any new document about MPP. The title leaves nothing to the imagination, and neither does the text: Rather than announcing an intention to *reconsider* its Termination Decision, the announcement set forth DHS's *conclusion* in unmistakable terms. The *Reversionary Property Owners* court found no ambiguity in an NPRM that both suggested open-mindedness about issues closely related to the one at hand and contained an explicit, broadly worded request for comments from the public. *See* 158 F.3d at 141-45. So how could there be any ambiguity about DHS's September 29 announcement, which did neither? *See ibid.*

The outcome is the same even if, *arguendo*, we take into account the Government's brief. The brief notified our court on September 20 "that the Secretary is reviewing the June 1 Memorandum and evaluating policy options regarding MPP." That's just the kind of broad language that does *not* suggest a reopening. *See Growth Energy*, 5 F.4th at 21-22.

Second, if we could, we would consider the October 29 Memoranda's response to comments. *See Reversionary Prop. Owners*, 158 F.3d at 142. We can't do that because DHS never *asked* for comments. That alone is enough to conclude this factor weighs against a finding of reopening. *See ibid.* True, the new Memoranda did respond to the *Biden I* court's criticisms. *See* October 29 Explanation Memorandum 11-29, 36-38 (responding to the district court's reasoning). But even if we pretended those responses were addressing comments rather than a judicial opinion, the first and third factors would outweigh this one. *Cf. Am. Rd. &*

Transp. Builders Ass'n, 588 F.3d at 1115 (agency response given "in answer to comments received pursuant to the publication of petitioner's own call for revisions . . . is not, without much more, sufficient to trigger the reopener doctrine" (emphasis omitted) (quotation omitted)).

Third, the overall context establishes beyond doubt that DHS didn't reopen the Termination Decision. The district court remanded to DHS "for further consideration" and went on to hold that DHS must "enforce and implement MPP . . . *until such a time as it has been lawfully rescinded in compliance with the APA*," among other things. *Biden I*, 2021 WL 3603341, at *27 (emphasis added). In light of that decretal language, DHS announced its unambiguous intention to re-terminate MPP—without a hint of an intention to put the Termination Decision back on the chopping block and rethink things. Then its October 29 Memoranda followed through. Thus, all of DHS's "proposals and reactions" in this case, *see Growth Energy*, 5 F.4th at 21-22, establish that DHS never reopened its Termination Decision—it just further defended what it had previously decided, *see Reversionary Prop. Owners*, 158 F.3d at 145-46.

Because the October 29 Memoranda merely continued, rather than reopened, the Termination Decision, they did not embody final agency action as to that Decision. *See Wash. All. of Tech. Workers*, 892 F.3d at 342; *Impro*, 722 F.2d at 850-51. So DHS's latest memos cannot render the June 1 Termination Decision nonfinal.

c.

Independently, subsequent events can't un-finalize a final agency action. An action is either final or not, and the mere fact that the agency could—or actually does—reverse course in the future does not change that fact. Were it otherwise, only irrevocable agency actions would be final. That is exactly the rule we rejected, at the Supreme Court's behest, just above. *See* Part II.A.1, *supra* pages 14-17; *Sackett*, 566 U.S. at 127-28 ("The mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal."); *see also Wash. All. of Tech. Workers*, 892 F.3d at 342 (explaining that even if the agency's reconsideration is a final action of its own under the reopening doctrine, the agency's original "[r]ule was unquestionably final agency action").

The Government's contrary view would never allow a court to make a final determination that any given agency action is final. We would be stuck in eternal limbo, waiting for the agency to give some carved-in-stone sign that the action in question is here to stay for good. That would have absurd jurisdictional consequences: Because our court views finality as a prerequisite of subject-matter jurisdiction, *see Louisiana*, 834 F.3d at 584, any post-judgment agency action would retroactively deprive the district court of subject-matter jurisdiction. No matter how final an agency action may appear, and no matter how sure the court's jurisdiction to review it, the slightest agency vicissitude could destroy both finality and jurisdiction at any moment.

This case illustrates the absurdity of the Government's position. As we've already explained, the Termination Decision was final on June 1. *See* Part II.A.1, *supra* pages 14-17. The Termination Decision remained final when the district court reviewed it and held it unlawful on August 13. *See Biden I*, 2021 WL 3603341. The Termination Decision remained final when we refused to stay the district court's decision on August 19. *See Biden II*, 10 F.4th 538. The Termination Decision remained final when the Supreme Court likewise refused a stay. *See Biden III*, 2021 WL 3732667. This tripartite judicial rebuke then prompted DHS to explain the Termination Decision anew by way of the October 29 Memoranda.[4] And those October 29 Memoranda somehow *retroactively* unfinalized the Termination Decision, the finality of which previously gave rise to the entire case (including the October 29 Memoranda themselves). The upshot of it all, the Government says, is that we should go back in time and hold that the district court did not have jurisdiction to start

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[4] *See, e.g.*, October 29 Cover Memorandum 2 (framing itself as issuing "[p]ursuant to the District Court's remand"); October 29 Explanation Memorandum 11 (noting that DHS wrote the October 29 Memoranda in response to "the decisions of the *Texas* district court, Fifth Circuit, and Supreme Court"); *id.* at 2, 4, 11-12 (similar); *id.* at 26-29 (responding directly to the district court's 8 U.S.C. § 1225 reasoning); *id.* at 11-29, 36-38 (addressing considerations the district court had faulted DHS for failing to address in the June 1 Memorandum); Oral Argument at 6:34-6:55 ("There was one memorandum in June, and that would have been the only memorandum, had the district court not identified issues it had with that memorandum. . . . And so the . . . new memorandum is based entirely and solely on the district court's findings under the APA and its remand . . . to the agency.").

this chain of events by invaliding the Termination Decision in the first place because the future retroactively unfinalized that decision. *Cf.* Back to the Future (Universal Pictures & Amblin Ent. 1985). We are aware of no case from any court that supports the Government's theory. Today we reject it.[5]

B.

Our jurisdictional inquiry also requires us to consider whether this case is moot. *See Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990) (holding mootness destroys subject-matter jurisdiction). It's not.

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[5] The Government cites only one case in support of its understanding of retroactive unfinalization: *Shrimpers & Fishermen of the RGV v. U.S. Army Corps of Engineers*, 849 F. App'x 459 (5th Cir. 2021) (per curiam). There, the "Army Corps of Engineers issued a permit for a natural gas pipeline." *Id.* at 461. Some petitioners sought review of that permit in our court. *Ibid.* But before we could consider it, the Corps suspended the permit to reconsider it and then vitiate it. *Ibid.* We held the original permit no longer constituted "final agency action." *Id.* at 462. *Shrimpers* was an unpublished and non-precedential decision. *See, e.g.*, *Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006) ("An unpublished opinion issued after January 1, 1996 is not controlling precedent, but may be persuasive authority."). And we hold it was wrong because it conflicts with the authorities discussed above. In any event, *Shrimpers* is easily distinguishable. The thing that rendered the permit nonfinal was the Corps's reconsideration and vitiation of it. *See Shrimpers*, 849 F. App'x at 462. As we've already explained above, DHS did not reconsider the Termination Decision and certainly did not vitiate it.

The Government's Suggestion of Mootness—operating on the mistaken assumption that the agency action under review is the June 1 *Memorandum* rather than the underlying *Termination Decision*—argues as follows. The States' supposed harms were caused by the legal defects (if any) of the June 1 Memorandum. The October 29 Memoranda superseded and rescinded the June 1 Memorandum. Just as a legislature can moot a pending appeal by amending a statute in a way that cures the statute's defect, *see id.* at 478–82, so too did DHS's October 29 Memoranda cure any legal defects in the June 1 Memorandum. *See United States v. Microsoft Corp.*, 138 S. Ct. 1186, 1187-88 (2018) (per curiam) (holding, like *Lewis*, that an intervening change in a statute mooted a case). So any challenge to the June 1 Memorandum must now be moot, and the appeals court has no choice but to vacate the district court's judgment.

The Government's stance, in more colloquial terms, is this: DHS can write a memo, litigate a case to final judgment, lose, and then immediately moot the dispute by writing a new memo overnight. Never mind that *Lewis* and *Microsoft* involved statutes instead of memos: In the Government's view, posting a new PDF document on the internet can moot a case as easily as a statute that's undergone bicameralism and presentment. Even better, that mootness *requires* this court to vacate the district court's judgment, thus giving DHS the same relief it would have received if it had won on the merits—without the inconvenience of having to actually do so. To describe the Government's position is to demonstrate its absurdity.

We nonetheless address each of the Government's mootness arguments in turn. We first explain that the

October 29 Memoranda, on their own terms, have no present legal effect. It necessarily follows that they cannot have the legal effect of mooting this case. Second, even if the October 29 Memoranda had legal effect, the Government has not shown they cure the unlawfulness of the Termination Decision. Third, even if the October 29 Memoranda did have legal effect and did cure that unlawfulness, the new memos would constitute (at very most) voluntary cessation that does not moot the dispute. Fourth and finally, our review of the October 29 Memoranda is barred by several independent appellate principles.

1.

The October 29 Memoranda cannot have the legal effect of mooting this case because those memos presently have *zero* legal effect. Perhaps more precisely, the memos' legal effect is one part nullity and one part impending. The Memoranda purported to do two things: (1) "immediately supersede[] and rescind[] the June 1 Memorandum," and (2) terminate 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." October 29 Cover Memorandum 4; *see also* October 29 Explanation Memorandum 4-5.

The October 29 Memoranda's supposed rescission of the June 1 Termination Decision was a nullity. The district court had *already* vacated the Termination Decision under 5 U.S.C. § 706, which empowers and commands courts to "set aside" unlawful agency actions. *See Biden I*, 2021 WL 3603341, at *23-24 & n.12. That

statutory empowerment means that, unlike a court's decision to hold a statute unconstitutional, the district court's vacatur rendered the June 1 Termination Decision void. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1014-16 (2018) (explaining this point); *see also Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 522 (7th Cir. 2021) ("Vacatur [of an agency action] retroactively undoes or expunges a past [agency] action."). So the October 29 Memoranda may have attempted to rescind DHS's rationale for the Termination Decision, but that attempt had no effect because there was nothing to rescind. A nullity can't moot a case.

That leaves the Memoranda's second purported effect: the re-termination of MPP. The October 29 Memoranda expressly state that the re-termination will have no effect until after the district court's injunction has been lifted. *See* October 29 Explanation Memorandum 4-5. The Government offers no explanation for how a legal effect *that has yet to occur* could moot this case *now*. True, the new memos use equivocal phrasing to describe their legal effect, and sometimes this involves present-tense language. *See, e.g.*, October 29 Cover Memorandum 4 ("I am hereby terminating MPP."). But the fact remains that the Memoranda don't purport to actually do anything until the injunction ends. Just as a nullity can't spring forth from the void to moot a case, a prophesied legal effect can't leap backward from the future to do so.[6]

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[6] Our approach is consistent with the venerable principle that, "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *United*

The Government objects that it would be strange to fault DHS for postponing its re-termination until the future. How else, the Government asks, could it have framed the October 29 Memoranda without risking contempt of the district court's injunction?

The answer, of course, is that the Government made the bed it's attempting to not sleep in. The Government chose to (a) appeal this case, (b) act as though it's returning to the district court under Federal Rule of Civil Procedure 60(b) (even though the appeal means the case is *not* before the district court), and (c) moot the very case it appeals, not by doing what the district court ordered it to do, but by refusing to confess error—all at the same time. The Government cannot use this have-its-cake-and-eat-it-too strategy to moot the case. *See* Part V.A, *infra* pages 106-09 (discussing that strategy in more detail).

2.

Let's nonetheless assume that the October 29 Memoranda have present legal effects. Even if such effects existed (they don't), the Government has not shown the effects would cure the unlawfulness of the Termination Decision. Nor that they would eliminate the States' ongoing injuries from that decision. Nor that they would remove our judicial power to grant relief against

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States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801); *accord Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 281 (1969) ("The general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision."). This principle applies only to changes in "the rule which governs." *Schooner Peggy*, 5 U.S. at 110 (emphasis added). The October 29 Memoranda do nothing to change the rule which governs.

DHS. That's an independent basis for concluding the case is not moot.

A case is moot if "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (quotation omitted). For challenges to governmental actions, that means "a case challenging a statute, executive order, or local ordinance usually becomes moot if the challenged law has expired or been repealed." *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020). In *Spell*, we accordingly held moot a challenge to gubernatorial COVID-19 stay-at-home orders after those orders "expired by their own terms." *Ibid.* With the orders expired, there was simply "nothing for us to enjoin." *Id.* at 177. Likewise, the Supreme Court held moot a challenge to New York City gun rules after the City amended those rules in a way that gave the petitioners "the precise relief [they had] requested in the prayer for relief in their complaint." *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam). But when a government repeals the challenged action and replaces it with something substantially similar, the injury remains. In such a case, the court can still "grant . . . effectual relief . . . to the prevailing party," *Knox*, 567 U.S. at 307 (quotation omitted), and the case is not mooted.

Consider *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993). There, Jacksonville adopted a "Minority Business Enterprise Participation" ordinance that required 10% of the city's contracting budget to be "set aside" for deals with minority-owned contractors. *Id.* at 658-59. Non-minority contractors brought

a Fourteenth Amendment challenge. *See id.* at 658-60 (describing the case's procedural history). After the Court granted certiorari, the city "repealed its . . . ordinance and replaced it with an ordinance entitled 'African-American and Women's Business Enterprise Participation.'" *Id.* at 660. That program was slightly narrower and more flexible than the original, and it allowed for set-asides above or below 10%. *Id.* at 660-61. The city argued it had mooted the case by repealing and replacing the original ordinance. *Id.* at 661.

The Court saw right through the city's gamesmanship. The Court first explained that a defendant generally may not moot a case by voluntarily ceasing the challenged conduct. *Id.* at 661-62. But then it explained that the case at hand was even more obvious than that—because the defendant city *hadn't really ceased anything*:

> This is an *a fortiori* case. There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so. Nor does it matter that the new ordinance differs in certain respects from the old one. [The relevant voluntary-cessation precedent] does not stand for the proposition that it is only the possibility that the *selfsame* statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect. The gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts. The new ordinance may disadvantage them to a lesser degree than the old one, but insofar as it accords preferential treatment to black-

> and female-owned contractors—and, in particular, insofar as its "Sheltered Market Plan" is a "set aside" by another name—it disadvantages them in the same fundamental way.

Id. at 662.[7]

Our court first applied *City of Jacksonville* in *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994). Faced with a challenge to its three-year residency requirement for liquor licenses, Texas repealed the relevant statute and replaced it with a one-year requirement. *Id.* at 549-50. *City of Jacksonville*, we held, was a perfect fit. Texas could not moot the case simply by tweaking its challenged law. *See id.* at 550-51. ("[T]he new one-year residency/citizenship requirement may lessen the burden placed on the Plaintiffs, but . . . the amendments' practical effect remains the same: Plaintiffs, as non-Texans, are treated differently.").

Likewise in *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279 (5th Cir. 2012). There, the city's zoning ordinance allegedly "singled out churches for unfavorable treatment." *Id.* at 281-82 (quotation omitted). The day before oral argument, the city repealed the challenged provision and replaced it with one that banned churches from certain properties outright. *Id.* at 284-85. We applied *City of Jacksonville* and held the

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[7] *City of Jacksonville* is probably best read as a corollary to the voluntary-cessation rule. *See* Part II.B.3, *infra* pages 39-45. A defendant who merely modifies her injurious behavior obviously can't show "the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quotation omitted). The rationale is intuitive: If the injury perdures, the court can still grant relief. So the case cannot be moot. *See Knox*, 567 U.S. at 307-08.

case was not moot. *Id.* at 285-86; *see also Big Tyme Invs., LLC v. Edwards*, 985 F.3d 456, 464-65 (5th Cir. 2021) (holding an Equal Protection challenge to a COVID-19 bar closure not mooted even by the adoption of more lenient restrictions because the new rules "continue[d] to differentiate between bars and restaurants" (quotation omitted)).

The same principle governs here. The Government says DHS's October 29 Memoranda mooted this whole case by rescinding the June 1 Memorandum and replacing it with a *new* explanation for terminating MPP. As we've explained, the Termination Decision is at issue here, not the June 1 Memorandum. And even aside from that, the Government's purported line between harms-caused-by-the-June-1-Memorandum and harms-caused-by-the-October-29-Memoranda is a distinction without a difference. This kind of faux-metaphysical quibbling ignores the "gravamen" of the States' challenge to the Termination Decision. *See City of Jacksonville*, 508 U.S. at 662. DHS cannot moot this case by reaffirming and perpetuating the very same injury that brought the States into court.

The Government offers two lines of response. First, it relies heavily on the Supreme Court's order in *Mayorkas v. Innovation Law Lab*, 141 S. Ct. 2842 (2021) (mem.). That order concerned the mirror image of this case—a challenge to the creation of MPP rather than its termination. The district court enjoined MPP, and the Ninth Circuit affirmed. *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1095 (9th Cir. 2020). But on June 1, of course, DHS terminated MPP. So the Court vacated the Ninth Circuit's judgment and remanded the case "with instructions to direct the District Court to vacate

as moot the . . . order granting a preliminary injunction." *Innovation Law Lab*, 141 S. Ct. at 2842.

That reliance is very much misplaced. DHS's policy change in *Innovation Law Lab* obviously gave the plaintiffs "the precise relief [they had] requested," leaving the injunction with no work to do. *See N.Y. State Rifle & Pistol*, 140 S. Ct. at 1526. So it made sense for the Supreme Court to hold the case moot. *See Innovation Law Lab*, 141 S. Ct. at 2842. In this case, DHS's October 29 Memoranda did nothing less than vow faithful adherence to the June 1 Termination Decision. Unlike the plaintiffs in *Innovation Law Lab*, the States are left with none of the relief they requested. That leaves the injunction with just as much work to do as ever.

Next, the Government focuses on each of the States' two merits challenges to the Termination Decision (based on 8 U.S.C. § 1225 and the APA). *See Biden I*, 2021 WL 3603341, at *22-23 (district court's discussion of § 1225); Part IV.B, *infra* pages 98-106 (our analysis of § 1225); *see also Biden I*, 2021 WL 3603341, at *17-22 (district court's discussion of the APA); Part IV.A, *infra* pages 88-97 (our discussion of the APA). It argues the October 29 Memoranda change the situation enough to moot the case.

As for § 1225, the Government points out that DHS's new Memoranda invoke deference under *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837 (1984), to justify paroling any and every alien DHS lacks the capacity to detain. *See* October 29 Explanation Memorandum 28 (citing *Chevron*). So *Chevron* deference, which wasn't at play before, is relevant now. And because the district court's § 1225 reasoning relied in part on the idea that paroling all above-capacity aliens would be impermissible under

§ 1182(d)(5)(A), *see Biden I*, 2021 WL 3603341, at *22 n.11, the Government argues, the § 1225 issue is now moot.

A creative move, but *Chevron* was as available before October 29 as it is today. The Government's own brief points out that "*DHS has long interpreted* Section 1182(d)(5) to authorize parole of noncitizens who present neither a security risk [n]or a risk of absconding and whose continued detention is not in the public interest." (Emphasis added and quotation omitted.) In fact, the American Civil Liberties Union (the "ACLU") raised *Chevron* deference in an August 17 *amicus curiae* brief filed in our court. The brief pointed to the longstanding DHS regulation in 8 C.F.R. § 212.5(b), arguing that the regulation is a broad, deference-worthy interpretation of 8 U.S.C. § 1182(d)(5)'s parole power. And if the district court had properly deferred to that interpretation, said the ACLU, it would have realized that releasing all over-capacity aliens fits within the statutory "case-by-case basis" limitation on parole.

The Government thus forfeited the *Chevron* issue by failing to mention it in its brief. *See HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2180 (2021) ("[T]he government is not invoking *Chevron*. We therefore decline to consider whether any deference might be due its regulation." (quotation omitted)); *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 669 (6th Cir. 2021) ("Notably, the government does not ask us to grant *Chevron* deference to its interpretation of the relevant statute. 'We therefore decline to consider whether any deference might be due.'" (quoting *HollyFrontier*, 141 S. Ct. at 2180)); *cf. Ortiz v. McDonough*, 6 F.4th 1267, 1275-76 (Fed. Cir. 2021) (applying the

same rule to deference under *Auer v. Robbins*, 519 U.S. 452 (1997)). In fact, it did not even raise the issue before the district court. *See generally Biden I*, 2021 WL 3603341. It now seeks to use the Suggestion of Mootness as a back door to undo those omissions. It may not do so. *See Bancorp*, 513 U.S. at 27 (concluding that a motion for *Munsingwear* vacatur is not a means to "collateral[ly] attack" the judgment); *accord Hous. Chron. Publ'g Co. v. City of League City*, 488 F.3d 613, 619 (5th Cir. 2007); *see also* Part IV.B, *infra* pages 98-106 (analyzing the statutory issue without regard to *Chevron*). And because *Chevron* was relevant to this case, if at all, before the October 29 Memoranda, the doctrine has no bearing at all on mootness.

As for the APA, the Government argues the October 29 Memoranda alleviate the States' injuries. The idea is that, even if the June 1 Termination Decision was arbitrary and capricious, the October 29 Memoranda are not. Thus, says the Government, DHS has fixed the problem the States complain of.

Again, no. The Government has not shown the October 29 Memoranda actually cure the States' APA-based injuries. For example, the Suggestion of Mootness's glowing description of the October 29 Memoranda offers no analysis whatsoever on whether they are *post hoc* rationalizations under the demanding standard announced by the Supreme Court. *See DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1904-05, 1907-09 (2020) (describing a multiple-memorandum agency process strikingly similar to the process here and concluding the later memorandum could "be viewed only as impermissible *post hoc* rationalization[]"). Nor does the Government explain how the October 29 Memoranda,

which are not final agency action of their own under the reopening doctrine, can be anything more than *post hoc* rationalizations of the Termination Decision.

If the October 29 Memoranda are *post hoc* rationalizations, they are powerless to cure the June 1 Termination Decision's problems. *See* Part IV.A, *infra* pages 88-97 (explaining the Termination Decision was arbitrary and capricious under *Regents*); *Regents*, 140 S. Ct. at 1907-09 (explaining "*post hoc* rationalizations . . . are not properly before us"). We need not decide that issue here. We hold only that the Government has not carried its "formidable burden" of showing that the October 29 Memoranda remove the States' injuries by curing the Termination Decision's APA defects. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90-91 (2013) (quotation omitted) (laying out the burden for a party attempting to show its injurious conduct will not recur); *City of Jacksonville*, 508 U.S. at 662 (explaining that a showing that the injury is no longer occurring is a prerequisite to showing injurious conduct will not recur).

3.

Even if the October 29 Memoranda had legal effects, and even if those legal effects cured the unlawfulness of the Termination Decision, the new memos would constitute at most a voluntary cessation of unlawfulness. Again, that's an independent basis for holding the case is not moot.

The voluntary-cessation rule is well settled: "[A] defendant cannot automatically moot a case simply by ending its allegedly unlawful conduct once sued." *Spell*, 962 F.3d at 179 (quotation omitted). Were it otherwise, the Supreme Court has explained, "a defendant could

engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Nike*, 568 U.S. at 91. And "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Ibid.* (quotation omitted). The inquiry centers on "whether the defendant's actions are 'litigation posturing' or whether the controversy is actually extinguished." *Yarls v. Bunton*, 905 F.3d 905, 910 (5th Cir. 2018).

Our court applies this same test in a slightly modified way when the defendant is a governmental entity. In such cases, "[w]ithout evidence to the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009), *aff'd on other grounds sub nom. Sossamon v. Texas*, 563 U.S. 277 (2011). In *Speech First, Inc. v. Fenves*, we explained three factors that can overcome the presumption. 979 F.3d 319 (5th Cir. 2020); *see also id.* at 328-29 (assuming "*arguendo*" that the presumption applies to public universities and analyzing accordingly). They are: "(1) the absence of a controlling statement of future intention [not to repeat the challenged policy]; (2) the suspicious timing of the change; and (3) the [governmental entity's] continued defense of the challenged polic[y]" after the supposedly mooting event. *Id.* at 328. If all three factors obtain, the case isn't moot. *See id.* at 328-29 (declining to decide whether fewer than three will suffice).

This case fits *Fenves* like a glove. DHS has repeatedly exhibited gamesmanship in its decisionmaking. DHS first announced it was suspending MPP on Inauguration Day 2021. *See Biden I*, 2021 WL 3603341, at *7 (noting the suspension went into effect the next day, on January 21). As the district court pointed out:

> Since that day, DHS has not offered a single justification for suspending new enrollments in the program during the period of [its review of MPP]. Indeed, when the original administrative record was filed [in district court] prior to the June 1 Memorandum's issuance, *it contained only a single document —the January 20 Memorandum*. There was no cost-benefit analysis or any sort of reasoned decisionmaking for a court to review.

Id. at *8 (citation omitted) (emphasis added). The States challenged that Suspension Decision on April 13. They "alleged that DHS's two-sentence, three-line memorandum" violated the APA and § 1225, among other things. *Id.* at *1 (quotation omitted). On May 14, the States moved for a preliminary injunction against the Suspension Decision. *Ibid.*

In the midst of briefing, DHS tried—successfully—to moot that challenge. This by way of its June 1 Termination Decision, which permanently ended MPP. *See ibid.* The district court held this mooted the States' challenge to the Suspension Decision, thus allowing the Government to avoid any responsibility for its completely unreasoned, two-sentence decision that started this whole case. *Ibid.*

After the district court allowed the States to replead a challenge to the Termination Decision, DHS threw another last-minute wrench into the bench trial. *See id.* at *2. At least three weeks before the trial was scheduled to begin, DHS became aware the administrative record was missing a key document: DHS's own 2019 assessment of MPP, which judged the policy to be a success. *Ibid.*; *id.* at *5 (describing the assessment). Despite the advance notice, DHS waited until *two days* before the one-day bench trial to add it to the record. *Id.* at *2.

The States claimed unfair surprise and moved to have the addition excluded, *see* ECF No. 80, but the district court denied that motion, *see* ECF No. 85. It pointed out: "Defendants even waited until 3:27pm two days before the [trial] to file the corrected Administrative Record, despite the declaration of the custodian [explaining that DHS had noticed the omission] being electronically signed at 5:14 p.m. Eastern time *the day before*." *Id.* at 2. This behavior, said the district court, came "perilously close to undermining the presumption of administrative regularity" courts normally accord to agency procedures. *Biden I*, 2021 WL 3603341, at *2 (quoting ECF No. 85 at 3). In the end, despite the States' limited opportunity to tailor their case to the inclusion of the 2019 assessment, the assessment played a significant role in the district court's analysis. *See id.* at *19 ("By ignoring its own previous assessment on the importance of deterring meritless asylum applications without a reasoned analysis for the change, [DHS] acted arbitrarily and capriciously." (quotation omitted)).

DHS continued its tactics on appeal. After we denied its motion for a stay, DHS announced its intention

to issue a new memorandum. *See Biden II*, 10 F.4th 538 (decided August 19); DHS Announces Intention to Issue New Memo Terminating MPP (posted September 29), screenshotted at *supra* page 25. On the Friday before oral argument—October 29—DHS issued its new Memoranda. Around 4:30 p.m. that Friday, the Government filed its 26-page Suggestion of Mootness.

Those facts easily satisfy all three *Fenves* factors. First, DHS "has not issued a controlling statement of future intention" to refrain from repeating MPP's termination. *Fenves*, 979 F.3d at 328-29. In *Fenves*, the University president, "in his official capacity, represent[ed] in his brief that the University has no plans to, and will not, reenact the [challenged] policies." *Id.* at 328 (quotation omitted). The court held that wasn't enough: Only "sworn testimony" from someone with "control" over the relevant policy choice would suffice. *Id.* at 328-29 (quotation omitted). This case is even more clear-cut. The Government's Suggestion of Mootness doesn't even *claim* that DHS has forsworn further memos on this topic. And there's certainly nothing close to "sworn testimony" establishing such a commitment.

Second, "the timing of [DHS's] policy amendments is at least as suspicious as was the timing of the changes in" *Fenves*. *Id.* at 329. In *Fenves*, the timing was "suspicious" because the University only began reviewing its policies after it lost in district court. *Ibid.* And the "changes were first announced only in the University's appellate brief." *Ibid.* Here, as in *Fenves*, DHS started reviewing its policy only after losing in district court. And unlike *Fenves*, DHS made the change the Friday before oral argument—long after briefing had

concluded. That timing, combined with DHS's pattern of belated shifts and its eleventh-hour mooting of the States' original challenge, is more than a little "suspicious." *Ibid.*

Third, DHS "continues to defend the original policies . . . as it did in the district court." *Ibid.* DHS's original stance, expressed in its briefing, was that the June 1 Termination Decision was entirely defensible and legal. In no way does the Suggestion of Mootness alter that stance. Nor do the October 29 Memoranda themselves. And if any doubt remained on this score, oral argument would remove it. When asked whether "the Government believe[s] that the June 1 Memo was a lawful exercise of government power," the Government's counsel responded: "Yes, your honor." Oral Argument at 55:46-55:54.

Even after giving DHS "some solicitude" in the voluntary-cessation analysis, *Sossamon*, 560 F.3d at 325, we hold this case is not moot. Each of the three *Fenves* factors is at least as obvious here as in *Fenves* itself. DHS has therefore not borne its "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Nike*, 568 U.S. at 91 (quotation omitted).

Instead of trying to shoulder that burden, the Government asserts the Memoranda can't possibly fit into the voluntary-cessation doctrine because DHS issued them in response to the district court's remand order. That's incorrect because it ignores the fundamental one-court-at-a-time rule. "The general rule is that a case can exist only in one court at a time, and a notice of appeal permanently transfers the case to us until we send it back." *United States v. Lucero*, 755 F. App'x 384,

386 (5th Cir. 2018) (per curiam); *see also Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.").

That same principle applies when an agency notices an appeal instead of accepting a remand order. Thus, if the Government wanted the October 29 Memoranda to be assessed as a response to *the district court's* remand, it should have voluntarily dismissed this appeal and asked *the district court* for relief from the judgment. *See* Fed. R. App. P. 42(b) (allowing for voluntary dismissal); Fed. R. Civ. P. 60(b) (providing a mechanism for a party to seek relief from a judgment); Part V.A, *infra* pages 106-09 (discussing DHS's attempt to have it both ways at once in this case). That court's disposition of such a motion, of course, would have been an appealable final decision. *See, e.g.*, *Brumfield v. La. State Bd. of Educ.*, 806 F.3d 289, 296 (5th Cir. 2015) ("[T]he district court's denial of the 60(b)(4) motion amounts to a refusal to dissolve an injunction, making the denial appealable under this court's precedent."). Such an approach would have run parallel to DHS's path in *Regents* itself, where a post-remand DHS returned to the district court with its second memorandum, waited for the district court's ruling, and appealed that ruling. 140 S. Ct. at 1904-05 (explaining that, before appealing, "[t]he Government asked the D. C. District Court to revise its prior order in light of [the new memorandum], but the court declined"). That's what allowed the appeals courts in the *Regents* litigation to proceed with the

benefit of full, first-instance review from the district court on the merits of both sets of agency documents.

The Government was entirely free, of course, to appeal when it did. But it may not invoke the timing of its own appeal to avoid the voluntary-cessation doctrine. Just as a litigant cannot notice an appeal and then continue litigating the case in the district court, an agency cannot notice an appeal and then act as if it had accepted the remand order.

4.

Finally, and in any event, independent principles of appellate law prohibit the Government's efforts to inject the October 29 Memoranda into this case at the eleventh hour. Three bear emphasis.

First and foremost is the record rule. Immediately after empowering courts to review agency action, the APA commands: "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706; *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). That rule applies not only to arbitrary-and-capricious review, *see* § 706(2)(A), but also to review for compliance with statutes, *see* § 706(2)(C). Thus, we will apply the law to the facts based on the agency record as it stood on the date of the Termination Decision—June 1.

Second, the States challenged the June 1 Termination Decision in district court. They did not challenge the October 29 Memoranda, which obviously did not exist at the time of the district court proceedings. This is

an appeal from the district court's disposition of the States' challenge, and the merits of DHS's actions on October 29 are not before us. Indeed, because the reopening doctrine establishes that the October 29 Memoranda embodied no final agency action, *see* Part II.A.2.b, *supra* pages 20-27, we do not have *jurisdiction* to decide those merits.

Third, the general rule is that "we are a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *see also Landry's, Inc. v. Ins. Co. of the State of Pa.*, 4 F.4th 366, 372 n.4 (5th Cir. 2021). That rule counsels against considering the merits of the October 29 Memoranda before a district court has done so. *Cf. Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, 946 F.3d 1100, 1110-15 (9th Cir. 2020) (holding a 2019 agency funding allocation didn't moot a challenge to the 2018 version of the same allocation, deciding the merits without regard to the 2019 allocation, and declining to address most issues not considered by the district court).[8]

C.

Now, standing. Several factual findings were central to the district court's standing analysis, and they

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[8] While we cannot and will not consider the *merits* of the October 29 Memoranda, we obviously can, must, and already have addressed the memos' effect on our *jurisdiction* (which is none, as it turns out). "This court necessarily has the inherent jurisdiction to determine its own jurisdiction." *Camsoft Data Sys., Inc. v. S. Elecs. Supply, Inc.*, 756 F.3d 327, 333 (5th Cir. 2014) (quotation omitted). As explained above in Part II.A.2, *supra* pages 17-29, and in Part II.B.1-3, *supra* pages 30-45, the October 29 Memoranda do nothing to destroy our jurisdiction.

will be central to ours as well. So we begin by reviewing those findings for clear error, and we find none. Then we conclude the States have standing to bring this suit.

1.

Under clear-error review, "[i]f the district court's view of the evidence is plausible in light of the entire record, an appellate court may not reverse even if it is convinced that it would have weighed the evidence differently in the first instance." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021). That same standard applies to facts that underlie jurisdictional issues like standing. *See Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 367 (5th Cir. 2020) ("Because this case was tried, Plaintiffs needed to prove standing by a preponderance of the evidence. A factual finding that a plaintiff met that burden is reviewed for clear error." (citation omitted)); *DeJoria v. Maghreb Petroleum Expl., S.A.*, 935 F.3d 381, 390 (5th Cir. 2019) ("[J]urisdiction is a legal question. But the facts that underlie a jurisdictional determination are still reviewed only for clear error.").

a.

The district court's most important finding was that MPP's termination has increased the number of aliens released on parole into the United States, including Texas and Missouri. *See Biden I*, 2021 WL 3603341, at *8 ("Without MPP, Defendants are forced to release and parole aliens into the United States because Defendants simply do not have the resources to detain aliens as mandated by statute."); *see also* 8 U.S.C. § 1182(d)(5) (laying out parole procedures).

The court rooted that finding firmly in the evidence before it. The court noted DHS's inadequate detention capacity, citing both a record declaration and some of DHS's own publications on the matter. *Biden I*, 2021 WL 3603341, at *8-9. So it's unsurprising that on appeal, even the Government admits DHS is "detaining at or near its capacity limits." Next, the court pointed to evidence that "the termination of MPP has contributed to the current border surge." *Biden I*, 2021 WL 3603341, at *9 (citing DHS's own previous determinations that MPP had curbed the rate of illegal entries). And it pointed out that the number of "enforcement encounters"—that is, instances where immigration officials encounter immigrants attempting to cross the southern border without documentation—had "skyrocketed" since MPP's termination. *Ibid.*; *see also id.* at *9 n.7 (noting a sworn statement of David Shahoulian, then the Assistant Secretary for Border and Immigration Policy at DHS, who predicted that "total [border] encounters this fiscal year [2021] are likely to be the highest ever recorded" (emphasis omitted)). Those pieces of record evidence make it eminently "plausible" that DHS's termination of MPP has increased the total number of aliens paroled into the United States. *Brnovich*, 141 S. Ct. at 2349.

The Government contests this fact in several ways—none of which persuades us the district court committed clear error. Broadly, the Government insists that "[t]he court cited no record evidence demonstrating that terminating MPP in fact led to an increase in the number of noncitizens released." The district court's record citations belie this claim. *See Biden I*, 2021 WL 3603341, at *8-9. So does the Government's own brief. As discussed below, that brief faults the district court for

giving DHS only two options: either detain aliens (8 U.S.C. § 1225(b)(2)(A)) or return them to Mexico (8 U.S.C. § 1225(b)(2)(C)). *See* Part IV.B, *infra* pages 98-106. Instead, says the Government, DHS has the third option of paroling aliens under 8 U.S.C. § 1182(d)(5)(A). Thus, for any given alien whose non-detention would otherwise violate § 1225, DHS can comply with the law (and was complying, before the district court's injunction) simply by paroling that alien under § 1182.

Put differently, the Government first denies DHS's policy will increase the number of paroled aliens. Then it argues DHS is complying with the law precisely by paroling the aliens it lacks the capacity to detain rather than returning them to Mexico. That litigating position confirms the district court's extensive record citations: MPP's termination, combined with the lack of detention capacity, has increased and (without an injunction) will increase the total number of parolees. *See Biden I*, 2021 WL 3603341, at *9 ("Even if the termination of MPP played *no* role in the increasing number of migrants, the lack of MPP as a tool to manage the influx means that more aliens will be released and paroled into the United States as the surge continues to overwhelm DHS's detainment capacity.").

The Government nonetheless contests the district court's statistics as to capacity limits and offers its own statistics in their place. This is effectively a request that we re-weigh the evidence that was before the district court, and we will not do that. *See Brnovich*, 141 S. Ct. at 2349. The task of evaluating competing statistics is precisely the kind of task a district court is best situated to undertake. *Cf. Woodfox v. Cain*, 772 F.3d

358, 380 (5th Cir. 2014) ("Again, given the fact-intensive nature of the statistical inquiry, we can find no clear error in the district court's opting to use the one-tailed and two-tailed tests.").

Third, the Government faults the district court for considering the number of encounters between immigration officials and would-be entrants at the border (called "border encounters"). The Government points out that officials might be arresting the same would-be entrants multiple times. And that could artificially inflate the number of *encounters*, even while the rate of *illegal entries* itself remains constant. So, the argument goes, the district court clearly erred by citing border encounters to conclude MPP's termination has contributed to the border surge. This misses the mark entirely. The district court's point was just that MPP's termination has caused an increase in attempted illegal crossings. And the court quite reasonably used the rate of border encounters as a proxy for that rate. If illegal entry attempts increase, it's irrelevant how many times a given entrant has tried *in the past*. As in any other context, a repeat offender is an offender just the same. And in all events, the Government's false-positive theory makes sense only if the incidence of repeat entrants has increased since MPP's termination. But it offers no such evidence, and the June 1 Memorandum itself suggests DHS made the Termination Decision with the hope that doing so would *decrease* the rate of repeat entry.

Fourth, the Government denies that DHS ever acknowledged MPP's effectiveness. The district court supported this proposition by reference to a DHS docu-

ment that said, "MPP implementation contributes to decreasing the volume of inadmissible aliens arriving in the United States on land from Mexico." *Biden I*, 2021 WL 3603341, at *5, *9 (quotation omitted). The Government points out that this quote came under the header "Metric," and says the document was therefore doing nothing more than proposing a metric for measuring MPP's effectiveness—not touting that effectiveness.

Yes, the quote comes from a sub-header labeled "Metric." But the prior page explains that "[t]he following are the intended goals of MPP and measurements of how those goals *are currently being met*." (Emphasis added.) And just after the metric is a "Data measurement" sub-header, measuring the "Number of Aliens Enrolled in MPP." That suggests the document was doing more than just proposing future measurements—and that instead, it was actually carrying out measurements itself. So one "plausible" "view of the evidence" is that DHS was not just proposing a metric but in fact concluding MPP had already successfully reduced illegal entries. *See Brnovich*, 141 S. Ct. at 2349. The district court did not clearly err by interpreting the DHS document the way it did.

Last and related, the Government argues MPP was an ineffective deterrent, and that its termination therefore could not have caused an increase in illegal entries. But the district court made the contrary finding after its own consideration of the record and weighing of the evidence. *See Biden I*, 2021 WL 3603341, at *8-9. That finding is "plausible in light of the entire record," *Brnovich*, 141 S. Ct. at 2349, and we will not disturb it on appeal. And even if the Government were correct that MPP was an ineffective deterrent, the fact remains that,

according to both the record and the Government's own brief, MPP's termination drastically increases the proportion of incoming aliens who are paroled rather than returned to Mexico. And it is precisely that increase in paroles that causes the States' harms.

b.

The district court found that the increase in parolees causes the States financial harm by way of driver's license applications. *Biden I*, 2021 WL 3603341, at *9-10. More specifically, the court found both that "[a]s a result of the termination of MPP, some aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and will obtain Texas driver's licenses" at a cost to Texas, and that "[e]ach additional customer seeking a Texas driver's license imposes a cost on Texas." *Id.* at *9.

Neither finding was clearly erroneous. In *DAPA*, we observed that "driving is a practical necessity in most of" Texas. 809 F.3d at 156. For that reason, we explained, it was "hardly speculative" that individuals would apply for driver's licenses upon becoming eligible to do so. *Id.* at 160. This case is indistinguishable. Among other things, eligibility for a Texas driver's license requires both residence in Texas and lawful status. And under Texas law, immigration parole under § 1182(d)(5) suffices. *See* Part II.C.2.b, *infra* pages 54-57 (explaining this). Thus, just as in *DAPA*, it is here "hardly speculative" that many newly paroled individuals will apply for Texas licenses. 809 F.3d at 160. Further, the district court found—with support from the record—that Texas incurs a cost for each driver's license application it reviews. *Biden I*, 2021 WL 3603341, at *10 (citing a declaration of the Chief of the

Texas Department of Public Safety Driver License Division, which explains, "DPS estimates that for an additional 10,000 driver['s] license customers seeking a limited term license, DPS would incur a biennial cost of approximately $2,014,870.80"). And of course, the record shows the State incurs a cost for actually granting licenses.

c.

Finally, the district court found that the increase in releases and paroles will increase the States' healthcare costs. *See Ibid.* (citing a record deposition for the proposition that "[t]he total costs to the State will increase as the number of aliens within the state increases").[9] That's because both Texas and Missouri subsidize healthcare for immigrants, regardless of immigration status. *See ibid.* Federal law affirmatively *requires* the States to make some of those expenditures. *See* 42 C.F.R. § 440.255(c) (Emergency Medicaid).

The Government appears to concede the obvious—that *if* the total number of in-State aliens increases, the States will spend more on healthcare. The Government's objection, instead, boils down to repeating its claim that MPP's termination can't have caused either an increase in entries or an increase in parolees. Because *those* district court findings were not clearly erroneous, this objection goes nowhere.

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[9] The district court also made findings about educational and criminal-justice costs. *Ibid.* We do not address those findings here because nothing turns on them.

2.

To establish standing, the States "must show an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *DAPA*, 809 F.3d at 150 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). And because there was a trial, the States "needed to prove standing by a preponderance of the evidence." *Env't Tex. Citizen Lobby*, 968 F.3d at 367.

Texas and Missouri each contend they have standing. But because only one of the States must have standing, we focus on Texas. *See Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *accord NRA v. McCraw*, 719 F.3d 338, 344 n.3 (5th Cir. 2013). We begin with (a) the special solicitude that Texas is owed in the standing analysis. Then we hold Texas (b) incurred an injury in fact that (c) was traceable to the Termination Decision, and that (d) can be redressed by a favorable judicial decision. Finally, we hold (e) the Government's counterarguments are foreclosed by precedent.

a.

At the outset, we note that Texas is entitled to "special solicitude" in the standing analysis. *Massachusetts*, 549 U.S. at 520; *see also DAPA*, 809 F.3d at 151 (beginning with the special-solicitude question). Special solicitude has two requirements: (1) the State must have a procedural right to challenge the action in question, and (2) the challenged action must affect one of the State's quasi-sovereign interests. *Id.* at 151-52 (citing *Massachusetts*, 549 U.S. at 516-20). In both *Massa-*

chusetts and *DAPA*, the first prong was satisfied because a State challenged an agency action as invalid under a statute. 549 U.S. at 516-17 (Clean Air Act); 809 F.3d at 152-53 (APA). And in both cases, the second prong was satisfied because a State's challenge involved an agency's alleged failure to protect certain formerly "sovereign prerogatives [that] are now lodged in the Federal Government." *Massachusetts*, 549 U.S. at 519-20; *see also DAPA*, 809 F.3d at 152-54. Particularly relevant here is *DAPA*, where we held that DAPA, by authorizing the presence of many previously unlawful aliens in the United States, affected "quasi-sovereign interests by imposing substantial pressure on them to change their laws, which provide for issuing driver's licenses to some aliens and subsidizing those licenses." 809 F.3d at 153 (quotation omitted).

This case is no different. First, just as in the *DAPA* suit, Texas is asserting a procedural right under the APA to challenge an agency action. *See id.* at 152 ("In enacting the APA, Congress intended for those 'suffering legal wrong because of agency action' to have judicial recourse, and the states fall well within that definition." (quoting 5 U.S.C. § 702)). And second, Texas asserts precisely the same driver's-license-based injury here that it did there. *See id.* at 153-54 (explaining that DAPA, by greatly increasing the class of people to whom existing Texas law would entitle a subsidized driver's license, pressured Texas to change its own law—thus affecting a quasi-sovereign interest). Thus, Texas is entitled to special solicitude in the standing inquiry. If nothing else, that means imminence and redressability are easier to establish here than usual. *See Massachusetts*, 549 U.S. at 517-18 (holding a State "can assert [its]

right[s] without meeting all the normal standards for redressability and immediacy" (quotation omitted)).[10]

b.

Texas has suffered actual injury already, and it faces additional costs if the district court's injunction ends. MPP's termination has increased the number of immigrants paroled into Texas under 8 U.S.C. § 1182(d)(5). And as *DAPA* discussed at length, Texas law requires the issuance of a license to any qualified person—including aliens who "present . . . documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States." 809 F.3d at 155 (alteration in original) (quoting TEX. TRANSP. CODE § 521.142(a)); *see also* TEX. TRANSP. CODE § 521.181. Parole under 8 U.S.C. § 1182 satisfies that requirement. *See* TEX. DEP'T OF PUB. SAFETY, VERIFYING LAWFUL PRESENCE 4 (2013), https://perma.cc/Z55H-GHBH (listing an acceptable document for "parolees" as "[i]mmigration documentation with an alien number or I-94 number," and going on to explain that "[t]his can include but is not limited to an I-94 with annotation 'parole' or 'paroled pursuant to [8 U.S.C. § 1182(d)(5)]'"); *see also* TEX. DEP'T OF PUB. SAFETY, U.S. CITIZENSHIP OR LAWFUL PRESENCE REQUIREMENT (2021), https://perma.cc/

[10] The Government's sole response is to assert that *only* a notice-and-comment claim under 5 U.S.C. § 553—like the claim Texas asserted in *DAPA*—suffices for special solicitude. And because the States are making an arbitrary-and-capricious claim under 5 U.S.C. § 706, they don't qualify. Supreme Court precedent forecloses this argument: *Massachusetts* itself recognized a procedural right to bring arbitrary-and-capricious challenges. *See* 549 U.S. at 520 (recognizing "a . . . procedural right to challenge the rejection of [a State's] rulemaking petition as arbitrary and capricious").

5AWR-HVPF (including a hyperlink to the Verifying Lawful Presence document). Likewise, parole (or any other form of release into the state, as opposed to return to Mexico) satisfies Texas's residency requirement for driver's licenses. *See* TEX. TRANSP. CODE § 521.1426(a) ("The department may not issue a driver's license or a personal identification certificate to a person who has not established a domicile in this state.").

Because driving is a "practical necessity in most of the state," there's "little doubt" many newly paroled aliens have applied—and without the district court's injunction, will apply in the future—for Texas driver's licenses. *See DAPA*, 809 F.3d at 156. And the district court found, without a hint of clear error, that each granted license (and each *reviewed application* for a license, even if not granted) costs Texas money. It follows that Texas has been actually injured—or at the least, that it faces imminent injury without the district court's injunction. Likewise with healthcare costs.

The Government says that's not enough because Texas has not shown it has already issued any licenses to immigrants who became eligible because of MPP's termination. Tellingly, however, it offers no hint as to how Texas could make that showing—nor why we should require it to do so. Imagine Texas had produced copies of driver's license applications from paroled aliens. Would that have counted as evidence that Texas had, in the Government's words, "issued a single additional driver's license as a result" of MPP's termination? Of course not: There would always remain some possibility that *any given parolee* would have been paroled even under MPP. MPP is precisely the sort of large-scale policy that's amenable to challenge using large-scale

statistics and figures, rather than highly specific individualized documents. And Texas's standing is robustly supported by just such big-picture evidence. There is nothing "conjectural" or "hypothetical" about that. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (quotation omitted); *cf. DAPA*, 809 F.3d at 161-62 ("The state must allege an injury that has already occurred or is certainly impending; it is easier to demonstrate that some DAPA beneficiaries would apply for licenses than it is to establish that a particular alien would." (quotation omitted)). To the contrary, given both MPP's effect of increasing the number of parolees and the fact that many of those parolees will apply for Texas licenses, it's impossible to imagine how the Government could terminate MPP *without* costing Texas any money. *See Clapper*, 568 U.S. at 409 ("[T]hreatened injury must be certainly impending to constitute injury in fact." (emphasis omitted)). And in all events, *Massachusetts* countenanced a far less obvious injury than this one. 549 U.S. at 522-23.

Second, the Government resorts to *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015), where this court held Mississippi lacked standing to challenge the Deferred Action for Childhood Arrivals ("DACA") program. *Id.* at 252. Mississippi produced neither "evidence that any DACA eligible immigrants resided in the state," nor "evidence of costs it would incur if some DACA-approved immigrants came to the state." *Ibid.* Instead, Mississippi cited nothing more than a nine-year-old study regarding the costs of illegal immigration as a whole (not the costs imposed by DACA in particular). *Id.* at 249, 252. We concluded that "Mississippi's claim of injury [was] not supported by any facts." *Id.* at 252.

This case is worlds apart. Texas *has*, of course, supported its claim of injury with facts. And that includes precisely the kind of facts Mississippi was missing: "evidence of costs it would incur" if MPP increased the number of parolees in the state. *See ibid.*; *Biden I*, 2021 WL 3603341, at *9-10 (citing record evidence of projected costs to issue additional driver's licenses, projected costs to evaluate additional driver's license applications, and projected healthcare costs).

Third, the Government points out that there's been a full bench trial here, unlike the preliminary-injunction posture of *DAPA*. That is a distinction, and it means Texas must show standing by a preponderance of the evidence rather than that it's merely "likely" to establish standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (concluding the standing burden of proof varies with the stages of litigation); *Fenves*, 979 F.3d at 329 (explaining the standard at the preliminary-injunction stage). Yet the distinction changes nothing. The district court's factual findings are not clearly erroneous. And as just explained, those findings do indeed suffice to show Texas's actual or imminent injury by a preponderance of the evidence.

Finally, the Government says Texas's injuries are self-inflicted and therefore entirely irrelevant to the standing inquiry. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam). Our court addressed and rejected precisely this argument in *DAPA*. *See* 809 F.3d at 157-60 (citing *Wyoming v. Oklahoma*, 502 U.S. 437 (1992)). The Government does not acknowledge that exhaustive, precedent-based treatment of the issue, and it offers no reason at all for holding that Texas's injury is self-inflicted in this case when it was

not in *DAPA*. Here, as there, Texas is injured by the "Hobson's choice of spending millions of dollars to subsidize driver's licenses or changing its statutes." *Id.* at 163.

c.

Texas's injury is also traceable to DHS's termination of MPP. The district court found that MPP's termination has caused, and will continue to cause, an increase in immigrants paroled into Texas. Many new parolees are certain to apply for driver's licenses—and evaluating each application will impose costs on Texas. *Cf. DAPA*, 809 F.3d at 160 (noting that new immigrants—in that case, DAPA recipients—"have strong incentives to obtain driver's licenses, and it is hardly speculative that many would do so if they became eligible"). Not to mention actually granting licenses. Likewise, at least some MPP-termination-caused immigrants will certainly seek healthcare services from the State. The causal chain is easy to see. *See Massachusetts*, 549 U.S. at 523 (finding traceability where the EPA's challenged action may have caused people to drive less fuel-efficient cars, which may in turn contribute to a prospective rise in sea levels, which may in turn cause the erosion of Massachusetts's shoreline).

The Government nonetheless argues that, when "a causal relation between injury and challenged action depends upon the decision of an independent third party . . . standing is not precluded, but it is ordinarily substantially more difficult to establish." *California v. Texas*, 141 S. Ct. 2104, 2117 (2021) (quotation omitted). And the district court's causal reasoning relies on mere speculation about "complex decisions made by non-citizens . . . before they risk[] life and limb to come

here." *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015). Thus, says the Government, Texas's injury (if any) can be traced back to immigrants' choices, not to MPP's termination.

But the court was not speculating. It did not merely prognosticate that, sometime in the future, MPP's termination would influence aliens' decisions whether to immigrate illegally. Instead, the court surveyed the record and found the relevant cause-and-effect had already been taking place (even if some of its impacts on Texas were still imminent rather than actual). *See Biden I*, 2021 WL 3603341, at *9-10. In other words, MPP's termination has already increased the rate of illegal entries and the number of parolees. That means the States have met their burden "to adduce facts showing that [the choices of the relevant third parties] have been or will be made in such manner as to produce causation." *Lujan*, 504 U.S. at 562. Those same findings of *past and present* facts differentiate this case from others where the Supreme Court has refused to base standing on speculation about the *future* choices of third parties. *See, e.g.*, *California*, 141 S. Ct. at 2118-19 ("The state plaintiffs have failed to show that the challenged minimum essential coverage provision, without any prospect of penalty, *will* harm them by leading more individuals to enroll in these programs." (emphasis added)); *Allen v. Wright*, 468 U.S. 737, 758 (1984) ("[I]t is entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its [racially discriminatory] policies. It is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the

private school once it was threatened with loss of tax-exempt status." (citation omitted)); *Clapper*, 568 U.S. at 413 ("[E]ven if respondents could show that the Government will seek the Foreign Intelligence Surveillance Court's authorization to acquire the communications of respondents' foreign contacts . . . respondents can only speculate as to whether that court *will* authorize such surveillance." (emphasis added)). Here, unlike in those cases, MPP's termination has already increased the rate of illegal entries into Texas. The only relevant third-party choice that remains, then, is the alien's choice to apply for a license once in Texas.

And in that regard, this case fits comfortably within the reasoning of *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). There, the Court concluded traceability was satisfied, even when it hinged on foreseeing "that third parties will likely react in predictable ways to the citizenship question, even if they do so unlawfully." *Id.* at 2566. That's because (a) the district court found that noncitizens' lower response rates to the census were "likely attributable at least in part to noncitizens' reluctance to answer a citizenship question," and (b) common sense showed that inference to be a reasonable prediction rather than "mere speculation." *Ibid.* In short, the Court held it's entirely permissible to rest traceability "on the predictable effect of Government action on the decisions of third parties." *Ibid.*

Here, likewise, the district court found that many newly arrived aliens will apply for licenses upon becoming eligible. *See Biden I*, 2021 WL 3603341, at *9-10; *DAPA*, 809 F.3d at 160. That is a simple causal inference based on a simple change in incentives. The district court was not speculating but instead describing

"the predictable effect of Government action on the decisions of third parties." *Dep't of Com.*, 139 S. Ct. at 2566; *see also Massachusetts*, 549 U.S. at 523 (finding traceability where the EPA's challenged action may have caused people to drive less fuel-efficient cars, which may in turn contribute to a prospective rise in sea levels, which may in turn cause the erosion of Massachusetts's shoreline).

d.

An injunction would redress Texas's injury by requiring reinstatement of MPP. And with MPP back in place, immigration officers would once again have discretion to return certain aliens to Mexico. That would help to alleviate Texas's driver's license- and healthcare-based injuries. *Cf. Massachusetts*, 549 U.S. at 525 ("While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it.").

The Government makes two arguments that it says undercut redressability. First, it says an injunction would provide no redress because immigration officers under MPP would have discretion not to return any given immigrant to Mexico. This argument ignores the fact that DHS "returned more than 55,000 aliens to Mexico under MPP." *Biden I*, 2021 WL 3603341, at *5 (quotation omitted). True, those were exercises of discretion—discretion the June 1 Termination Decision withdrew by explicitly requiring "DHS personnel, effective immediately, to take all appropriate actions to terminate MPP, including taking all steps necessary to re-

scind implementing guidance and other directives issued to carry out MPP." The Government offers no basis to conclude that a renewed MPP, by restoring that discretion, would do *anything but* increase the number of aliens returned to Mexico. And that would decrease the number of aliens released into Texas, thereby redressing Texas's injuries.

Second, the Government argues there is no redressability because aliens cannot be returned to Mexico without Mexico's consent. This argument fails because for at least some aliens, DHS can refuse admission at ports of entry in the first place. *See* 8 U.S.C. § 1225(b)(2)(C) (allowing the Attorney General to "return [an] alien" "who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States . . . to that territory pending a" removal proceeding). Part of MPP's function was to exercise that authority on a programmatic, widespread basis. And DHS can do *that* unilaterally.

e.

The Government argues that this theory of standing lacks a limiting principle. It says our reasoning would allow states to object whenever DHS exercises its discretion not to remove even one noncitizen. *See DAPA*, 809 F.3d at 161 (explaining that its rationale would not allow standing in such a case). It also says our reasoning would let states challenge *any* federal policy with an effect on state populations, since such a policy might have some effect on a state's fisc.

As we explained in *DAPA*, the Supreme Court considered precisely these risks in *Massachusetts* and

found them unpersuasive. *DAPA*, 809 F.3d at 161; *Massachusetts*, 549 U.S. at 546 (Roberts, C.J., dissenting) (raising similar concerns, evidently without persuading the majority). "After *Massachusetts v. EPA*, the answer to those criticisms is that there are other ways to cabin policy disagreements masquerading as legal claims." *DAPA*, 809 F.3d at 161. And our reasoning leaves precisely the same safeguards in effect as did *DAPA*. A litigant must have a cause of action to sue. *Id.* at 161 (citing *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 396 (1987)). The litigant must avoid the dual nonreviewability provisions in 5 U.S.C. § 701(a). *Id.* at 161-62. The litigant must show it has standing—a feasible task when a broad, class-based policy makes it a practical certainty that some aliens will apply for licenses (as in *DAPA* and here), but not so feasible if the litigant seeks to challenge an *individual* immigration decision. *See ibid.* And most litigants will not be entitled to special solicitude in the standing inquiry—not even states, unless a "quasi-sovereign" interest is at stake. *Id.* at 162 (quoting *Massachusetts*, 549 U.S. at 520). The Government's "parade of horribles" is, for that reason, purely speculative. *Ibid.* True, the States have managed to clear every standing and reviewability hurdle in this case. But it does not follow that those hurdles have suddenly ceased to exist.

The Government also seeks to differentiate this case from *DAPA* on grounds of magnitude—it seems to suggest there's no standing here because the damages may not total to millions of dollars. Our court noted that Texas's injuries in that case largely depended on its "need to hire employees, purchase equipment, and obtain office space"—"steps that would be unnecessary" with smaller numbers of new applicants. *DAPA*, 809

F.3d at 162. Regardless of what *DAPA* had to say on the magnitude of injury required for standing, the Supreme Court has since clarified that "[f]or standing purposes, a loss of even a small amount of money is ordinarily an injury." *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) (quotation omitted); *see also Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801-02 (2021) (nominal damages sufficient for standing's redressability prong).

III.

We've arrived at page 63 of this opinion, but we're still not ready for the merits. Two more non-jurisdictional threshold questions remain. First, do the States have a cause of action to bring this suit? Yes. Second, does the APA nonetheless shield DHS's Termination Decision from judicial review? No.

A.

The States must have a cause of action to sue. And because this is an APA case, the States' claims must fall within the zone of interests of the INA. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224-25 (2012). The Supreme Court has repeatedly explained that the zone-of-interests inquiry is "not especially demanding." *See, e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (quotation omitted). To satisfy the test, the States must show only that their asserted interest is "arguably within the zone of interests to be protected or regulated by" the statutes they claim have been violated. *Patchak*, 567 U.S. at 224-25 (quotation omitted) (going on to emphasize the word "arguably" and the lenience it confers). And though the test is

rooted in legislative intent, the States need not point to "any indication of congressional purpose to benefit" them. *Id.* at 225 (quotation omitted). Instead, "[t]he test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Ibid.* (quotation omitted).

The States easily clear this low bar. As discussed above, MPP's termination poses imminent and actual harm to Texas's fisc. *See* Part II.C.2.b, *supra* pages 54-57. It's clear that the INA aimed, at least in part, to protect States from just those kinds of harms. *Cf. Demore v. Kim*, 538 U.S. 510, 517-22 (2003) (discussing the policy concerns animating Congress's 1996 amendments to the INA). And that's exactly what our court concluded in *DAPA*, where we explained Texas was within the INA's zone of interests because "Texas seeks to participate in notice and comment before the Secretary changes the immigration classification of millions of illegal aliens in a way that forces the state to the Hobson's choice of spending millions of dollars to subsidize driver's licenses or changing its statutes." 809 F.3d at 163. Under the Supreme Court's lenient test for APA cases, that is more than enough. *See Patchak*, 567 U.S. at 224-25.

The Government nonetheless argues the States lack a cause of action because their claims fall outside the zone of interest of § 1225(b)(2)(A) and (C). Note the shift—the Government focuses on the zone of interests of *two subparagraphs* in § 1225(b)(2) rather than that of the INA (or even § 1225(b)(2)) as a whole. That particular form of jiu-jitsu is at odds with both Fifth Circuit

and Supreme Court precedent. *See DAPA*, 809 F.3d at 163 (analyzing the INA's zone of interests, not the zone of one particular provision); *Clarke*, 479 U.S. at 401 ("In considering whether the 'zone of interest' test provides or denies standing in these cases, we first observe that the Comptroller's argument focuses too narrowly on 12 U.S.C. § 36, and does not adequately place § 36 in the overall context of the National Bank Act.").

The Government also argues "Congress said nothing in Section 1225 about benefiting States or saving them from attenuated financial burdens." That argument likewise focuses too narrowly on § 1225, *see Clarke*, 479 U.S. at 401, and in any event it's nothing more than a rehash of the Government's failed standing arguments, rejected above. *See* Part II.C.2, *supra* pages 52-63. And the Government's cases to the contrary are entirely inapposite. *See Fed'n for Am. Immigr. Reform, Inc. v. Reno*, 93 F.3d 897, 900-01 (D.C. Cir. 1996) (holding the test unsatisfied, but decided before *Patchak* and *Lexmark* clarified the test's leniency); *INS v. Legalization Assistance Project*, 510 U.S. 1301, 1302, 1305 (1993) (O'Connor, J., in chambers) (discussing a different immigration statute in a suit that did not involve States).

We therefore hold the APA affords the States a cause of action.

B.

The next reviewability question is whether Congress gave with one hand and took away with the other. The Government argues that, even if the APA gives the plaintiff States a cause of action to review some agency actions, it doesn't extend to this particular one. Why?

Because, in the Government's view, Congress's enactment of 5 U.S.C. § 701(a) gave DHS the power to make the Termination Decision without *any* review by *any* court, at *any* time, in *any* way. This is perhaps the Government's most ambitious claim in a case that does not want for ambitious assertions of governmental power. And if the Government were correct, it would have far-reaching implications for the separation of powers and would herald a new era of lawmaking-by-PDF-document. We hold the Government is wrong.

The APA creates a "basic presumption of judicial review": Any proper plaintiff aggrieved by final agency action may presumptively challenge that action in federal court. *Regents*, 140 S. Ct. at 1905; *see* 5 U.S.C. § 702. This presumption is "strong" and "well-settled." *DAPA*, 809 F.3d at 163 (going on to note that rebutting the presumption requires "clear and convincing evidence"). The presumption can be rebutted "by a showing that [1] the relevant statute precludes review, § 701(a)(1), or [2] that the agency action is committed to agency discretion by law, § 701(a)(2)." *Regents*, 140 S. Ct. at 1905 (quotation omitted). We address each in turn.

1.

The Government halfheartedly suggests that the INA is a statute that "preclude[s] judicial review." 5 U.S.C. § 701(a)(1). In particular, the Government points to this text in the INA:

> [A]ny other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the

> Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2)(B)(ii). This restriction, says the Government, combines with § 1225(b)(2)(C) (which provides the Secretary "may return" certain aliens to contiguous territories) to deny judicial review of the Termination Decision.

We disagree for three reasons. For starters, this reviewability argument succeeds only if the Government prevails on the statutory interpretation argument itself, discussed below. Because we conclude § 1225 does indeed restrain DHS's discretion, *see* Part IV.B, *infra* pages 98-106, this reviewability argument must fail.

Second and more fundamentally, the Government misconstrues the two relevant statutory provisions. Under § 1225(b)(2)(C), the Attorney General "may return" "*an alien*"—that is, a certain specified person—to Mexico pending her removal proceeding. *Id.* (emphasis added). So perhaps the Government's discretionary decision to return one specific person to Mexico is affected by the discretion-insulating, jurisdiction-stripping provision in § 1252(a)(2)(B)(ii). But that's not what this case is about. The question here is whether DHS's decision to terminate an *entire program*—operating across an international border and affecting thousands or millions of people and dollars—is rendered unreviewable by § 1252(a)(2)(B)(ii). And there's nothing in that clause to suggest Congress embraced the latter proposition. To the contrary, the entirety of the text and structure of § 1252 indicates that it operates

only on denials of relief for individual aliens.[11] The Government's reading of it would bury an awfully large elephant in an really small mousehole. *Cf. Am. Bar*

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[11] At the risk of belaboring an obvious point, we note three features of § 1252 in support. First, § 1252 is titled "[j]udicial review of orders of removal," which indicates the section applies to individual aliens (who are subject to orders of removal) rather than programmatic decisions. Second, the provisions surrounding § 1252(a)(2)(B) apply to individual removal decisions and not broad programmatic decisions. Section 1252(a)(2)(A) repeatedly refers to an "individual determination," § 1252(a)(2)(A)(i), "individual aliens," § 1252(a)(2)(A)(iii), and to the provisions of § 1225(b)(1) that apply to inspection and asylum for individual aliens. Obviously none of that contemplates DHS decisions to create or terminate entire governmental programs outside of individualized removal proceedings. Subparagraph (C) refers to "any final order of removal against an alien," yet again describing an individual removal order and not broad programmatic decisions like the Termination Decision. Subparagraph (D) refers to a "petition for review" filed by, yet again, an individual alien. Thus all of the subparagraphs surrounding § 1252(a)(2)(B)—and hence the structure of the statute—suggest it applies to removal decisions affecting individual aliens and not broad programmatic decisions made by the Secretary of DHS. Third, there's the text of § 1252(a)(2)(B) itself. It begins by stripping jurisdiction to review "any judgment regarding the granting of relief" under five INA provisions—all of which affect only individual aliens. § 1252(a)(2)(B)(i). And it preserves judicial review over certain asylum decisions—again, affecting individual aliens. The text invoked by the Government ("any other decision . . . the authority for which is specified under this subchapter to be in the discretion of [DHS]") is nestled into this litany of individualized decisions affecting only single aliens. § 1252(a)(2)(B)(ii). The best reading of the "any other decision" language, then, is that it "appl[ies] only to persons or things of the same general kind or class specifically mentioned (ejusdem generis)." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012).

Ass'n v. FTC, 430 F.3d 457, 469 (D.C. Cir. 2005) (Sentelle, J.) ("To find [the agency's view] deference-worthy, we would have to conclude that Congress not only had hidden a rather large elephant in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that Congress even suspected its presence.").

Third, the Government wrongly focuses on § 1225(b)(2)(C) in isolation. When read in context, § 1225(b)(2) comes nowhere close to giving the Government unreviewable discretion to terminate MPP and release undocumented immigrants into the United States *en masse*. Section 1225(b)(2)(A) provides that, under certain circumstances, "the alien shall be detained" during her removal proceeding. That's obviously a mandatory statutory command—not a commitment to agency discretion. Then § 1225(b)(2)(C) gives the Government the discretion to return certain otherwise-detainable aliens to Mexico. Those provisions cannot be read together to give the Government unreviewable discretion to release anyone. *Cf. Hawkins v. HUD*, 16 F.4th 147, 155 (5th Cir. 2021) ("Whereas the first sentence in the regulation employs discretionary language when the two conditions are present (HUD 'may' undertake certain actions), the second sentence uses quintessential mandatory language (HUD 'shall' provide assistance) when a third condition is established in addition to the first two.").

2.

Next is 5 U.S.C. § 701(a)(2), which disallows judicial review of "agency action . . . committed to agency discretion by law." The Supreme Court has held that "an agency's decision not to institute enforcement proceedings [is] presumptively unreviewable under § 701(a)(2)." *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (citing *Heckler*, 470 U.S. at 831). We conclude *Heckler* does not bar judicial review in this case. The first reason is that *Heckler* does not apply to agency rules. Second, even if it did, it would not apply to *this* agency rule. And third, even if the presumption applied to rules, the clear statutory text would override it here.

Before we explain, take careful note of the APA's presumption structure. By default in APA cases, we presume reviewability. *See, e.g.*, *Regents*, 140 S. Ct. at 1905. That presumption flips if *Heckler* applies, *see, e.g.*, *Lincoln*, 508 U.S. at 191, but not before then. Thus, it's perfectly correct to presume nonreviewability once we know we're in *Heckler*'s domain. But it's perfectly incorrect to presume we're in *Heckler*'s domain at the outset. That would be question-begging of the worst sort, and it would fly in the face of Supreme Court precedent. *See, e.g.*, *Regents*, 140 S. Ct. at 1905.

a.

Heckler does not apply to agency rules. To understand why, we must start with the English constitutional tradition against which the Founders framed our Constitution's executive power and against which the Supreme Court decided *Heckler*. We (i) explain the background principles of English law. Then we (ii) explain our Constitution's executive power. Next we (iii) turn

to *Heckler* and (iv) its progeny. Then (v) we apply these principles to this case and hold that, far from barring our review, *Heckler* powerfully supports it. And finally, (vi) we reject the Government's counterarguments.

i.

We begin with English law's struggle against royal prerogative. The word "prerogative" refers to powers that are vested in the executive and not governed by law. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 375 (Peter Laslett ed. 1988) ("This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative."). It also connotes powers that inhere in the king by virtue of his kingship. *See* Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 178 (1998).

Most relevant here are the *suspending* and *dispensing* prerogatives wielded by the Stuart Kings Charles II and James II. *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 115-19 (2020) (discussing the life and death of these powers). These prerogatives were closely related to one another, but they were not identical. As one historian put it, "[t]he power to suspend a law was the power to set aside the operation of a statute for a time. It did not mean, technically, the power to repeal it. The power to dispense with a law meant the power to grant permission to an individual or a corporation to disobey a statute." LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 59-60 (1981); *see also* Carolyn A. Edie, *Tactics and*

Strategies: Parliament's Attack upon the Royal Dispensing Power 1597-1689, 29 AM. J. LEGAL HIST. 197, 198-99 (1985) (similar explanation, including distinguishing the dispensing power from the pardoning power on the ground that the former "made the act or thing prohibited lawful to be done by him who hath" the dispensation (quotation omitted)).

As Catholic kings governing a Protestant nation, the Stuarts focused their prerogatives most fiercely on laws that excluded Catholics from certain offices and positions. *See* MCCONNELL, *supra*, at 116 (discussing). For instance, in 1661, Parliament required certain officials to swear an "Oath of Allegiance and Supremacy" to profess faith in the Church of England and renounce Catholicism. Corporation Act of 1661, 13 Car. II, st. 2 c. 1. Charles II eventually responded by suspending all such laws. He said: "We do . . . declare our will and pleasure to be, that the execution of all, and all manner of penal laws in matters ecclesiastical, against whatsoever sort of nonconformists, or recusants, be immediately suspended, and they are hereby suspended." King Charles II, Declaration of Indulgence (Mar. 15, 1672). Thus, Charles purported to set aside the laws entirely—literally, to suspend their operation. Parliament ended up forcing Charles II to rescind that declaration. Parliament also enacted the Test Act of 1672, 25 Car. II c. 2, and the Test Act of 1678, 30 Car. II, st. 2. These Acts (together the "Test Act") excluded Catholics from public office. *See* 2 HENRY HALLAM, CONSTITUTIONAL HISTORY OF ENGLAND FROM THE ACCESSION OF HENRY VII TO THE DEATH OF GEORGE II 149-50 (1827).

Charles II died in 1685, and his brother James II assumed the throne that same year. "Not trusting Protestant militias and gentry to protect him from rebellion, James II tried to create an enlarged standing army under the control of Catholic officers, and to put Catholic peers in key positions in the Privy Council and the government." MCCONNELL, *supra*, at 116. The Test Act stood in his way, so he granted dispensations from it—thereby allowing certain Catholics to hold high-ranking civil and military offices in defiance of Parliament. After various political intrigues (all interesting but none relevant here), a court sided with James II and held "that the King had a power to dispense with any of the laws of Government as he saw necessity for it." *Godden v. Hales*, 2 Show. 475, 478 (K.B. 1686). Score one for prerogative.

Flush with victory, James II decided to go further, suspending the Test Act *in toto*. He declared "that from henceforth the execution of all and all manner of penal laws in matters ecclesiastical . . . be immediately suspended; and the further execution of the said penal laws and every of them is hereby suspended." King James II, Declaration of Indulgence (Apr. 4, 1687). The following year, James II reissued that same Declaration, requiring Anglican clergy to read it aloud from their pulpits. Seven bishops petitioned the King to withdraw the order. So the King charged them with seditious libel on the theory that they had falsely denied his suspension and dispensation powers.

This gave rise to the celebrated *Case of the Seven Bishops*, 12 How. St. Tr. 183 (K.B. 1688). The King's Bench split 2-2 and sent the case to a jury to break the

tie.[12] The jury acquitted the bishops, and all of London exploded into celebration. Edie, 29 AM. J. LEGAL HIST. at 229. "The charge had been one of libel, but the verdict was against the prerogative." *Ibid.*; *see also* McConnell, *supra*, at 116 (explaining the case's impact).

After William of Orange deposed James II—in part because of James's abuse of the suspending and dispensing powers—Parliament drafted the English Bill of Rights. Its very first declaration reads: "That the pretended Power of Suspending of Laws, or the Execution of Laws, by regal Authority, without Consent of Parliament, is illegal." An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (1689). Its second declaration reads: "That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been

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[12] Justice John Powell, who voted against the King, explained his reasoning:

> Gentlemen, I do not remember, in any case in all our law (and I have taken some pains upon this occasion to look into it), that there is any such power in the king, and the case must turn upon that. In short, if there be no such dispensing power in the king, then that can be no libel which they presented to the king, which says, that the declaration, being founded upon such a pretended power, is illegal.
>
> Now, gentlemen, this is a dispensation with a witness: it amounts to an abrogation and utter repeal of all the laws; for I can see no difference, nor know of none in law, between the king's power to dispense with laws ecclesiastical, and his power to dispense with any other laws whatever. If this be once allowed of, there will need no parliament; all the legislature will be in the king, which is a thing worth considering, and I leave the issue to God and your consciences.

12 How. St. Tr. at 183.

assumed and exercised of late, is illegal." Thus, the English Bill of Rights codified the celebrated verdict from the *Case of the Seven Bishops*.

This became a fundamental tenet of English law. McConnell, *supra*, at 117. As Blackstone explained, "it was formerly held, that the king might, in many cases, dispense with penal statutes." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *186 (1753) [*hereinafter* BLACKSTONE'S COMMENTARIES]. But by Blackstone's time, he noted, the English Bill of Rights had "declared, that the suspending or dispensing with laws by regal authority, without consent of parliament, is illegal." *Ibid.* Or as Lord Mansfield put it in 1766, "I can never conceive the prerogative to include a power of any sort to suspend or dispense with laws." 16 THE PARLIAMENTARY HISTORY OF ENGLAND 267 (T.C. Hansard ed. 1813) (going on to explain that "the duty of [the executive] is to see the execution of the laws, which can never be done by dispensing with or suspending them").

ii.

The Framers agreed that the executive should have neither suspending nor dispensing powers. And they framed our Constitution against the backdrop of that belief. The delegates to the Constitutional Convention voted "[o]n question 'for giving this suspending power'" to the President. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 104 (Max Farrand ed. 1911). Madison recorded that the vote was a unanimous no. *Ibid.* Further, the amended Virginia Plan originally gave a "single person" the "power to carry into execution the national laws." *Id.* at 67. That text passed through the Committee on Detail, which was chaired by

John Rutledge—a major critic of royal prerogatives. *Id.* at 65. The Committee changed the text to read more or less as the Take Care Clause does now: "he shall take care that the laws of the United States be duly and faithfully executed." *Id.* at 185; *see also* MCCONNELL, *supra*, at 118 ("[T]he significance [of the wording change] is that the President has the duty, not just the authority, to carry the laws of the nation into execution."). Hence, George Nicholas could conclude during Virginia's ratification debate that "[t]he English Bill of Rights provides that no laws shall be suspended. The Constitution provides that no laws shall be suspended, except one, and that in time of rebellion or invasion, which is the writ of *habeas corpus*." 3 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 246 (2d ed. 1881).

And since then, both courts and the executive branch itself have recognized the president's inability to suspend or dispense with the law. Consider *United States v. Smith*, 27 F. Cas. 1192 (C.C.D.N.Y. 1806). There, the defendants claimed President Thomas Jefferson had authorized them to violate the Neutrality Act. President Jefferson's lawyers responded that such an authorization would be either suspension or dispensation—and therefore unconstitutional under the Take Care Clause. *Id.* at 1203 (explaining the president "cannot suspend [a statute's] operation, dispense with its application, or prevent its effect. . . . If he could do so, he could repeal the law, and would thus invade the province assigned to the legislature"). Supreme Court Justice William Paterson, riding circuit, agreed and concluded the Take Care Clause "explicitly" denies the president's power to dispense with laws. *Id.* at 1229.

Consider also President Andrew Jackson's attempt to convince the Supreme Court that he, and only he, got to decide whether the laws were being faithfully executed. *See Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 612-13 (1838). The Court forcefully responded that presidents have no power to suspend the law: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies *a power to forbid their execution*, is a novel construction of the constitution, and entirely inadmissible." *Id.* at 613 (emphasis added).

Scholars also broadly agree that the Constitution ruled out the suspending and dispensing powers. As one professor explained it:

> The duty to execute laws "faithfully" means that American presidents may not—whether by revocation, suspension, dispensation, inaction, or otherwise —refuse to honor and enforce statutes that were enacted with their consent or over their veto. Many scholars have agreed that the Take Care Clause was meant to deny the president a suspending or dispensing power.

CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS 16 (1998); *id.* at 160 n.58 (collecting sources); *see also* McConnell, *supra*, at 118 ("[I]t would be hard to imagine language that would preclude those prerogatives more effectively" than does the language in the Take Care Clause.); David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. INT'L L. & FOREIGN AFFS. 75, 99-100 (2007); Saikrishna Bangalore Prakash, *The Great Suspender's Unconstitutional Suspension of the Great Writ*, 3 Alb.

Gov't L. Rev. 575 (2010) (arguing Lincoln's suspension of habeas corpus was unconstitutional).

iii.

Heckler is best understood as a recognition of these principles. There, death-row inmates had asked the Food and Drug Administration (the "FDA") to "take various enforcement actions" against states and drug companies regarding lethal-injection drugs. 470 U.S. at 823. The FDA refused, and the inmates sued under the APA. *Ibid.* The Court held the FDA's decision unreviewable under § 701(a)(2). It explained that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id.* at 831-32 ("[A]n agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)."). In other words, a litigant may not waltz into court, point his finger, and demand an agency investigate (or sue, or otherwise enforce against) "that person over there." Thus, *Heckler* recognized and carried forward the executive's longstanding, common-law-based discretion to do nothing in a particular case. *See id.* at 831 (citing *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1869)).

But the Court also carried forward the executive's duty to faithfully execute the laws. Thus, the Court recognized that Congress *can* rebut the common-law presumption that nonenforcement discretion is unreviewable. Specifically, "the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 832-33. In other words, the executive *cannot* look at a statute, recognize that the

statute is telling it to enforce the law in a particular way or against a particular entity, and tell Congress to pound sand. So *Heckler* expressly embraces the common law's condemnation of the dispensing power. *Compare ibid.* (explaining Congress's ability to rebut the nonreviewability presumption), *with Smith*, 27 F. Cas. at 1203 (explaining that the Constitution does not let the president "suspend [a statute's] operation, dispense with its application, or prevent its effect"). Moreover, the Court emphasized that nothing in the *Heckler* opinion should be construed to let an agency "consciously and expressly adopt[] a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler*, 470 U.S. at 833 n.4 (quotation omitted). This, of course, is a condemnation of the suspending power. *Compare ibid.*, *with Kendall*, 37 U.S. at 613 ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.").

Heckler's two "exceptions," then, were not random.[13] They were instead recognitions of the hoary principle that the executive branch may neither suspend nor dispense with the laws. By recognizing those principles, the Court harmonized the common law's rule *in favor of* enforcement discretion with the common law's (and the Constitution's) rule *against* suspensions and dispensations.

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[13] This does not include the unrelated exception for the case where an agency refuses to enforce "based solely on the belief that it lacks jurisdiction." *Heckler*, 470 U.S. at 833 n.4.

None of that would make any sense if *Heckler* nonenforcement discretion applied to rules. Start with the definition of "rule." Under the APA, that word simply means "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). Courts typically emphasize "general . . . applicability" at the expense of "particular applicability." *E.g.*, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 892 (1990) (concluding, in the § 551 context, that "the individual actions . . . identified in the six affidavits can be regarded as rules *of general applicability*" (emphasis added)). Contrast that with an "order." *See* § 551(6) (defining "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing").

The Government's contention that *Heckler* should apply to rules is reminiscent of the Stuarts. The heart of Charles II's 1672 suspension was that "the execution of all, and all manner of penal laws in matters ecclesiastical . . . be immediately suspended." Charles II, Declaration of Indulgence (Mar. 15, 1672). And James II's suspension similarly proclaimed "that from henceforth the execution of all and all manner of penal laws in matters ecclesiastical . . . be immediately suspended." King James II, Declaration of Indulgence (Apr. 4, 1687). Thus, suspending a law is nothing more than (a) announcing a refusal to enforce that law (as per *Heckler*) and (b) applying that refusal on a generalized, prospective basis (*à la* "rule" under § 551(4)). To apply *Heckler* to rules, then, would be to contort the Supreme

Court's precedent into a rejection of the English Bill of Rights of 1689. That simply can't be right.

Once we recognize that *Heckler* nonreviewability applies only to *orders* and not *rules*, the problem disappears entirely. The Stuart suspensions are ineligible for the nonreviewability presumption precisely because those suspensions would be, in today's parlance, "rules of general applicability" under the APA. *See Lujan*, 497 U.S. at 892. The common law left the executive free to leave the law unenforced in *particular* instances and at *particular moments* in time. *See, e.g.*, *Confiscation Cases*, 74 U.S. at 457-59, 462 (recognizing the executive's nonreviewable discretion to simultaneously dismiss several civil forfeiture proceedings it had instituted). But the English Bill of Rights, followed by the Constitution, explicitly forbade the executive from nullifying whole statutes by refusing to enforce them on a *generalized* and *prospective* basis.

iv.

That is why the Supreme Court and the Fifth Circuit have consistently read *Heckler* as sheltering one-off nonenforcement decisions rather than decisions to suspend entire statutes. *Heckler*'s progeny never has allowed the executive to affirmatively enact prospective, class-wide rules without judicial review.

Heckler itself, as discussed above, contains no hint of an intent to allow such suspension. Likewise with *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). The *State Farm* Court held that an agency rule is reviewable—even when the rule does nothing but remove preexisting legal constraints. *Id.*

at 39-41. The National Highway Traffic Safety Administration had previously required (by rule) passive safety restraints in cars. *Id.* at 37. Then it issued a new rule that rescinded that requirement. *Id.* at 38. The Court had no trouble reviewing the new rule. *Id.* at 40-41.[14]

Massachusetts confirms that *Heckler* doesn't apply to rulemaking. The Court there asked whether the *denial* of a petition for rulemaking—the mere decision not to make a rule—was reviewable. 549 U.S. at 527. The answer was a qualified yes: Such decisions are subject to limited review. *Id.* at 527-28 (going on to explain the relevant differences between nonenforcement decisions and refusals to initiate rulemaking). But if the decision *not* to make a rule is subject to limited review under *Massachusetts*, how could the decision *to* make a rule be entirely exempt from review under *Heckler*?

And *United States v. Armstrong*, 517 U.S. 456 (1996), further underscores the point. There the Court considered a claim of race-based selective prosecution. *Id.* at 458. Before conducting its due process analysis, the Court noted that "[i]n the ordinary case, 'so long as the

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[14] It's true that the Supreme Court decided *State Farm* before *Heckler*. But the *State Farm* Court acknowledged—and held inapplicable—the longstanding doctrine that "an agency's refusal to take action in the first instance" is nonreviewable. 463 U.S. at 39-41. Indeed, the Court acknowledged that "rescission is not unrelated to an agency's refusal to take action in the first instance," but went on to find the rescission reviewable precisely because the organic statute in question applied the APA's ordinary reviewability rules to the issue at hand. *Ibid.* Thus, applying *Heckler* to rules would seem to entail that *Heckler* overturned *State Farm sub silentio*. *But see Heckler*, 470 U.S. at 839 (Brennan, J., concurring) (explaining that *Heckler* did not overturn *State Farm sub silentio*).

prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'" *Id.* at 464 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). That canonical formulation has everything to do with the decision whether to enforce a law against a given individual. It has nothing to do with flouting a statutory command as to an entire class of people, as DHS has done here. *See* Part IV.B, *infra* pages 98-106 (explaining the statutory command). And it has less-than-nothing to do with engaging in APA rulemaking.

Our cases likewise apply *Heckler*, if at all, to one-off agency enforcement decisions rather than to agency rulemakings. *See, e.g.*, *Chao v. Occupational Safety & Health Rev. Comm'n*, 480 F.3d 320, 324 n.3 (5th Cir. 2007) (*Heckler* protected the Secretary of Labor's "prosecutorial discretion to cite only a single willful violation where the facts alleged would support numerous willful violations."); *Ellison v. Connor*, 153 F.3d 247 (5th Cir. 1998) (applying *Heckler* to an agency's decision not to issue an individual permit, where the governing statute provided no standard by which to judge such a decision); *Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 455 (5th Cir. 2003) (applying *Heckler* to the EPA's "decision not to issue [notices of deficiency] related to four aspects of" a Texas state program).

Apparently, the lone exception in this centuries-old line of cases was the now-vacated *Texas v. United States (Interim Enforcement)*, 14 F.4th 332 (5th Cir. 2021), *vacated by* __ F.4th __, 2021 WL 5578015 (5th Cir. Nov. 30, 2021) (en banc) (mem.). There, a combination of

memos from DHS and its subagency Immigration and Customs Enforcement ("ICE") had established new "interim enforcement priorities." *Id.* at 334. Those memos effectively created a class-based priority scheme governing agency decisions to arrest, detain, and remove aliens. *See id.* at 334-35. After the district court enjoined those memos' operation, a panel of our court granted the Government a partial stay pending appeal. *Ibid.* The panel, among other holdings, characterized the relevant part of the memos as mere nonenforcement and therefore held that part nonreviewable under *Heckler*. *See id.* at 336-40. It did so even though the memos in question were undisputedly rules. *See Texas v. United States*, 2021 WL 3683913, at *51 (S.D. Tex. Aug. 19, 2021) ("[N]o Party disputes that the Memoranda are rules of some kind and, therefore, that the rulemaking provisions of the APA apply."). And it did so without any discussion of that fact or any recognition of its significance.

Because our en banc court vacated *Interim Enforcement*, we are left with no cases either in the Supreme Court or in our circuit applying *Heckler* to agency rules. Like Justice John Powell, *see supra* note 12, we conclude: "[We] do not remember, in any case in all our law (and [we] have taken some pains upon this occasion to look into it), that there is any such power in the [agency], and the case must turn upon that." *Seven Bishops*, 12 How. St. Tr. at 183. For all those reasons, we hold that *Heckler* cannot apply to agency actions that qualify as rules under 5 U.S.C. § 551(4).

v.

Now, we apply that principle to this case. The June 1 Termination Decision is a rule under 5 U.S.C. § 551(4).

To see why, start with MPP itself. That was obviously a rule; it applied to DHS operations nationwide and on a prospective basis. *See Biden I*, 2021 WL 3603341, at *5 (describing DHS's nationwide rollout of the program and noting it aimed "to ensure that certain aliens attempting to enter the U.S. illegally or without documentation, including those who claim asylum, *will* no longer be released into the country" (quotation omitted) (emphasis added)). So MPP was "an agency statement of general . . . applicability and future effect." § 551(4). And by directing agents to return certain aliens to Mexico, it either "prescribe[d] law or policy" or at the very least "describe[d] the organization, procedure, or practice requirements" of the agency. *Ibid.*; *see also Biden I*, 2021 WL 3603341, at *5 (describing how MPP worked); *cf. DAPA*, 809 F.3d at 170-77 (holding DAPA required notice and comment on the ground it was a *substantive* rule, which entails *a fortiori* it was a rule).

DHS's June 1 decision to terminate MPP was, therefore, also a rule. As just explained, MPP was "an agency statement of general . . . applicability and future effect" that either "prescribe[d] law or policy" or "describe[d] [agency] organization, procedure, or practice requirements. § 551(4). And that means terminating the policy necessarily was too. Because it entirely negated MPP's future effect, the Termination Decision was just as general and just as prospective as MPP itself. *See Regents*, 140 S. Ct. at 1933-34 (Kavanaugh, J., dissenting) (using similar reasoning to conclude rescinding DACA was a rule); *id.* at 1909 n.3 (majority opinion) (responding to Justice Kavanaugh's broader point with-

out contesting the rescission's status as a rule). Because the Termination Decision was a rule, *Heckler* does nothing to affect our power to review it.[15]

vi.

The Government offers two responses, but they are unpersuasive. First, it says *Lincoln* held *Heckler* can apply to rulemakings. But that's wrong. The *Lincoln* Court applied *Heckler* nonreviewability to an agency's "allocation of funds from a lump-sum [congressional] appropriation." *Lincoln*, 508 U.S. at 192. For one thing, the discretionary allocation of funds is not the same as refusing to follow a statute. The Court also explicitly refused to hold that the allocation in question was a rule. *Id.* at 196-97. And the Government's (over) reading of *Lincoln* would set it at odds with the more recent *Massachusetts*—a case whose holding, we reiterate, would make no sense if *Heckler* applied to rules.

The Government next invokes *Heckler* as sound public policy. The idea seems to be that because the policy concerns underlying *Heckler* are in play here, nonreviewability must apply—even though the agency action in question is a rule rather than an order. But this argument is inconsistent with the very opinion it cites.

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[15] We hasten to underscore the limits of this holding. The parties have not asked us to decide whether this rule requires notice and comment, and we express no view on that issue. Indeed, not all rules *do* require notice and comment. That is why the *DAPA* court, for example, had to dedicate multiple pages to the question whether DAPA (which was undisputedly a rule) was a *substantive* rule that required notice and comment. 809 F.3d at 170-77.

The *Heckler* Court did indeed list some of the "many" reasons for its rule. 470 U.S. at 831-32. First, "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id.* at 831. Second, "when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832 (emphasis omitted). And third, "an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch." *Ibid.*

But immediately after its policy discussion, the Court said this:

> We of course *only* list the above concerns to facilitate understanding of our conclusion that an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2). For good reasons, such a decision has traditionally been 'committed to agency discretion,' and we believe that the Congress enacting the APA did not intend to alter that tradition.

Ibid. (emphasis added); *see also Armstrong*, 517 U.S. at 458-64 (laying out the rule in similar terms, without any suggestion that policy concerns justify its expansion). So the rule, which comes from the common law, is simply that one-off decisions not to act get a presumption of nonreviewability. The policy rationales behind that rule are just that: policy rationales.

And that is how our court has treated them. We consistently lay out and apply the *Heckler* rule in pure nonenforcement terms—and we discuss the underlying policy separately, if at all. *See, e.g.*, *Rollerson v. Brazos River Harbor Navigation Dist. of Brazoria Cnty. Tex.*, 6 F.4th 633, 644-45 (5th Cir. 2021) (laying out the rule and only then discussing its justifications); *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 233-34 (5th Cir. 2015) (similar); *Pub. Citizen*, 343 F.3d at 464-65 (similar). *But see Texas Interim*, 14 F.4th at 336-40.

Nor does our holding create a slippery slope. One might worry that, if *Heckler* can't apply to rules, every agency document (for example, a nonbinding priority memo) would be *ipso facto* reviewable. But that's mistaken: Most agency memos are not final agency action under 5 U.S.C. § 704. And they are nonreviewable for that reason (or for others)—not because of *Heckler*. The Termination Decision, in contrast, is *both* ineligible for *Heckler and* qualifies as final agency action under § 704. *See* Part II.A.1, *supra* pages 14-17; *accord EEOC*, 933 F.3d at 441-44 (concluding a supposed "Guidance" document was in fact final agency action because it bound EEOC staff). And it's reviewable only because both are true—and because no other reviewability hurdle stands in the way in this case.

b.

In the previous section, we discussed English law, American law, *Heckler*, and *Heckler*'s progeny to show that *Heckler*'s unreviewability holding does not apply to agency rules. But even if every word of that preceding section were wrong—that is, even if *Heckler*'s unreviewability holding *could* apply to agency rules—it still would not apply here. That's for two reasons.

The first reason is simple. As the district court pointed out:

> [T]he MPP program is not about enforcement proceedings *at all*. Any alien eligible for MPP has already been placed into enforcement proceedings under Section 1229a. The only question MPP answers is *where* the alien will *be* while the federal government pursues removal—in the United States or in Mexico.

Biden I, 2021 WL 3603341, at *16. That is precisely correct. *See Heckler*, 470 U.S. at 832 (describing "our conclusion that an agency's decision *not to take enforcement action* should be presumed immune from judicial review under § 701(a)(2)" (emphasis added)). Up until this point, we have assumed for the sake of argument that deciding to terminate MPP is nothing more than deciding to leave the INA entirely unenforced against a class of individuals. But that isn't true. Terminating MPP does not leave the INA *un*enforced; it just leaves the INA *mis*enforced—that is, enforced in a way that's inconsistent with the statute itself. The decision is whether to detain aliens while § 1229a proceedings are pending, return aliens to Mexico while § 1229a proceedings are pending, or do something else (like parole) while § 1229a proceedings are pending. No matter which way *that* decision goes, the § 1229a proceeding goes on. The Government is still engaged in enforcement —even if it chooses to do so in a way that ignores the statute. That's obviously not nonenforcement.

Second and independent, we explained in *DAPA* that an agency action "need not directly confer public benefits" to be "more than nonenforcement." 809 F.3d at

166-67. Instead, "removing a categorical bar on receipt of [governmental] benefits and thereby making a class of persons newly eligible for them 'provides a focus for judicial review.'" *Ibid.* (quoting *Heckler*, 470 U.S. at 832). That's so even if the agency retains the ability to undo its decision in any particular case in the future. *Ibid.* (explaining "[r]evocability . . . is not the touchstone for whether agency action is reviewable").

As discussed above, the district court found that MPP's termination will result in the parole of many aliens (under 8 U.S.C. § 1182(d)(5)) whom DHS otherwise would have returned to Mexico. The Government's brief, of course, confirms that the plan is indeed to give widespread parole to the class of aliens whom it can't or won't detain. And under Texas law, § 1182(d)(5) parole satisfies the state's "lawful presence" requirement—which is a prerequisite to obtaining a Texas driver's license. *See* Part II.C.2.b, *supra* pages 54-57. To be sure, status as a § 1182(d)(5) parolee is not *sufficient* for obtaining a license in Texas. But it is one way of satisfying the *necessary* condition of lawful status. Thus, MPP's termination functions to "remov[e] a categorical bar on receipt of [public] benefits and thereby mak[e] a class of persons newly eligible for them." *DAPA*, 809 F.3d at 167. The removal of that bar "provides a focus for judicial review." *Heckler*, 470 U.S. at 832; *accord DAPA*, 809 F.3d at 167.

Indeed, the executive branch has historically used parole *precisely* as a means of removing bars that would otherwise stand between an alien and governmental benefits. As one treatise explains:

> Parole under [§ 1182(d)(5)(A)] has many different uses. The government has granted parole as an alternative to admission, for example for noncitizens who do not qualify for an admission category but have an urgent need for medical care in the United States; or who qualify for a visa but are waiting for it to become available.

ALEINIKOFF ET AL., *supra*, at 299 (also explaining that "[*e*]*ven after* a noncitizen's parole ends, the fact that she has been paroled may help make her eligible for adjustment of status to lawful permanent resident" (emphasis added)). So it's easy to see how the termination of MPP—and the Government's substitution of parole—"remov[es] a categorical bar on receipt of [public] benefits." *DAPA*, 809 F.3d at 167.

The Government responds that DHS didn't specifically tell immigration officers how to use the parole power. It adds that not all parolees are eligible for employment authorization. But neither point is responsive. That's because MPP's termination (*i.e.*, DHS's refusal to return above-capacity aliens to Mexico), coupled with DHS's limited detention capacity and its limited options for handling above-capacity aliens, *necessarily entails* that DHS will parole those aliens. What else could it do? So the Government offers no reason to doubt the Termination Decision, by offering classwide parole to above-capacity aliens, removes a categorical bar on those aliens' ability to obtain Texas driver's licenses.

c.

Even if *Heckler* could apply in theory, the statute's text would rebut it in actuality. As the *Heckler* Court

explained, "the presumption [that nonenforcement decisions are unreviewable] may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." 470 U.S. at 832-33. That is precisely what Congress did when it phrased § 1225(b)(2)(A) in mandatory terms. We discuss the statutory interpretation point below. *See* Part IV.B, *infra* pages 98-106. That discussion will explain exactly the statutory guidelines that would suffice to overcome *Heckler* even if it could in theory apply to something like the Termination Decision. *Cf. Hawkins*, 16 F.4th at 156 (holding over a dissent that clear regulatory text, which featured a mandatory/permissive distinction less clear than the distinction at issue here, provided the relevant guidelines and thereby overrode *Heckler*).

IV.

At long last, we've reached the merits. We confront two issues. First, was the Termination Decision arbitrary and capricious under the APA? Yes. Second, was the Termination Decision contrary to the text of 8 U.S.C. § 1225? Again, yes.

A.

The APA directs courts to "hold unlawful and set aside agency action[s]" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). "The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). While applying this "deferential" standard, we must not "substitute" our "own policy judgment for that of the

agency." *Ibid.* But we must ensure that "the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Ibid.* "Put simply, we must set aside any action premised on reasoning that fails to account for relevant factors or evinces a clear error of judgment." *Univ. of Tex. M.D. Anderson Cancer Ctr. v. HHS*, 985 F.3d 472, 475 (5th Cir. 2021) (quotation omitted). This review "is not toothless." *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019). "In fact, after *Regents*, it has serious bite." *Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1136 (5th Cir. 2021). And in all events, we can consider only the reasoning "articulated by the agency itself"; we cannot consider *post hoc* rationalizations. *State Farm*, 463 U.S. at 50; *see also Regents*, 140 S. Ct. at 1909 ("An agency must defend its actions based on the reasons it gave when it acted.").

DHS failed to consider several "relevant factors" and "important aspect[s] of the problem" when it made the Termination Decision. *Michigan v. EPA*, 576 U.S. 743, 750, 752 (2015) (quotations omitted). These include (1) the States' legitimate reliance interests, (2) MPP's benefits, (3) potential alternatives to MPP, and (4) the legal implications of terminating MPP. We address each in turn. Then we (5) address an overarching counterargument from the Government.

1.

DHS "failed to address whether there was legitimate reliance on" MPP. *Regents*, 140 S. Ct. at 1913 (quotation omitted). That alone is fatal. *See ibid.* ("It would be arbitrary and capricious to ignore such matters." (quotation omitted)).

The seven-page memo that accompanied the June 1 Termination Decision didn't directly mention any reliance interests, and certainly not those of the States. The closest it got was a reference to "the impact [terminating MPP] could have on border management and border communities." But it then made clear that "border communities" include *only* "nongovernmental organizations and local officials"—with no mention whatsoever of border states. And the vague reference to "border management" is insufficient to show specific, meaningful consideration of the States' reliance interests. Given the Supreme Court's explanation that border states "bear[] many of the consequences of unlawful immigration," *Arizona v. United States*, 567 U.S. 387, 397 (2012), one would expect a "reasonable and reasonably explained" memo to mention the issue at least once, *Prometheus*, 141 S. Ct. at 1158.

The Agreement between DHS and Texas underscores the reliance interests at play—and DHS's awareness of them. The Agreement stipulated, *inter alia*:

- "Texas, like other States, is directly and concretely affected by changes to DHS rules and policies that have the effect of easing, relaxing, or limiting immigration enforcement."
- "The harm to Texas is particularly acute where its budget has been set months or years in advance and it has no time to adjust its budget to respond to DHS policy changes."
- "[A]n aggrieved party will be irreparably damaged."

And the Agreement went on to describe itself as "a binding and enforceable commitment between DHS and Texas." Thus, the Agreement *both* demonstrates DHS's prior knowledge of the States' reliance interests *and* affirmatively created reliance interests all its own. DHS's failure to consider those interests when it terminated MPP was arbitrary and capricious. *See Regents*, 140 S. Ct. at 1913.

Astonishingly, the Government responds that DHS had *no* obligation to consider the States' reliance interests at all. Yet again, that "contention is squarely foreclosed by *Regents*." *Biden II*, 10 F.4th at 553. There, the Supreme Court acknowledged that DACA was a discretionary program. *Regents*, 140 S. Ct. at 1910. Still, the Court faulted DHS for not considering reliance interests. As the Court explained, "[w]hen an agency changes course . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Id.* at 1913 (quotation omitted). That included the States' reliance interests. *See id.* at 1914 (highlighting assertions that "States and local governments could lose $1.25 billion in tax revenue each year"). So if DHS must consider states' reliance interests before terminating DACA—a discretionary immigration program—then it must do so before terminating MPP.

The Government interprets *Regents* differently. On its view, *Regents* "said that legitimate reliance interests were 'one factor to consider' . . . it did not categorically hold that costs to States must be considered in undertaking any and all agency actions." (quoting 140 S. Ct. at 1914). But that's not what *Regents* said.

The Court was clear that agencies must consider reliance interests, and that failure to do so is arbitrary and capricious. *See* 140 S. Ct. at 1913 (explaining that "[i]t would be arbitrary and capricious to ignore" reliance interests and that "consideration [of any reliance interests] must be undertaken by the agency in the first instance" (quotation omitted)). And *Regents* contains not one hint that States' reliance interests somehow fall outside the general rule.

The Government next responds that the States lack "any cognizable reliance interests in MPP." And it faults the States for failing to provide a better accounting of the specific actions they took in reliance on MPP. There are three problems with that.

First, the Government's argument reads as if taken straight from the *Regents* dissent. The majority explicitly rejected the dissent's argument that "DACA recipients have no legally cognizable reliance interests." 140 S. Ct. at 1913 (quotation omitted). Instead, explained the majority, agencies "must" assess the strength of reliance interests (even *weak* interests, it seems) "in the first instance." *See ibid.* That's at least as true here as it was there.

Second, the Government premises its cognizability argument on its related contention that the Termination Decision does nothing to injure the States. But of course, we've already held the opposite in the standing discussion above. *See* Part II.C.2, *supra* pages 52-63.

And third, this reasoning depends entirely on ignoring the Agreement—in which DHS explicitly acknowledged, in a manner akin to a liquidated-damages clause, that Texas would be "irreparably damaged" by DHS

policy changes that relaxed strictures on illegal border crossings. Obviously, nothing like the Agreement existed in the *Regents* case; in fact, the DACA program expressly told its beneficiaries that their deferred-action status could be revoked for any reason or no reason, at any time, without any notice. *See* 140 S. Ct. at 1930-31 (Thomas, J., concurring in the judgment in part and dissenting in part). If that nonetheless created cognizable reliance interests, the Agreement *a fortiori* does the same.

2.

DHS failed to reasonably consider its own factual findings regarding the benefits of MPP. When a "new policy rests upon factual findings that contradict those which underlay [an agency's] prior policy," the agency must provide "a more detailed justification" than usual to avoid arbitrariness and capriciousness. *Fox*, 556 U.S. at 515. Yet DHS didn't address its own prior factual findings at all when it terminated MPP.

As the district court explained, DHS's October 2019 Assessment of MPP found that "aliens without meritorious claims—which no longer constitute[d] a free ticket into the United States—[were] beginning to voluntarily return home." *Biden I*, 2021 WL 3603341, at *5 (quotation omitted). DHS also found that MPP addressed the "perverse incentives" created by allowing "those with non-meritorious claims [to] remain in the country for lengthy periods of time." *Id.* at *6. (quotation omitted). These benefits, DHS emphasized, were a "cornerstone" of the agency's immigration policy. *Id.* at *5-6 (quotation omitted).

The Termination Decision "rest[ed] upon factual findings that contradict those which underlay" MPP. *Fox*, 556 U.S. at 515. "As an initial matter," the June 1 Memorandum explained DHS's determinations "that MPP had mixed effectiveness in achieving several of its central goals" and that "MPP does not adequately or sustainably enhance border management" in a cost-effective manner. In other words, DHS began its Termination-Decision analysis by disclaiming its earlier conclusion that MPP had been a resounding success.

Given that setup, one might expect DHS to address its prior factual findings—explaining why they were mistaken, misguided, or the like. And indeed, a "more detailed justification" of that sort is not just a good idea; it's legally required for a decision predicated on contradicting prior agency findings. *See ibid.* DHS nonetheless failed to discuss *any* of its prior factual findings —much less explain why they were wrong. That failure provides another basis for our conclusion that the Termination Decision was arbitrary and capricious. *Ibid.*

The Government, of course, does not contest that DHS made those findings in 2019. It instead spills much ink explaining that it predicated the Termination Decision partly on *other* issues with MPP. That misses the point. The Termination Decision explicitly rested upon 2021 factual findings that contradicted DHS's own 2019 findings. That triggers the arbitrary-and-capricious rule set forth in *Fox*. *See* 556 U.S. at 515. Yet DHS failed to give a "detailed" (or *any*) discussion of the prior findings. *Ibid.* That's that.

Further, some of DHS's discussion of MPP's supposed shortcomings was itself irrational. For example,

the June 1 Memorandum partly relied on the notion that MPP resulted in too many *in absentia* removal proceedings:

> The focus on speed was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their immigration proceedings. In particular, the high percentage of cases completed through the entry of *in absentia* removal orders (approximately 44 percent, based on DHS data) raises questions for me about the design and operation of the program, whether the process provided enrollees an adequate opportunity to appear for proceedings to present their claims for relief, and whether conditions faced by some MPP enrollees in Mexico, including the lack of stable access to housing, income, and safety, resulted in the abandonment of potentially meritorious protection claims.

But the district court found, and the Government does not now contest, that *in absentia* removal rates were similar prior to MPP. *Biden I*, 2021 WL 3603341, at *20-21. It makes no sense to reject MPP because of its high *in absentia* rate without even mentioning that its predecessor had a similar rate. We therefore cannot conclude DHS "examine[d] the relevant data and articulate[d] a satisfactory explanation" with "a rational connection between the facts found and the choice" to terminate MPP. *State Farm*, 463 U.S. at 43 (quotation omitted).

The Government says this conclusion would require DHS to provide "empirical or statistical studies." *See Prometheus*, 141 S. Ct. at 1160 (explaining studies are not required to avoid arbitrariness). That's incorrect. We do not fault DHS for failing to provide a study. We

fault DHS for cherry-picking a *single* statistic from the administrative record and relying on it in an entirely nonsensical fashion. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (holding "an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice" (quotation omitted)); *State Farm*, 463 U.S. at 43 ("[T]he agency must examine the relevant data.").

3.

DHS also insufficiently addressed alternatives to terminating MPP. The rule is that, "when an agency rescinds a prior policy[,] its reasoned analysis must consider the alternatives that are within the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913 (quotation omitted). In *Regents*, for example, the DACA program had two main components—deferred action ("forbearance") and governmental benefits. *Ibid.* Yet when DHS rescinded DACA, it considered only the yes-no choice whether to retain or terminate the entire program: Its "memorandum contain[ed] no discussion of forbearance *or the option of retaining forbearance without benefits*." *Ibid.* (emphasis added). And "[t]hat omission alone render[ed] [DHS's] decision arbitrary and capricious." *Ibid.* In short, agency action is arbitrary and capricious when it considers *only* the binary choice whether to retain or terminate a program, without also "considering less disruptive alternatives." *Wages & White Lion*, 16 F.4th at 1139.

That is just the situation here. As the Government points out, DHS considered the possibility of retaining MPP as a whole. It also considered the opportunity cost of doing so. But that is not enough under *Regents*:

DHS was required to consider, not just the binary decision whether to keep or reject MPP, but also "the alternatives that [were] within the ambit of" MPP. 140 S. Ct. at 1913 (quotation omitted). In *Regents*, that required considering possible *changes* to DACA (such as keeping forbearance while eliminating government benefits). And here, it requires considering possible *changes* to MPP. DHS failed to consider any alternative within the ambit of the policy. "That omission alone renders [DHS's] decision arbitrary and capricious." *Regents*, 140 S. Ct. at 1913.

4.

DHS also failed to consider the legal implications of terminating MPP. As the district court explained, the States' complaint, filed on April 13, put DHS on notice of these issues (including the § 1225 issue) one and a half months before the Termination Decision. *Biden I*, 2021 WL 3603341, at *24. One would think the "natural response" to this "newly identified problem" would be to consider the problem—perhaps explaining why DHS thought terminating MPP comported with § 1225. *See Regents*, 140 S. Ct. at 1916. But DHS did not do so. That's one more reason for our conclusion that DHS's action was not the product of "reasoned decisionmaking." *Michigan*, 576 U.S. at 750 (quotation omitted).

The Government's only response on this score is to assert that terminating MPP did not violate § 1225. "But it is a fundamental precept of administrative law that an administrative agency cannot make its decision first and explain it later." *Wages & White Lion*, 16 F.4th at 1140 (quotation omitted). DHS cannot omit any discussion of § 1225 in the Termination Decision and

then "cure those deficiencies by offering *post hoc* rationalizations before our court. The very fact that [DHS] perceived the need to rehabilitate its [Termination Decision] with new and different arguments before our court underscores that the [Memorandum] itself omitted a reasoned justification for the agency's action." *Ibid.* (And in any event, as we explain in Part IV.B, *infra* pages 98-106, the Termination Decision did violate § 1225.)

5.

As an overarching matter, the June 1 Memorandum sometimes baldly asserted that DHS considered this or that factor—in lieu of showing its work and actually considering the factor on paper. For example, the June 1 Memorandum said DHS had "carefully evaluated [MPP's] implementation guidance and programmatic elements; prior DHS assessments of the program"; and other considerations. The Government's brief several times treats this and similar statements as materially equivalent to *actual evaluation* of the factors in question.

The law says otherwise. "Stating that a factor was considered . . . is not a substitute for considering it." *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986); *see also Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1226 (5th Cir. 1991) ("The EPA's failure to consider the regulatory alternatives, however, cannot be substantiated by conclusory statements.").

This well-established principle makes sense. As another circuit has put it:

> [A]n agency's "experience and expertise" presumably enable the agency to provide the required explanation, but they do not substitute for the explanation, any more than an expert witness's credentials substitute for the substantive requirements applicable to the expert's testimony under [Federal Rule of Evidence] 702. The requirement of explanation presumes the expertise and experience of the agency and still demands an adequate explanation in the particular matter.

CS Wind Viet. Co. v. United States, 832 F.3d 1367, 1377 (Fed. Cir. 2016) (citations omitted). As we've already explained, the Government's arguments fail even without taking this principle into account. But to the extent they rely on substituting DHS's *assertions about explanations* with *explanations* themselves, we reject those arguments with redoubled vigor.

B.

The Termination Decision also violated the INA. We begin by explaining the four statutory provisions that are most relevant here. Then we hold that DHS violated them.

1.

Four provisions are relevant here. We provide them here for reference, in order of descending importance. First, 8 U.S.C. § 1225(b)(2)(A) provides:

> Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

Section 1225(b)(2)(C) provides:

> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

Section 1182(d)(5) provides:

> (A) The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served 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.
>
> (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.

And finally, § 1226(a) provides in relevant part:

> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision

> on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—
>
> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on—
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
>
> (B) conditional parole. . . .

Here's how those provisions fit together. First and most important is § 1225(b)(2)(A), which applies to "the case of an alien who is an applicant for admission." MPP concerns only that same group of aliens. *See Biden I*, 2021 WL 3603341, at *5 (explaining MPP concerns "aliens attempting to enter" the United States (quotation omitted)); *compare ibid.*, *with* 8 C.F.R. § 1.2 (defining "[a]rriving alien" as "*an applicant for admission* coming or attempting to come into the United States" (emphasis added)). As DHS itself put it in the administrative record, MPP applies "to non-Mexican nationals who may be arriving on land . . . seeking to enter the United States from Mexico illegally or without documentation."

And § 1225(b)(2)(A) uses mandatory language ("the alien shall be detained") to require DHS to detain aliens pending removal proceedings. *See also* 8 U.S.C. § 1229a (describing "proceedings for deciding the inadmissibility or deportability of an alien"). The Supreme Court has given this provision the same gloss. *See Jennings*, 138 S. Ct. at 837 ("Read most naturally, §§ 1225(b)(1) and (b)(2) . . . mandate detention of

applicants for admission until certain proceedings have concluded.").

Section 1225(b)(2)(C) then explains a permissible alternative to otherwise-mandatory detention. As for most aliens who fit within (A)'s scope, (C) provides that DHS "may" return them to a contiguous foreign territory instead of detaining them. This allowance is, of course, discretionary. But it does not undo the obvious fact that (A) is otherwise mandatory. So (A) sets a default (mandatory detention), and (C) explicitly sets out an allowed alternative (contiguous-territory return pending removal proceedings).[16]

Section 1182(d)(5), meanwhile, provides another alternative. Rather than detaining or returning any given alien, DHS may instead "parole" that alien. § 1182(d)(5)(A). Unlike § 1225(b)(2)(C), § 1182(d)(5) doesn't *explicitly* apply to aliens covered by § 1225(b)(2)(A). But it does so implicitly by referring to "any alien *applying for admission* to the United States," § 1182(d)(5)(A) (emphasis added), which is an

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[16] In *Hawkins*, our court considered a regulation that gave HUD broad, general discretion. 16 F.4th at 154-55 (quoting the regulation, which said in some circumstances, "HUD may exercise any of its rights or remedies under the contract, or Regulatory Agreement, if any" (quotation omitted)). The regulation then said "HUD shall" take certain actions under certain circumstances. *Ibid.* (emphasis omitted). Our court read those provisions to confer some discretion—limited by the "shall." *Id.* at 155 (The "language marks a contrast between the mandatory 'shall' in this sentence and the permissive 'may'" before it.). Judge Duncan dissented, arguing the majority overlooked a key "textual link." *Id.* at 161 (Duncan, J., dissenting). No matter which reading was better in *Hawkins*, this case is much easier because § 1225 has none of the nuance that divided that panel.

obvious parallelism to § 1225(b)(2)(A)'s "alien who is an *applicant for admission*." (Emphasis added.)

But § 1182(d)(5)'s parole alternative has its limits. Thanks to a 1996 amendment, § 1182(d)(5)(A) requires that parole be granted "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." *Ibid.*; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, 3009-689. And because of a 1980 amendment, § 1182(d)(5)(B) forbids parole of any given alien 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." *Ibid.* (emphasis added); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 108.

Section 1226(a), meanwhile, provides a parallel detention-and-parole scheme that applies to aliens who have *already* entered the United States. As the Supreme Court has explained, § 1226(a) "generally governs the process of arresting and detaining" inadmissible aliens who are already "inside the United States." *Jennings*, 138 S. Ct. at 837; *see also Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1115-20 (9th Cir. 2007) (explaining and holding the two forms of parole are distinct, but allowing for the possibility that § 1182(d)(5) parole could apply even to already-arrived aliens). DHS may arrest such aliens pursuant to an administrative arrest warrant. § 1226(a); *cf.* § 1357(a)(2) (warrantless arrests sometimes permissible).

DHS may release aliens detained under § 1226(a) on either bond or conditional parole. Bond and conditional parole apply only to "the arrested alien"—meaning aliens arrested and detained under § 1226(a), rather than any and every alien. Bond is more or less self-explanatory. *See* § 1226(a)(2)(A). Conditional parole, however, differs from § 1182(d)(5)'s humanitarian parole in important ways. Most obviously, conditional parole involves conditions. *See Ortega-Cervantes*, 501 F.3d at 1112-13 ("Among the conditions imposed on Ortega-Cervantes was a requirement that here port to the INS at the conclusion of the criminal proceedings in which he was to be a witness for further review of his case." (quotation omitted)). And unlike humanitarian parole, being conditionally paroled does not count as being" paroled into the United States" under § 1255(a). *See id.* at 1116-20 (announcing that holding and explaining that conflating narrow humanitarian parole and broadly available conditional parole would cause statutory incoherence); *Matter of Castillo-Padilla*, 25 I. &N. Dec. 257, 260-63 (BIA 2010) (drawing the same distinction), *aff'd sub nom.*, *Castillo-Padilla v. U.S. Atty. Gen.*, 417 F. App'x 888 (11th Cir. 2011) (per curiam).[17]

So in short, § 1225(b)(2)(A) sets forth a general, plainly obligatory rule: detention for aliens seeking admission. Section 1225(b)(2)(C) authorizes contiguous-territory return as an alternative. Section 1182(d)(5)

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[17] That matters a great deal: Having been "paroled into the United States" often triggers eligibility for adjustment of status under § 1255. *See* § 1255(a) (allowing" [a]djustment of status of nonimmigrant to that of person admitted for permanent residence" for, *inter alia*, "an alien who was inspected and admitted or paroled into the United States").

allows humanitarian parole as another alternative, but that parole can be exercised only within narrow parameters (case-by-case and with a public-interest justification). And § 1226(a)'s bond-and-conditional-parole provisions, by their very terms, apply only to aliens detained under § 1226(a)itself—not to aliens detained under § 1225(b). And even if they did apply elsewhere, bond and conditional parole have restrictions of their own.

2.

The Government recognizes that the four statutory alternatives described in the preceding section are exhaustive. Congress gave DHS no fifth choice. The Termination Decision nonetheless purported to arrogate to DHS a fifth alternative that Congress did not provide. By so deciding, DHS contradicted § 1225's statutory scheme.

As the district court found, DHS lacks the resources to detain every alien seeking admission to the United States. *Biden I*, 2021 WL 3603341, at *8. That means DHS can't detain everyone § 1225(b)(2)(A) says it "shall" detain. So it's left with a class of people: aliens it apprehended at the border but whom it lacks the capacity to detain. By terminating MPP, DHS has refused to return that class to contiguous territories, as permitted by § 1225(b)(2)(C). The Government's position thus boils down to this: We can't do one thing Congress commanded (detain under § 1225(b)(2)(A)), and we

don't want to do one thing Congress allowed (return under § 1225(b)(2)(C)).[18]

Parole does not provide a way out of the box created by DHS's can'ts-and-don't-wants. As noted in the previous section, the Government can parole aliens under § 1182(d)(5) or § 1226(a). Let's consider both parole options.

Start with § 1182(d)(5). That provision gives DHS the power to parole certain aliens "*only* on a case-by-case basis for urgent humanitarian reasons or significant public benefit." § 1182(d)(5)(A) (emphasis added). DHS cannot use that power to parole aliens *en masse*; that was the whole point of the "case-by-case" requirement that Congress added in IIRIRA. *See ibid.* So the Government's proposal to parole every alien it cannot detain is the opposite of the "case-by-case basis" determinations required by law. *See ibid.*

The Government also suggests that DHS retains the discretion to return aliens to Mexico on a case-by-case basis—and that means its § 1182(d)(5) parole decisions really *are* case-by-case after all. But that is backward. It's the § 1225(b)(2)(C) return power DHS is allowed to

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[18] The Government also says that any detention mandate in § 1225(b)(2)(A) is entirely undone by § 1225(b)(2)(C)'s discretionary return authority. Put differently, the idea is that we are improperly reading a "shall" into § 1225(b)(2)(C)'s "may"—effectively requiring the Government to return people to Mexico when Congress merely authorized (and did not require) that result. This is a strawman. It's obviously true that § 1225(b)(2)(C) is discretionary. But § 1225(b)(2)(A) is mandatory, and (C) offers a permissible alternative to the otherwise-mandatory obligation in (A). DHS is violating (A)'s mandate, refusing to avail itself of (C)'s authorized alternative, and then complaining that it doesn't like its options.

exercise as a class-wide alternative to detention. It can make case-by-case exceptions for § 1182(d)(5) parole. The Government conjures the mirror image of that scheme by proposing that DHS exercise the parole power on a class-wide basis, with narrow, case-by-case exceptions for returns. That is the exact opposite of what Congress said.

Equally unhelpful is § 1226(a) parole. Though the Government does not say it outright, it hints that DHS could use this power to release on bond or parole aliens whom it lacks the capacity to detain—all within its statutory authority. And § 1226(a)(2)'s bond-and-parole power, unlike the distinct parole power in § 1182(d)(5), isn't limited to case-by-case determinations.

But § 1226(a) parole has other problems. DHS's § 1226(a) power applies *only* to aliens arrested and detained under § 1226(a). The Government has not even suggested that any aliens within MPP's scope were arrested under § 1226(a). And indeed, given that both MPP and § 1225(b)(2) concern aliens *apprehended at the border*—in contrast to § 1226(a)'s concern with aliens *already in the United States*—it's hard to see how the latter provision is relevant to MPP at all. Even if it were, that would not allow DHS to simply release anyone into the United States. Instead, DHS would be able to release only on "bond" or "conditional parole." § 1226(a)(2). There is no indication that this is DHS's practice or its plan.

Finally, the Government says DHS can ignore Congress's limits on immigration parole and that Supreme Court precedent makes everyone (including the plaintiff States and the federal courts) powerless to say anything about it. The Government's sole precedent for this

proposition is *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). There, the Court held that "[t]he deep-rooted nature of law-enforcement discretion" can survive "even in the presence of seemingly mandatory legislative commands." *Id.* at 761. The Government reads this to mean that it can take the powers given to it by Congress (such as the power to grant immigration parole) while ignoring the limits Congress placed on those powers (such as the case-by-case requirement in § 1182 and the arrest limitation in § 1226).

This argument is as dangerous as it is limitless. By the Government's logic, *Castle Rock* would allow DHS to use the power to make, say, asylum decisions while ignoring every single limitation on those decisions imposed by the INA. And perhaps worse, the Government would have us hold that DHS's pick-and-choose power is completely insulated from judicial review. That would make DHS a genuine law unto itself. And *Castle Rock* says no such thing.

To the contrary, *Castle Rock* is relevant only where an official makes a nonenforcement decision. *See id.* at 760-61 (noting the widespread existence of statutes that "by their terms, seem to preclude *nonenforcement* by the police" and explaining the statutes do not in fact do so (emphasis added) (quotation omitted)). As we've already explained, DHS's Termination Decision was not nonenforcement. *See* Part III.B.2.b, *supra* pages 85-87. And the same is true of DHS's pretended power to parole aliens while ignoring the limitations Congress imposed on the parole power. That's not *non*enforcement; it's *mis*enforcement, suspension of the INA, or both. *See* Part III.B.2.a.i, *supra* pages 69-73 (describing the English prerogative power of suspension).

We therefore hold that DHS has violated not only the APA but also Congress's statutory commands in § 1225.

V.

Having resolved jurisdiction (Part II), reviewability (Part III), and the merits (Part IV), we turn at last to remedies. Here the Government presents three issues. First, whether DHS is entitled to vacatur of the district court's judgment and injunction under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). No. Second, whether the district court abused its discretion in vacating the Termination Decision rather than remanding to DHS without vacatur. No. Third, whether the district court erred in granting permanent injunctive relief against the Government. Again, no.

A.

The Government requests that we vacate the district court's judgment and remand the case under *Munsingwear*. Because the case is not moot, we will not do so. But even if the case were moot, which it's not, we'd still refuse to order the equitable *Munsingwear* remedy.

Broadly, the vacatur inquiry "is an equitable one." *Bancorp*, 513 U.S. at 29. When a case becomes moot on appeal, the reviewing court must dispose of the case "in the manner most consonant to justice" and must account for "the nature and character of the conditions which have caused the case to become moot." *Id.* at 24 (quotation omitted); *see also Staley v. Harris Cnty.*, 485 F.3d 305, 310 (5th Cir. 2007) ("[V]acatur is to be determined on a case-by-case basis, governed by facts and not inflexible rules."). The default disposition is to "vacate

the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39. That default, however, flips when the case is mooted by "the voluntary conduct of the party that lost in the District Court." *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 194 n.6 (2000) (citing *Bancorp* for the proposition that "mootness attributable to a voluntary act of a nonprevailing party ordinarily does not justify vacatur of a judgment under review").

The decision to issue the October 29 Memoranda was "voluntary conduct of the party that lost in the District Court." *Ibid.* To show its entitlement to vacatur, then, the Government must show that the equities of this particular case warrant a departure from *Laidlaw*'s default rule.

As discussed above in greater detail, *see* Part II.B.1-3, *supra* pages 30-45, DHS's litigation tactics tilt the equities decidedly against vacatur. After losing in district court, DHS had two procedural options. Each had its upsides and downsides. Discontent with its choices, DHS tried to choose both at the same time.

Option 1: DHS could've reopened the Termination Decision, taken new action, and returned to the district court to seek relief from the judgment under Federal Rule of Civil Procedure 60(b). *See Horne v. Flores*, 557 U.S. 433 (2009). DHS's ultimate goal under Option 1 would have been a district court holding that its new action was lawful, accompanied by a lifting of the injunction. *Cf. Regents*, 140 S. Ct. at 1904-05 (describing DHS's unsuccessful attempt to secure such a ruling). That would leave the ball in the States' court. The injunction would be gone, and the States would have to

appeal the 60(b) determination if they wanted it reinstated. Option 1, however, would've had two downsides: (a) DHS would have no chance to ask our court or the Supreme Court for a stay pending appeal from the *Biden I* judgment. And (b) the district court might have ruled against DHS on the merits at the 60(b) stage, holding DHS's action still violated the law in one way or another.

Option 2: DHS could've appealed the district court's *Biden I* decision. Unlike Option 1, this would give DHS the chance to try for a stay pending appeal. *See Biden II*, 10 F.4th 538; *Biden III*, 2021 WL 3732667. But Option 2 had a downside of its own: (c) A merits loss on appeal would put DHS right back in district court with nothing to show for its efforts. Nothing, that is, except lost time and a new Fifth Circuit precedent on the books, holding the Termination Decision to be unlawful. Such a precedent would be the law of the case, potentially hampering any subsequent attempt to seek Rule 60(b) relief in the district court on the basis of new agency action.

Instead of choosing Option 1 or Option 2, DHS tried to split the difference by taking Option 1.5: appeal the district court's *Biden I* decision, try to get a stay pending appeal, read the tea leaves, and then try to moot the case with a new memo (but not a full-on new agency action) if things seem to be going poorly. What's more, the Government now argues that its Option 1.5 strategy should give it the exact same remedy—vacatur of the injunction—as if it had never appealed at all (Option 1) or had appealed and won (Option 2). This is a game of heads I win, tails I win, *and* I win without even bothering to flip the coin. Suffice it to say, it does nothing to

entitle the Government to an equitable remedy. And the Government comes nowhere near overcoming *Laidlaw*'s strong presumption against vacatur in a situation of voluntarily caused mootness. 528 U.S. at 194 n.6.[19]

The Government points to several Supreme Court cases in response. None of them change our conclusion. The Government's main authority is the Supreme Court's grant of *Munsingwear* vacatur in *Innovation Law Lab*. As we've already explained, that vacatur happened after the losing party backed down from, rather than doubling down on, its injurious action. 141 S. Ct. at 2842; *accord N.Y. State Rifle & Pistol*, 140 S. Ct. at 1526-27. And as we've already explained, the Government cannot invoke cases like *Lewis* and *Microsoft* that ordered vacatur where a *legislature* changed a statute while an appeal was pending. *See Lewis*, 494 U.S. at 475-77; *Microsoft*, 138 S. Ct. at 1187-88. Neither case concerned a situation where, as here, the agency appealing the judgment is the sole entity responsible for changing the challenged action. *See also* Part II.B, *supra* pages 29-30 (discussing *Lewis* and *Microsoft*); Part II.B.3, *supra* pages 39-45 (discussing voluntary cessation).

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[19] All of this is made worse by the fact that DHS could've switched from Option 2 to Option 1 at any time. For example, if at any point in the appellate process DHS thought things were going badly and wanted to confess error, it could voluntarily dismiss its appeal. *See* Fed. R. App. P. 42. That would put it right back at Option 1. It could then restart its rulemaking process and then attempt to get Rule 60(b) relief from the district court. But the fact that DHS can switch from one option to the other does not mean that it gets to choose both options at once.

B.

Next, we consider the district court's decision to remand and vacate the June 1 Termination Decision rather than remanding without vacatur.[20] This issue should not be confused with *Munsingwear* vacatur. In discussing *Munsingwear* vacatur above, we considered whether to vacate the district court's order on mootness grounds. Here, in contrast, we consider whether the district court committed reversible error by itself vacating the underlying agency action—that is, the June 1 Termination Decision. "We review the district court's decision to vacate for abuse of discretion." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1051 (D.C. Cir. 2021) (quotation omitted).

Remand without vacatur of the agency action is "generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389-90 (5th Cir. 2021). But by default, remand

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[20] The district court phrased its order as vacating the "June 1 Memorandum" rather than the Termination Decision. *Biden I*, 2021 WL 3603341, at *27. But the obvious upshot was vacatur of the Decision underlying the Memorandum, as evidenced by the district court's order "to enforce and implement MPP in good faith." *Ibid.* (emphasis omitted). That order would make no sense if the court hadn't vacated the Termination Decision. Moreover, it's the Government's obligation—as the appellant—to identify errors or ambiguities in the decision it's appealing. The Government has forfeited any complaint about the district court's phraseology by failing to raise it in its original brief. *See, e.g.*, *Satterfield & Pontikes Constr., Inc. v. U.S. Fire Ins. Co.*, 898 F.3d 574, 584 (5th Cir. 2018) ("An argument that is not pressed in the original brief is [forfeited] on appeal.").

with vacatur is the appropriate remedy. *See, e.g.*, *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action.").

The D.C. Circuit's test for whether vacatur is appropriate considers two factors: "(1) the seriousness of the deficiencies of the action, that is, how likely it is the agency will be able to justify its decision on remand; and (2) the disruptive consequences of vacatur." *Ibid.* (quotation omitted). Our court applies the same test, though perhaps phrased differently. *See Cent. & S. W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) ("EPA may well be able to justify its decision to refuse to promulgate a national variance for the electric utilities and it would be disruptive to vacate a rule that applies to other members of the regulated community.").

The district court didn't abuse its discretion when it vacated the Termination Decision. As described above, the Termination Decision was seriously deficient in several ways. And the district court explained that "DHS *knew* of these failings when it issued the June 1 Memorandum because Plaintiffs first brought suit on April 13, 2021—nearly two months earlier." *Biden I*, 2021 WL 3603341, at *24. That original complaint raised the same arbitrary-and-capricious challenge we now adjudicate. So DHS was on notice about the problems with its decision well before it terminated MPP. And it still failed to correct them. It therefore makes sense that the district court didn't take seriously DHS's claim that it could easily fix those errors on remand without vacatur. *See United Steel*, 925 F.3d at 1287. Doubly so because any post-remand DHS memorandum would run the risk of

being an impermissible *post hoc* rationalization under *Regents*. *See* 140 S. Ct. at 1907-10.

And for two reasons, the district court acted well within its discretion when it concluded vacatur is not disruptive in this case. *See Standing Rock Sioux Tribe*, 985 F.3d at 1053 (district court did not abuse its discretion by vacating, *even* when vacatur "would cause" "severe economic disruption," because the court reasonably considered all relevant factors (quotation omitted)). First, the district court required DHS to re-implement MPP "in good faith," not overnight. *Biden I*, 2021 WL 3603341, at *27. Second, the Government's disruption arguments rise or fall with its balance-of-equities arguments, many of which ignore the good-faith aspect of the injunction. Because we reject those arguments below, we reject their analogues here. *See United Steel*, 925 F.3d at 1287 (The agency "explains neither how the [agency action] can be saved nor how vacatur will cause disruption. We therefore take the normal course and vacate."); *cf. Biden II*, 10 F.4th at 560 ("The Government makes no [vacatur] argument materially different from its irreparable-injury argument.").

C.

Finally, we ask whether the district court abused its discretion by granting permanent injunctive relief. It did not. The district court's injunction restrained DHS "from implementing or enforcing" the June 1 Termination Decision. *See Biden I*, 2021 WL 3603341, at *27. It also ordered DHS "to 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." *Ibid.* And it imposed various reporting requirements. *Ibid.* The court clarified, however, that it was not requiring "DHS to take any immigration or removal action nor withhold its statutory discretion towards any individual that it would not otherwise take." *Id.* at *28.

1.

To be entitled to permanent injunctive relief, plaintiffs must show "(1) that [they have] suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff[s] and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). The district court applied that test and concluded the States were entitled to a permanent injunction. *Biden I*, 2021 WL 3603341, at *26-27. We review that decision for abuse of discretion. *E.g.*, *Valentine v. Collier*, 993 F.3d 270, 280 (5th Cir. 2021); *Whole Woman's Health v. Paxton*, 10 F.4th 430, 438 (5th Cir. 2021) (en banc). Our circuit's settled rule is that "[a] district court abuses its discretion if it (1) relies on clearly erroneous factual findings or erroneous conclusions of law when deciding to grant the injunction, or (2) misapplies the factual or legal conclusions when fashioning its injunctive relief." *Valentine*, 993 F.3d at 280 (quotation omitted).

On the first and second prongs, the district court incorporated by reference its discussion of injuries in the standing context. *Biden I*, 2021 WL 3603341, at *26. The court found that MPP's termination has contributed, and will continue to contribute, to the number of parolee aliens in the States. *Id.* at *8. It likewise found this would impose costs on the States. *Id.* at *9-10. And because they will be unable to recover those additional costs from the federal government, the court concluded the costs constituted an irreparable injury not adequately remedied by damages. *Id.* at *26; *see also DAPA*, 809 F.3d at 186 (noting the difficulty of retracting governmental benefits once granted). Add to that pocketbook injury the pressure imposed by DHS's termination of MPP, which gives the States "the Hobson's choice of spending," potentially, "millions of dollars" to evaluate and grant additional licenses—or instead changing their statutes. *See id.* at 163. The Government contests these points only by challenging the district court's factual findings, as it did in the injury-in-fact context. We rejected those arguments there, *see* Part II.C.1, *supra* pages 46-52, and we reject them here. The district court did not abuse its discretion by determining that the first two *eBay* prongs have been satisfied.

The Government has entirely failed to contest the public-interest prong on appeal, so we will not hold the district court abused its discretion by concluding that an injunction was in the public interest. *See Biden I*, 2021 WL 3603341, at *26 (explaining that "there is a public interest in having governmental agencies abide by the federal laws that govern their existence and operations" (quotation omitted)); *see also Wages & White Lion*, 16 F.4th at 1143 ("And there is generally no public interest

in the perpetuation of unlawful agency action." (quotation omitted)); *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) (per curiam) ("[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends.").

That leaves the balance of the equities—*eBay*'s third prong. On this score, the Government gives a litany of harms it says the district court's injunction is causing. It says these harms outweigh the harms to the States. Again, our review is tightly circumscribed. *See Texas v. Ysleta Del Sur Pueblo*, 955 F.3d 408, 415-16 (5th Cir. 2020) (applying the deferential abuse-of-discretion standard to the district court's balancing of the equities in the permanent injunction context), *as revised* (Apr. 3, 2020), *cert. granted on other grounds*, 142 S. Ct. 395 (2021).

Much of the Government's argument amounts to repeating its claim that DHS cannot restart MPP unilaterally. The district court explained why that's at least partially false: DHS has the unilateral power to turn back individuals who have not yet entered the United States. *Biden I*, 2021 WL 3603341, at *25 n.15. And to the extent restarting MPP requires cooperation with Mexico, the Government studiously downplays the fact that the district court ordered reinstatement "*in good faith*." *Id.* at *27. Further, the mere fact that *some* foreign-relations issues are in play cannot suffice to defeat the injunction. The Government's contrary position would allow DHS to implement any immigration program it liked—no matter how far afield from the law—with impunity.

The Government also invokes foreign-policy concerns and logistical disruptions. For example, the Gov-

ernment cites a DHS official's declaration that "requiring DHS to reinstitute the program, would wreak havoc on the Administration's approach to managing migration in the region, including by undermining . . . delicate bilateral (and multilateral) discussions." And the Government says restarting MPP is complicated by the fact that the relevant facilities have been shuttered for months "due to COVID-19."

Those harms are entirely self-inflicted. *Pennsylvania*, 426 U.S. at 664 (explaining the principle); *Biden I*, 2021 WL 3603341, at *24 (reaching that conclusion). As for foreign relations, DHS could have simply informed Mexico throughout the negotiation process that its ability to terminate MPP was contingent on judicial review. Doubly so because the States filed this very lawsuit one and a half months *before* the Termination Decision—so there's no question DHS was on notice about these legal issues. As the district court aptly put it, "Mexico is capable of understanding that DHS is required to follow the laws of the United States." *Ibid.* As for shuttered infrastructure, the district court specifically considered, and rejected, the bizarre factual claim that DHS's infrastructure has somehow remained closed this whole time solely due to COVID-19. *See id.* at *21 (explaining that "[*p*]*ast* problems with *past* closures are irrelevant to the decision to *prospectively* terminate MPP in June 2021"). The Government gives no reason to think that finding was clearly erroneous.[21]

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[21] The Government also cites two additional declarations from government officials in support of its balance-of-equities argument. These declarations, however, were not before the district court when it decided to grant the injunction. The district court issued its judgment on August 13, 2021, and the Government did not submit

The Government also complains the injunction impinges on "Executive autonomy." But of course, that whole line of reasoning is based on the notion that MPP's termination was a *lawful* exercise of autonomy. Under both the APA and 8 U.S.C. § 1225, it was not.

We conclude the district court made factual findings that were not clearly erroneous and gave correct statements of the law, and it soundly applied those conclusions in fashioning its injunctive relief. *See Valentine*, 993 F.3d at 280. The district court did not abuse its discretion by granting a permanent injunction.

2.

The Government objects that 8 U.S.C. § 1252(f)(1) bars injunctive relief in this case. That provision reads as follows:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter . . . other than with respect to the application of such provisions to an individual alien against

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these declarations until it requested a *stay* from the district court's judgment—on August 16. Because the declarations were not before the district court when it decided the injunction issue, and because the Government gives no argument why we should consider them despite that, we will not do so. And even if we did, they would not change our analysis. The declarations are largely repetitive of the arguments we've already addressed. That includes the generous use of strawmen, based on the false assumption that the district court ordered DHS to reinstate MPP overnight.

> whom proceedings under such part have been initiated.

The Government says the district court's injunction restrained the operation of § 1225(b)(2)(C).

That is backward. In its Termination Decision, DHS all but forbade its own officers from invoking the "operation" of § 1225(b)(2)(C). The district court's injunction undid that restraint. Far from "restrain[ing]" the "operation" of the statute, the injunction restored it.

Justice Thomas's concurrence in *Nielsen v. Preap*, 139 S. Ct. 954 (2019), is not to the contrary. The Court in that case did not reach the § 1252(f) issue. *See id.* at 962. But Justice Thomas rejected the idea that an injunction complied with § 1252(f) simply by framing itself as "enjoin[ing] conduct not authorized by the statutes" rather than enjoining their "operation." *Id.* at 975 (Thomas, J., concurring in part and concurring in the judgment) (quotation omitted). He called this reasoning "circular and unpersuasive." *Ibid.* (going on to note that "[m]any claims seeking to enjoin or restrain the operation of the relevant statutes will allege that the Executive's action does not comply with the statutory grant of authority, but the text clearly bars jurisdiction to enter an injunction '[r]egardless of the nature of the action or claim'" (quoting § 1252(f)(1)).

But again, *Preap* was the opposite of our case. The plaintiffs in *Preap* were seeking to prevent DHS from enforcing § 1226(c), which requires the agency to take certain categories of aliens into custody. *See id.* at 959-60. In other words, DHS was applying the provision in question, and the injunction interfered with the way it did so. Here, in contrast, DHS flatly refuses to apply

either § 1225(b)(2)(A) or § 1225(b)(2)(C), and the injunction requires otherwise. Thus, the injunction did anything but "enjoin or restrain the operation of" the INA. § 1252(f)(1).

* * *

The Government's position in this case has far-reaching implications for the separation of powers and the rule of law. The Government says it has unreviewable and unilateral discretion to create and to eliminate entire components of the federal bureaucracy that affect countless people, tax dollars, and sovereign States. The Government also says it has unreviewable and unilateral discretion to ignore statutory limits imposed by Congress and to remake entire titles of the United States Code to suit the preferences of the executive branch. And the Government says it can do all of this by typing up a new "memo" and posting it on the internet. If the Government were correct, it would supplant the rule of law with the rule of say-so. We hold the Government is wrong.

The Government's motion to vacate the judgment and remand for further proceedings is DENIED. The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

2:21-CV-067-Z

THE STATE OF TEXAS, THE STATE OF MISSOURI,
PLAINTIFFS

v.

JOSEPH R. BIDEN, JR. ET AL., DEFENDANTS

[Filed: Nov. 18, 2021]

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiffs' Motion to Enforce Permanent Injunction and for Expedited Discovery (ECF No. 107) ("Motion"). The Court has considered all responses, replies, objections, and sur-replies (as applicable) to the Motion. For the following reasons, Plaintiffs' Motion is **GRANTED in part** as to the request for additional discovery and **DENIED** in all other respects.

BACKGROUND

On April 13, 2021, Plaintiff States Missouri and Texas filed a complaint with this Court against federal Defendants.[1] ECF No. 1. Plaintiffs asked the Court for relief including an injunction to prevent Defendants from

[1] Defendants are the United States of America; President Biden in his official capacity; the Department of Homeland Security

suspending or terminating the Migrant Protection Protocols ("MPP"). ECF No. 1 at 39. This case's short but complicated procedural history is detailed in the Court's Memorandum Opinion and Order filed August 13, 2021, in which the Court granted injunctive relief. ECF No. 94. Specifically—among other requirements—the Court ordered Defendants to (1) enforce and implement MPP in good faith and (2) to file with the Court monthly reports including specific relevant data. ECF No. 94 at 52-53. On September 15, 2021, Defendants filed a Notice of Compliance with Injunction ("August Compliance Notice") (ECF No. 105) and a Monthly Report Pursuant to Court's Injunction ("August Report") (ECF No. 106).

Plaintiffs filed the present Motion on September 23, 2021, alleging that Defendants are not enforcing and implementing MPP in good faith. ECF No. 107 at 1. Plaintiffs ask the Court to (1) find that Defendants are not in compliance with the August 13 Order, (2) to command concrete steps to comply, and (3) to allow Plaintiffs expedited discovery relating to compliance and specifically related to Haitian migrant activity. ECF No. 107 at 10. Defendants filed a Response in opposition to Plaintiffs' Motion on October 14, 2021, claiming that "the government is implementing the injunction in good faith" and that Plaintiffs "offer no valid basis for their

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("DHS") and DHS Secretary Mayorkas in his official capacity; the United States Customs and Border Protection ("CBP") and Acting Commissioner of CBP Troy Miller in his official capacity; the United States Immigration and Customs Enforcement ("ICE") and Acting ICE Director Tae Johnson; and the United States Citizenship and Immigration Services ("CIS") and Acting CIS Director Tracy Renaud in her official capacity.

request for other broad-ranging discovery."[2] ECF No. 110 at 1. The following day, Defendants filed documents reporting increased actions and new data from the month of September—the First Supplemental Notice of Compliance with Injunction ("September Compliance Notice") (ECF No. 111) and the Monthly Report for September 2021 ("September Report") (ECF No. 112).

Subsequently, on October 28, 2021, Plaintiffs filed a Reply in Support of Motion to Enforce Permanent Injunction and for Expedited Discovery (ECF No. 113). Plaintiffs are concerned about an influx of Haitian migrants and the fact that Defendants are not re-implementing MPP in the same manner as it was initially implemented. *See* ECF No. 113. Defendants filed the Second Supplemental Notice of Compliance with Injunction ("October Compliance Notice") (ECF No. 114) and the Monthly Report for October 2021 ("October Report") (ECF No. 115) on November 15, 2021. These reports reflect that Defendants will fully re-implement MPP in the near future.

LEGAL STANDARDS

Courts have inherent power to enforce compliance with their lawful orders through civil contempt. *Shillitani v. United States,* 384 U.S. 364, 370 (1966). In enforcing compliance, courts should use "(t)he least possible power adequate to the end proposed." *Spallone v. United States,* 493 U.S. 265,276 (1990) (quoting *Anderson v. Dunn,* 6 Wheat. 204,231 (1821)). Plaintiffs have

[2] Defendants' Response was filed by all the listed Defendant parties except the United States Customs and Border Protection.

the burden to establish by clear and convincing evidence: (1) that a court order was in effect; (2) that the order required certain conduct by Defendants; and (3) that Defendants failed to comply with the court's order. *Petroleos Mexicanos v. Crawford Enters., Inc.,* 826 F.2d 392, 401 (5th Cir. 1986) (citing *McComb v. Jacksonville Paper Co.,* 336 U.S. 187, 191 (1949)). The evidence must be "so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts." *Test Masters Educ. Servs., Inc. v. Singh,* 428 F.3d 559, 582 (5th Cir. 2005) (quoting *Piggly Wiggly Clarksville, Inc. v. Mrs. Baird's Bakeries,* 177 F.3d 380, 383 (5th Cir. 1999)). If Plaintiffs show a prima facie case, Defendants can defend against it by showing a present inability to comply with the subpoena or order. *Petroleos Mexicanos,* 826 F.2d at 401 (citing *United States v. Rylander,* 460 U.S. 752, 757 (1983)).

ANALYSIS

Defendants are taking steps toward re-implementing MPP. Since the time that Plaintiffs filed the Motion, Defendants have filed additional reports showing increased action and an estimated timeframe on re-implementation. *See* ECF Nos. 111, 114. The Court finds that Plaintiffs have not met the burden of showing by clear and convincing evidence that Defendants are not in compliance with the injunction. However, the Court finds good reason to modify the injunction to allow *limited* discovery to ensure continued compliance with the injunction.

A. Plaintiffs fail to show clear and convincing evidence that Defendants are failing to comply with the Court's order.

The Court's injunction requires Defendants to "enforce and implement MPP *in good faith*." ECF No. 94 at 52. Plaintiffs argue that the current administration's implementation of MPP deviates from the previous administration's initial implementation. The essence of Plaintiffs' argument is that good-faith implementation requires not only the same pace of progress, but also the same manner of implementation as the previous administration. This is not the correct standard.

If Defendants failed to show any movement and instead argued that progress was impossible, Plaintiffs' arguments detailing a possible path forward would be relevant—and potentially compelling. However, Defendants have highlighted actions the Government has taken in compliance with the injunction. Moreover, Defendants can achieve good-faith implementation without duplicating the previous administration's implementation. Thus, Plaintiffs fail to show clear and convincing evidence that Defendants have failed to comply with the Court's order.

1. Defendants show action and progress in implementing MPP.

Defendants' August Compliance Notice shows Defendants took initial administrative steps towards implementing MPP. *See* ECF No. 105. Specifically, Defendants (1) began negotiations with the Mexican government, (2) identified funds for building structures in Laredo and Brownsville for hearings, (3) set up a task

force that began reviewing policies, and (4) initiated discussions to make space on immigration court dockets. ECF No. 105 at 1, 3. While these steps do not constitute concrete and visible implementation of MPP, the Court finds they are relevant foundational steps *toward* implementation.

During September, Defendants showed increased action and "substantial progress toward re-implementation of MPP." ECF No. 111 at 1. Defendants identified specific concerns held by the Mexican government and stated that Defendants were finalizing plans to mitigate those concerns. ECF No. 110-1, ¶¶ 8-13; ECF No. 111 at 1-2. Defendants also reported that they were no longer waiting for Mexico's agreement before taking additional steps. ECF No. 111 at 3. Accordingly, Defendants issued task orders to rebuild necessary hearing facilities in Laredo and Brownsville. ECF No. 110 at 9.

Defendants' October Compliance Notice states that Defendants are "largely finished" with "internal planning" and are ready to re-implement MPP "shortly after" the Mexican government agrees to accept the return of individuals enrolled in the program. ECF No. 114-1 at 3. Defendants further report only "one set of outstanding issues that must be resolved before Mexico will be in a position to make the independent decision to accept into Mexico those enrolled in MPP." *Id.* Defendants "anticipate that the remaining issues will be resolved shortly and that reimplementation will begin within the coming weeks." *Id.*

The Court takes seriously its responsibility to "protect the sanctity of its decrees and the legal process." *Test Masters,* 428 F.3d at 582 (5th Cir. 2005). However, the Court finds that Defendants' actions toward

re-implementation of MPP are sufficient to negate Plaintiffs' current allegations of bad-faith failure to comply. As a result, the Court need not determine what actions would still be required of Defendants if the Mexico negotiations were to stalemate or if the Mexican government were to permanently withhold consent.

2. Good-faith implementation does not require Defendants to implement MPP in the same manner as the previous implementation.

Plaintiffs claim that Defendants fail to follow the same blueprint that the previous administration followed in implementing MPP. This claim may be true. However, this is not controlling to the Court's analysis. The standard does not require the Court to determine whether Defendants are implementing MPP in the most expeditious or prudent manner possible, or in the same manner as the previous administration, or in the manner Plaintiffs would have chosen. Rather, the Court must simply determine whether Plaintiffs have shown by clear and convincing evidence that Defendants are not in compliance with the injunction.

Plaintiffs are incorrect that "good-faith implementation of this Court's injunction requires proceeding at least as quickly as Defendants did the first time they implemented MPP." ECF No. 107 at 5. The two cases Plaintiffs cite as authority for this proposition are distinguishable from present circumstances, and neither provides controlling authority. One merely states that the district court did not err by instructing the jury to consider past dealings between the two parties—among other factors—in evaluating good-faith motive behind a sale. *United Mine Workers of Am. V. Rag Am. Coal Co.,* 392 F.3d 1233, 1239-40 (10th Cir. 2004). The other

affirms that the district court did not clearly err when it considered previous business practice as only one factor in evaluating good-faith intent and when the party in question was sitting in complete inaction. *In re Montgomery,* 518 F.2d 1174, 1175 (4th Cir. 1975).

Even if the Court considers previous implementation of MPP in comparison to Defendants' present efforts, other factors offset a need to follow suit. First, the COVID-19 pandemic poses a continuing and ever evolving challenge to both business transactions and daily life for most of the nation. It is reasonable that the pandemic would alter best practices for implementing MPP, including in the manner that the CDC's Title 42 order affects operations. ECF No. 110 at 10.

Second, the Mexican government expressed that it would not agree to implementation unless certain aspects of the program are changed. ECF No. 111 at 2. This requires Defendants to alter implementation procedures. Notably, Mexico requires shorter lag times between enrolling aliens in MPP and concluding proceedings, lessening Defendants' ability to count on lag time to finish building, organizing, and planning. ECF No. 110-1, ¶ 9.

The Court finds that none of Plaintiffs' specific claims of Defendants' bad-faith failure are clear and convincing. Specifically, Plaintiffs present that Defendants are wrongly delaying reimplementation based on COVID-19 issues, lack of agreement from Mexico, and incomplete facilities. Plaintiffs insist that MPP should be re-implemented in a phased manner, without waiting for the entire border to be ready.

However, Defendants report that they expect an agreement with Mexico soon but are no longer waiting for such agreement before taking concrete action and rebuilding facilities. It is reasonable for Defendants to experience some delays and variances from the effects of the COVID-19 pandemic. Moreover, Defendants claim that they expect to re-implement MPP within a few weeks. Given these current reports, none of Plaintiffs' claims clearly and convincingly show lack of good-faith re-implementation.

Plaintiffs fail to show controlling authority that Defendants must implement MPP in the same manner as initially. The Court finds that Defendants' current deviation from the original method and manner of implementation does not constitute bad-faith failure to re-implement MPP.

B. Plaintiffs are entitled to *limited* discovery to ensure Defendants' compliance with the injunction.

Plaintiffs request expedited discovery through depositions and additional monthly reporting. These requests are limited and directly relevant to the injunction's objectives.

First, Plaintiffs request to depose four lower-level agency officials on a limited basis related to facts articulated in the August Compliance Report. ECF No. 107 at 9; ECF No. 113 at 7 n.7. These officials have already testified by declaration in this matter. *See* ECF Nos. 105-1 and 110-1 (Nunez-Neto), 98-1 (Shahoulian), 98-2 (Weiss), and 98-3 Zuniga). Plaintiffs want to probe possible discrepancies between Defendants' representations of compliance and facts in the officials' declara-

tions. ECF No. 113 at 8. Plaintiffs seek this information to ascertain more fully Defendants' compliance with the injunction.

Although the Court has not found clear and convincing evidence of Defendants' noncompliance, Plaintiffs have provided some evidence that Defendants are not re-implementing MPP as quickly or as thoroughly as they should. Thus, the Court finds Plaintiffs' request reasonable—considering the ongoing importance of compliance and the limited nature of the request.

Defendants cannot assert privilege or status to avoid depositions of lower-level officials limited to explaining decisions and actions taken to implement those decisions. The deliberative process privilege protects only "predecisional information" about the deliberative process by which an agency reached a policy decision. *Skelton v. U.S. Postal Serv.,* 678 F.2d 35, 38 (5th Cir. 1982). It does not protect information explaining a decision, and it certainly does not protect factual information. *Id.; Branch v. Phillips Petroleum Co.,* 638 F.2d 873, 882 (5th Cir. 1981). Additionally, in contrast to probing the mental processes of a federal Executive Department Secretary, which may require a higher standard, Plaintiffs request limited depositions to gain facts from officials who work—or formerly worked — several levels below agency heads. *See United States v. Morgan,* 313 U.S. 409,422 (1941). The status of these officials does not foreclose such narrow questioning.

Second, Plaintiffs request information related to the monthly reporting that the injunction already requires. *See* ECF No. 107. Plaintiffs request data for the time period before the injunction, beginning January 21, 2021. *Id.* Plaintiffs also request this information broken

down to show data related to Haitian migrants. *Id.* Finally, Plaintiffs request data related to Defendants' violation of parole limits, pointing to the Court's findings on this subject. *Id.*

The Court finds Plaintiffs' request for information reasonable and in good faith. Plaintiffs require prior data to confirm whether Defendants' current actions and results represent a change from the time period before the injunction. The injunction addresses parole practices, but additional information is necessary to clarify Defendants' compliance with legal limits on parole decision-making. While Haitian migrants are not subject to MPP, data on Haitian migrants is relevant to the injunction's objectives and of increased importance given the humanitarian crisis Plaintiffs describe. ECF No. 107 at 2.

The Court retains jurisdiction over this matter for the purpose of construction, modification, and enforcement of the permanent injunction. Accordingly, the Court finds Plaintiffs' Motion seeking limited discovery should be **GRANTED.**

CONCLUSION

For the reasons set forth above, it is **ORDERED** that Plaintiffs Motion to Enforce Permanent Injunction and for Expedited Discovery is **GRANTED in part** as follows:

(a) Plaintiffs may conduct **limited depositions**—relating to the facts in the Defendants' filed notices and reports to obtain an explanation of Defendants' actions or lack thereof related to the injunction—of the following officials: (1) Acting Assistant Secretary Blas Nuñez-Neto; (2) former Assistant Secretary David Shahoulian;

(3) Principal Deputy Chief Immigration Judge Daniel H. Weiss; and (4) Principal Deputy Assistant Secretary Ricardo Zuniga;

(b) Defendants must file with the Court **on or before December 15, 2021** a report showing the five categories of information required by the injunction broken down monthly beginning January 21, 2021;

(c) Defendants' reports filed with the Court in compliance with the injunction, including the report required by subsection (b), must include—as a part of categories (5) and (6)—the number of applicants paroled or released into the United States based on DHS's lack of detention capacity; and

(d) Defendants' reports filed with the Court in compliance with the injunction, including the report required by subsection (b), must show data on Haitian migrants in all categories.

The Court finds all other relief should be and is hereby **DENIED.**

SO ORDERED.

Nov. [18], 2021.

/s/ MATTHEW J. KACSMARYK
MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

2:21-CV-067-Z

THE STATE OF TEXAS, THE STATE OF MISSOURI,
PLAINTIFFS

v.

JOSEPH R. BIDEN, JR. ET AL, DEFENDANTS

Filed: Aug. 13, 2021

MEMORANDUM OPINION AND ORDER

The Court enters the below-listed findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure after a consolidated hearing and trial on the merits on Plaintiff States Texas and Missouri's various claims against the federal Defendants.[3]

[3] Defendants are the United States of America; President Biden in his official capacity; the Department of Homeland Security ("DHS") and DHS Secretary Mayorkas in his official capacity; the United States Customs and Border Protection ("CBP") and Acting Commissioner of CBP Troy Miller in his official capacity; the United States Immigration and Customs Enforcement "ICE" and Acting ICE Director Tae Johnson; and the United States Citizenship and Immigration Services ("CIS") and Acting CIS Director Tracy Renaud in her official capacity.

For the reasons that follow, the Court **FINDS** and **CONCLUDES** that Plaintiffs are entitled to relief on their APA and statutory claims against Defendants. The Court will therefore enter judgment in favor of Plaintiffs. The Court also crafts injunctive relief to ensure Plaintiffs receive a full remedy.

I. PROCEDURAL BACKGROUND

Only four months old, this case already has a complicated procedural history. Thus, the Court will quickly summarize the record before entering its findings of fact and conclusions of law.

On April 13, 2021, Plaintiffs filed this suit challenging the temporary suspension of the Migrant Protection Protocols ("MPP"). ECF No. 1. MPP was a program implemented by the Department of Homeland Security that returned some aliens temporarily to Mexico during the pendency of their removal proceedings. Specifically, Plaintiffs alleged that DHS's "two-sentence, three-line memorandum" that suspended enrollments in the Migrant Protection Protocols pending review of the program was a violation of the APA, 8 U.S.C § 1225, the Constitution, and a binding agreement between Texas and the federal government. *See* ECF No. 1 at 4; ECF No. 45 (showing the original administrative record to consist solely of the Secretary's January 20 Memorandum without any supporting documentation).

On May 3, Defendants made a motion to transfer this case to the Southern District of Texas. ECF No. 11. On June 3, the Court denied this motion in a written order. *See* ECF No. 47 at 9 ("Defendants' evidence, taken as a whole, does not establish that the convenience of the

parties and witnesses will be enhanced by transferring this case.").

On May 14, Plaintiffs moved for a preliminary injunction. ECF No. 30. But before briefing was concluded, DHS completed its review of MPP and issued a new memorandum (the "June 1 Memorandum") that *permanently* terminated MPP. ECF No. 46. The Court concluded the June 1 Memorandum mooted Plaintiffs' original complaint but allowed Plaintiffs to amend their complaint and file a new motion seeking to enjoin the June 1 Memorandum. *See* ECF No. 52 at 3 ("[T]he January 20 Memorandum expired upon the completion of DHS's review of the program.").

Accordingly, Plaintiffs amended their complaint and renewed their motion for a preliminary injunction. *See* ECF Nos. 48, 53. On June 22, Defendants filed the administrative record. ECF No. 61. Three days later, Defendants filed their response to Plaintiffs' motion. ECF No. 63. Plaintiffs filed their reply on June 30.

But in addition to opposing Plaintiffs' Motion, Defendants also moved to strike the entire appendix attached to Plaintiffs' Motion because it arguably ran afoul of the "record rule." The Court expedited briefing on this motion and denied the motion by written order for the reasons stated in ECF No. 76.

Next, the parties agreed with the Court that this case involved mainly questions of law. Accordingly, the parties favored consolidating the preliminary injunction hearing with the trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). ECF No. 68. The Court ordered the consolidation, provided notice to the parties, and allowed

each party to file a supplemental brief before the hearing. *Id.*

Lastly, on July 20, two days before the hearing, Defendants filed a notice of a "corrected administrative record." ECF No. 78. By this notice, Defendants added the 2019 DHS assessment of MPP to the administrative record—even though Defendants knew for at least three weeks that the document was *not* included in the certified administrative record. ECF No. 85 at 2. Plaintiffs moved to strike this last-minute addendum to the administrative record. The Court denied that motion by written order on July 21. ECF No. 85 ("The delay between the government's acquiring knowledge of the missing document and its filing of notice with the Court comes perilously close to undermining the presumption of administrative regularity. But the Court finds the presumption is not overcome in this case.").

On July 22, the Court held a consolidated hearing and bench trial on the merits. The parties filed their proposed findings of fact and conclusions of law on July 27. ECF Nos. 91, 92. The parties also filed supplemental briefs on the scope of relief available to Plaintiffs. ECF Nos. 90, 93. Pursuant to Fed. R. Civ. P. 52(a), the Court may now enter its findings of facts and conclusions of law.

II. EVIDENTIARY OBJECTIONS[4]

1. At the bench trial, Defendants made several objections to Plaintiffs' exhibits which the Court deferred ruling upon. Trial Tr. 8-30. The Court now overrules Defendants' objections under Fed. R. Evid. 401 as the

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[4] Citations to Plaintiffs' Appendix in Support, found at ECF No. 54, are labeled App. ###. Citations to the administrative record, found at ECF No. 61, are labeled AR ###.

exhibits are relevant to Plaintiffs' claims and overrules Defendants' objections under Fed. R. Evid. 403. "Rule 403 assumes a trial judge is able to discern and weigh the improper inferences that a jury might draw from certain evidence, and then balance those improprieties against probative value and necessity. Certainly, in a bench trial, the same judge can also exclude those improper inferences from his mind in reaching a decision." *Gulf States Util. Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. Unit A Jan. 1981).

2. The Court overrules Defendants' privilege objections as to Exhibits A10 and C. The content Defendants seek to protect has been in the public record for months. Even if Defendants were unaware of Exhibit A10 and C at the time the exhibits were published, Defendants have been on notice since June 8, 2021, when Plaintiffs filed their Appendix in Support. ECF No. 54. The Court finds Defendants' privilege objections to be untimely and moot.

3. The Court sustains Defendants' hearsay objections under Fed. R. Evid. 802 as to Plaintiffs' Exhibits A-7, A-9, A-11, A-12, A-13, and A-15 to the extent the information within the exhibits is offered for the truth of the matters asserted.

4. The Court overrules Defendants' objections under Fed. R. Evid. 702 as to Plaintiffs' Exhibits D, E, F, F-1, G, G-1, H, H-1, and I. Defendants object to these exhibits, generally arguing Plaintiffs impermissibly offered expert testimony. *See* ECF No. 92 at 28. Defendants' objections fail to identify with specificity which declarants and which parts of each exhibit were impermissibly offered. Further, Defendants fail to state with specificity why each declarant is unqualified.

5. Even so, the Court reviewed each declaration and finds Defendants' objections unpersuasive. For example, in reviewing Plaintiffs' Exhibit D, Declaration of Mark Morgan, the Court noted Mark Morgan served as the Acting Commissioner of the United States Customs and Border Patrol from 2019-2021. App. 390. Prior to that service, Mr. Morgan served as the Acting Chief of the United States Immigration and Customs Enforcement. *Id.* Prior to that assignment, Mr. Morgan served twenty years as an FBI agent. *Id.* The Court finds Mr. Morgan more than sufficiently qualified to opine and present testimony in the form of a declaration regarding immigration laws, policies, procedures, and practices.

6. Any objections not previously discussed are overruled.

III. FINDINGS OF FACT[5]

1. Because the Court consolidated the hearing on the motion with a trial on the merits, the proper standard

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[5] In preparing this memorandum opinion and order, the Court carefully considered the trial arguments, the record, and the admitted exhibits and applied the standard in this circuit for findings of fact and conclusions of law. *See Century Marine Inc. v. United States*, 153 F.3d 225, 231 (5th Cir. 1998) (discussing standard for findings and conclusions under Rule 52). In accordance with that standard, the Court has not set out its findings and conclusions in "punctilious detail" or "slavishly traced the claims issue by issue and witness by witness, or indulged in exegetics, parsing or declaiming every fact and each nuance and hypothesis." *Id.* The Court instead has limited its discussion to those legal and factual issues that form the basis for its decision. *Id.*

Where appropriate, any finding of fact herein that should more appropriately be regarded as a conclusion of law shall be deemed as such, and vice versa.

for factual findings is the preponderance of the evidence.

A. Overview of the relevant statutory framework

2. Section 1225 of Title 8 of the United States Code establishes procedures for DHS to process aliens who are "applicant[s] for admission" to the United States, whether they arrive at a port of entry or cross the border unlawfully. 8 U.S.C. § 1225(a)(1).

3. An immigration officer must first inspect the alien to determine whether he is entitled to be admitted. § 1225(a)(3). Section 1225(b)(2)(A) provides that, if an immigration officer "determines" that an "applicant for admission" is "not clearly and beyond a doubt entitled to be admitted," then the alien "shall be detained for a proceeding under Section 1229a of this title" to determine whether he will be removed from the United States.

4. Alternatively, if an alien lacks valid entry documentation or misrepresents his identity, he shall be "removed from the United States without further hearing or review unless" he "indicates either an intention to apply for asylum . . . or a fear of persecution." § 1225(b)(1)(A)(i). If the alien makes such a showing, then he "shall be detained for further consideration of the application for asylum." § 1225(b)(1)(B)(ii). Such an alien then would also be placed in a Section 1229a full removal proceeding. See 8 C.F.R. § 208.30(f).

5. Under either route, Section 1229a proceedings involve a hearing before an immigration judge with potential review by the Board of Immigration Appeals. 8 U.S.C. § 1229a; 8 C.F.R. § 1003.1. In a full removal proceeding, the government may charge the alien with any applicable ground of inadmissibility, and the alien

may seek asylum or any other form of relief or protection from removal to his home country. 8 U.S.C. § 1229a(a)(2), (c)(4).

6. Most importantly for this case, when DHS places an applicant for admission into a full removal proceeding under Section 1229a, the alien is subject to *mandatory* detention during that proceeding. § 1225(b)(2)(A) ("[I]f the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained* for a proceeding under Section 1229a of this title.") (emphasis added). DHS does retain the discretion to parole certain aliens "for urgent humanitarian reasons or significant public benefit." § 1182(d)(5)(A).

7. But Congress allows DHS an alternative to mandatory detention in the United States: "In the case of an alien described in [Section 1225(b)(2)(A)] who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, [DHS] may return the alien to that territory pending a proceeding under Section 1229a of this title." § 1225(b)(2)(C). This contiguous-territory-return authority enables DHS to avoid having to detain aliens arriving on land from Mexico (or Canada), and instead allows DHS to temporarily return those aliens to the foreign territory from which they just arrived pending their immigration proceedings.

B. MPP was created to combat an influx of illegal aliens during the Trump administration

8. In 2018, the southern border of the United States experienced an immigration surge and a resulting "humanitarian and border security crisis." AR 186; App.

005. Federal officials encountered an approximately 2,000 inadmissible aliens each day in 2018. App. 005. By May 2019, that number had increased to 4,800 aliens crossing the border daily. AR 682.

9. The resulting influx of immigrants had "severe impacts on U.S. border security and immigration operations." App. 302. But most aliens lacked meritorious claims for asylum—"only 14 percent of aliens who claimed credible fear of persecution or torture were granted asylum between Fiscal Year 2008 and Fiscal Year 2019." App. 005. With so many "fraudulent asylum claims," "[t]he dramatic increase in illegal migration" was "making it harder for the U.S. to devote appropriate resources to individuals who [were] legitimately fleeing persecution." App. 302-03.

10. The influx did not just divert resources from legitimate asylum seekers, but illegal aliens with *meritless* asylum claims were being released into the United States. "[M]any of these individuals . . . disappeared into the country before a judge denie[d] their claim and simply bec[a]me fugitives." App. 303. "Between Fiscal Year 2008 and Fiscal Year 2019, 32 percent of aliens referred to [the Executive Office for Immigration Review] absconded into the United States and were ordered removed *in absentia*." App. 005.

11. In response, the Trump Administration implemented a program known as the Migrant Protection Protocols. On December 20, 2018, the Secretary of Homeland Security announced the MPP program, under which DHS would begin the process of invoking the

authority provided at § 1225(b)(2)(C).[6] This statutory authority allows DHS to return to Mexico certain third-country nationals—*i.e.*, aliens who are not nationals or citizens of Mexico—arriving in the United States from Mexico for the duration of their removal proceedings under 8 U.S.C. § 1229a. AR 151.

12. The goal of MPP was to ensure that "[c]ertain aliens attempting to enter the U.S. illegally or without documentation, including those who claim asylum, will no longer be released into the country, where they often fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim." App. 303-04.

13. The same day, the United States obtained the Government of Mexico's agreement to temporarily permit "entry of certain foreign persons from within the United States who have entered that country through a port of entry or who have been apprehended between ports of entry and interviewed by the authorities of migration authorities of that country, and have received a notice to attend a hearing before a judge." AR 149.

14. On January 25, 2019, DHS issued guidance for implementation of MPP. Three days later, DHS began implementing MPP, initially in San Diego, California, then El Paso, Texas, and Calexico, California, and then nationwide. AR 155, 156, 684.

15. Under the issued guidance, DHS officers determined whether aliens were amenable to the MPP process. If they were, the DHS officer could issue a No-

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[6] Section 235(b)(2)(C) of the Immigration and Nationality Act (INA)

tice to Appear (NTA), place the alien into a removal proceeding under Section 1229a, and then return the alien to Mexico to await removal proceedings *unless* the alien affirmatively demonstrated a fear of persecution or torture in Mexico. AR 161.

16. Certain categories of noncitizens were not amenable to MPP: unaccompanied alien children—as defined in 6 U.S.C. § 279(g); citizens or nationals of Mexico; noncitizens processed for expedited removal under 8 U.S.C. § 1225(b)(1); noncitizens "in special circumstances"; returning lawful permanent residents seeking admission; noncitizens with an advance parole document or in parole status; noncitizens with known physical or mental health issues; noncitizens with a criminal history or a history of violence; noncitizens of interest to the Government of Mexico or the United States; any noncitizen who demonstrated that they are more likely than not to face persecution or torture in Mexico; and other noncitizens at the discretion of the Port Director or Border Patrol counterpart. AR 161.

17. On February 12, 2019, U.S. Immigration and Customs Enforcement issued guidance on MPP to its field offices, in anticipation of expansion of MPP across the border. AR 165-70. After June 7, 2019, DHS began constructing temporary structures at the southern border in Brownsville and Laredo, Texas, to hold immigration hearings for noncitizens subject to MPP, and notified Congress of their completion in August 2019. These temporary facilities functioned as virtual courtrooms, with immigration judges appearing by video connection from their courthouses within the United States. AR 208, 684.

C. The Department of Homeland Security found MPP to be effective

18. Upon review, DHS found MPP to be effective. In its October 28, 2019, Assessment of the Migrant Protection Protocols, DHS stated that "MPP has demonstrated operational effectiveness." AR 683. DHS noted that it had "returned more than 55,000 aliens to Mexico under MPP" and that "MPP has been an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system." *Id.*

19. Specifically, DHS found "[s]ince a recent peak of more than 144,000 in May 2019, total enforcement actions . . . have decreased by 64% through September 2019." *Id.* Moreover, DHS found "[b]order encounters with Central American[7] families—who were the main driver of the crisis and comprise a majority of MPP-amenable aliens—have decreased by approximately 80%." *Id.*

20. Additionally, DHS stated "although MPP is one among many tools that DHS employed in response to the border crisis, DHS has observed a connection between MPP implementation and decreasing enforcement actions at the border—including a rapid and substantial decline in apprehensions in those areas where the most amenable aliens have been processed and returned to Mexico pursuant to MPP." *Id.*

21. In addition to finding MPP effective at deterring border encounters and decreasing the number of illegal

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[7] These countries are also sometimes referred to as the "Northern Triangle." The Northern Triangle countries are Guatemala, Honduras, and El Salvador.

aliens present in the United States, DHS also found that "MPP is restoring integrity to the [immigration] system." *Id.* As examples of this restoration, DHS found that "MPP returnees with meritorious claims can be granted relief or protection within months, rather than remaining in limbo for years while awaiting immigration court proceedings in the United States." *Id.* at 684. And "MPP returnees who do not qualify for relief or protection are being quickly removed from the United States. Moreover, aliens without meritorious claims—which no longer constitute a free ticket into the United States—are beginning to voluntarily return home." *Id.*

22. DHS did recognize that there were some flaws in the original implementation of MPP. On October 25, 2019—just three days before releasing its assessment of MPP—DHS released the Migrant Protection Protocols Red Team Report. AR 192. This report found several issues and recommended improvements—but not termination—of MPP. Some of these improvements included standardizing documents and protocols to ensure aliens received a fair process and hearing on their claims. AR 192-201.

23. MPP also faced legal challenges. In *Wolf v. Innovation Law Lab*, a district court enjoined the implementation of MPP. 366 F. Supp. 3d 1110 (N.D. Cal. 2019). The Ninth Circuit stayed that injunction, but a separate panel affirmed the injunction on the merits. 951 F.3d 1073 (9th Cir. 2020). The Ninth Circuit then granted a stay as far as the district court's injunction applied outside the territorial limits of the Ninth Circuit but otherwise denied the government's request for a stay. 951 F.3d 986 (9th Cir. 2020).

24. But the Supreme Court stayed the injunction in full granting the Trump Administration a legal victory. 140 S. Ct. 1564 (Mar. 11, 2020). The Supreme Court also granted certiorari. 141 S. Ct. 617 (Oct. 19, 2020). The case was later dismissed from the merits docket as moot. *Wolf*, 2021 WL 2520313, at *1 (June 20, 2021) (citing *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950)).

25. But throughout the legal challenges, DHS found MPP was meeting its intended goals. AR 554. First, DHS found "MPP provides a streamlined pathway for aliens to defensively apply for protection or relief from removal, while upholding *non-refoulement* obligations through screenings of fear in Mexico." *Id.* Second, DHS found "MPP provides a pathway for aliens to proceed efficiently through the U.S. immigration court processes, as compared to non-detained dockets." *Id.* at 555. Third, DHS found "MPP decreases the number of aliens released into the interior of United States for the duration of their U.S. removal proceedings." *Id.* And fourth, DHS found "MPP implementation contributes to decreasing the volume of inadmissible aliens arriving in the United States on land from Mexico—including those apprehended between the [ports of entry]." *Id.*

26. By December 31, 2020, DHS had enrolled 68,039 aliens in the MPP program. *Id.*[8] DHS concluded its

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[8] The COVID-19 pandemic accounted for the markedly fewer aliens enrolled in MPP in 2020. Due to the pandemic, MPP removal proceedings began to be postponed on April 22, 2020. AR 466. Additionally, beginning in March 2020, DHS assisted in the enforcement of Title 42—a statutory provision not relevant to this suit—to expel certain amenable noncitizens from Mexico and the Northern Triangle countries back to Mexico, and certain amenable

review of MPP and found it to be a "cornerstone" of DHS's efforts to restore integrity to the immigration system:

> These unprecedented [immigration] backlogs have strained DHS resources and challenged its ability to effectively execute the laws passed by Congress and deliver appropriate immigration consequences: those with meritorious claims can wait years for protection or relief, and those with non-meritorious claims often remain in the country for lengthy periods of time.
>
> This broken system has created perverse incentives, with damaging and far-reaching consequences for both the United States and its regional partners. In Fiscal Year 2019, certain regions in Guatemala and Honduras saw 2.5% of their population migrate to the United States, which is an unsustainable loss for these countries.
>
> MPP is one among several tools DHS has employed effectively to reduce the incentive for aliens to assert claims for relief or protection, many of which may be meritless, as a means to enter the United States to live and work during the pendency of multi-year immigration proceedings. Even more importantly, MPP also provides an opportunity for those entitled to relief to obtain it within a matter of months. MPP, therefore, is a cornerstone of DHS's ongoing efforts to restore integrity to the immigration system—and

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noncitizens from other countries to their countries of origin if Mexico will not accept them, with limited exceptions. AR 621-22, 631. Title 42 expulsions accounted for 102,234 and 111,175 repatriations in 2020 and the first quarter of 2021. AR 660.

of the United States' agreement with Mexico to address the crisis at our shared border.

AR 687.

D. During the transition period, the outgoing Trump Administration entered into an Agreement with Texas and warned the incoming Biden Administration of the dangers of ending MPP

1. DHS and Texas enter into an Agreement

27. Shortly before leaving office, the Trump Administration entered into a Memorandum of Understanding (the "Agreement") between Texas and DHS. App. 317-26. The Agreement was finalized on January 8, 2021. *Id.* at 325.

28. The Agreement purportedly established "a binding and enforceable commitment between DHS and Texas," in which Texas agreed to "provide information and assistance to help DHS perform its border security, legal immigration, immigration enforcement, and national security missions." *Id.* at 319. In return, DHS agreed "to consult Texas and consider its views before taking any action, adopting or modifying a policy or procedure, or making any decision that could:

(1) reduce, redirect, reprioritize, relax, or in any way modify immigration enforcement;

(2) decrease the number of ICE agents performing immigration enforcement duties;

(3) pause or decrease the number of returns or removals of removable or inadmissible aliens from the country;

(4) increase or decline to decrease the number of lawful, removable, or inadmissible aliens;

(5) increase or decline to decrease the number of releases from detention;

(6) relax the standards for granting relief from return or removal, such as asylum;

(7) relax the standards for granting release from detention;

(8) relax the standards for, or otherwise decrease the number of, apprehensions or administrative arrests;

(9) increase, expand, extend, or in any other way change the quantity and quality of immigration benefits or eligibility for other discretionary actions for aliens; or

(10) otherwise negatively impact Texas.

In case of doubt, DHS will err on the side of consulting with Texas." *Id.* at 319.

29. To enable this consultation process, the Agreement requires DHS to "[p]rovide Texas with 180 days' written notice . . . of any proposed action" subject to the consultation requirement. *Id.* at 320. That would give Texas "an opportunity to consult and comment on the proposed action." *Id.* After Texas submitted its views, "DHS will in good faith consider Texas's input and provide a detailed written explanation of the reasoning behind any decision to reject Texas's input before taking any action" covered by the Agreement. *Id.*

30. The parties agree DHS did not follow these procedures when it issued the June 1 Memorandum. But

DHS did send a letter that purported to terminate the Agreement "effective immediately" on February 2, 2021. *Id.* at 347-48. Texas avers that the termination letter also did not comply with the Agreement and chose to interpret a letter as a notice of intent to terminate. ECF No. 53 at 21. Accordingly, even under Texas's view, the Agreement is only "binding until August 1, 2021." *Id.*

2. The Biden Administration was warned of the consequences of terminating MPP

31. During the latter half of 2020, the Biden transition team met with career staff from DHS. According to Mark Morgan—who is former Acting Commissioner of CBP, former Acting Director of ICE, and Marine—CBP "career employees . . . fully briefed the Biden transition officials on the importance of MPP and the consequences that would follow a suspension of MPP." App. 399. Morgan stated: "transition personnel were specifically warned that the suspension of the MPP, along with other policies, would lead to a resurgence of illegal aliens attempting to illegally enter our [southwest border]." *Id.* And officials were also "warned smuggling organizations would exploit the rescission and convince migrants the U.S. borders are open. They were warned the increased volume was predictable and would overwhelm Border Patrol's capacity and facilities, as well as HHS facilities." *Id.*

E. The Biden Administration first suspended, then terminated MPP.

32. The incoming Biden Administration (1) knew MPP had been found effective by DHS as a matter of policy, (2) knew MPP had been successfully defended in court,

and (3) had received warnings about the consequences that would attend the repealing of MPP. But the Biden Administration suspended new enrollments in MPP on its first day in office. On January 20, 2021, the Acting Secretary of DHS wrote that "[e]ffective January 21, 2021, the Department will suspend new enrollments in the Migrant Protection Protocols (MPP), pending further review of the program. Aliens who are not already enrolled in MPP should be processed under other existing legal authorities." AR 581.

33. Since that day, DHS has not offered a single justification for suspending new enrollments in the program during the period of review. Indeed, when the original administrative record was filed prior to the June 1 Memorandum's issuance, it contained only a single document —the January 20 Memorandum. *See* ECF No. 45. There was no cost-benefit analysis or any sort of reasoned decisionmaking for a court to review.

34. But the flaws of the January 20 Memorandum were mooted when DHS completed its review and issued the June 1 Memorandum that terminated the MPP program. AR 1-7; ECF No. 52 at 3 ("[T]he January 20 Memorandum expired upon the completion of DHS's review of the program.").

35. In the June 1 Memorandum, DHS Secretary Mayorkas found that his "review confirmed that MPP had mixed effectiveness in achieving several of its central goals and that the program experienced significant challenges." AR 3.

36. In particular, Secretary Mayorkas made several conclusions. First, the Secretary "determined that MPP

does not adequately or sustainably enhance border management in such a way as to justify the program's extensive operational burdens and other shortfalls." *Id.*

37. Second, the Secretary was concerned that MPP did not ensure that aliens waiting in Mexico were able to attend their immigration proceedings. "The focus on speed was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their immigration proceedings." *Id.* at 4. The Secretary noted that "[i]n particular, the high percentage of cases completed through the entry of *in absentia* removal orders (approximately 44 percent, based on DHS data) raises questions for me about the design and operation of the program." *Id.*

38. Third, the Secretary found that MPP was "intended to reduce burdens on border security personnel and resources, but over time the program imposed additional responsibilities that detracted from the Department's critically important mission sets." *Id.* The Secretary also added that "[a] number of the challenges faced by MPP have been compounded by the COVID-19 pandemic." *Id.* The Secretary concluded by stating "as a result, any benefits the program may have offered are now far outweighed by the challenges, risks, and costs that it presents." *Id.*

39. The June 1 Memorandum contained no discussion or analysis of DHS's previous assessment that MPP removed "perverse incentives" and decreased the number of aliens attempting to illegally cross the border.

40. The June 1 Memorandum contained no discussion or analysis regarding DHS's ability to fulfill its statutory obligation to detain certain classes of aliens in the absence of MPP.

F. The termination of MPP has and will continue to increase the number of aliens being released into the United States and has and will continue to impose harms on Plaintiff States Texas and Missouri

1. The termination of MPP increases the number of aliens present in the United States

41. First, Defendants' termination of MPP necessarily increases the number of aliens present in the United States regardless of whether it increases the absolute number of would-be immigrants. MPP authorized the return of certain aliens to Mexico. Without MPP, Defendants are forced to release and parole aliens into the United States because Defendants simply do not have the resources to detain aliens as mandated by statute. App. 307 ("[R]esource constraints during the [May 2019] crisis, as well as other court-ordered limitations on the ability to detain individuals, made many releases inevitable."); App. 330 n.7 ("Continued detention of a migrant who has more likely than not demonstrated credible fear is not in the interest of resource allocation.").

42. Second, the termination of MPP has contributed to the current border surge. DHS previously acknowledged that "MPP implementation contribute[d] to decreasing the volume of inadmissible aliens arriving in the United States on land from Mexico." AR 555. MPP removed the "perverse incentives" which enticed aliens with "a free ticket into the United States." AR

684, 687; Trial Tr. 147:23-25 (Defense counsel: "I think it's fair to say that [MPP] probably deterred some individuals from coming to the United States.").

43. Since MPP's termination, the number of enforcement encounters on the southwest border has skyrocketed. Defendants' data shows encounters jumping from 75,000 in January 2021, when MPP was suspended, to about 173,000 in April 2021, when this case was filed. AR 670. Since then, encounters have continued to increase: CBP data shows nearly 189,000 encounters occurred in June 2021. U.S. Customs and Border Protection, *Southwest Land Border Encounters*, CBP (Aug. 3, 2021), https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters; FRE 201.[9]

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[9] Moreover, the Court takes judicial notice of the sworn statement of David Shahoulian, Assistant Secretary for Border and Immigration Policy at DHS—filed in the District Court of the District of Columbia in Title 42 related litigation. ECF No. 113-1 at 7–9, No. 1:21-CV-100-EGS (D.D.C. Aug. 2, 2021) (emphasis added). The Court finds David Shahoulian is a "source[] whose accuracy cannot reasonably be questioned." FRE 201.

> In May and June 2021, for example, CBP recorded over 180,000 and 188,000 encounters, respectively, at the southwest border . . . These constitute the highest numbers of monthly encounters recorded by CBP in more than twenty years, including during previous surges when the Department was not constrained by COVID-19 capacity considerations. As noted above, due to COVID-19-related guidance, border facilities are currently expected to operate at only 25 to 50 percent capacity, depending on individual facility infrastructure and facility type.
>
> Based on preliminary data, the number of border encounters continued to increase in July 2021. Over the first 29 days of July,

44. Even if the termination of MPP played *no* role in the increasing number of migrants, the lack of MPP as a tool to manage the influx means that more aliens will be released and paroled into the United States as the surge continues to overwhelm DHS's detainment capacity.

45. Texas is a border state. But Missouri also faces an increased number of aliens due to the termination of MPP. Statistically, for every 1,000 aliens who remain unlawfully in the United States, fifty-six end up residing in Missouri. App. 006.

2. Texas and Missouri have suffered injuries because of the increased numbers of aliens present in their states

a. Driver's Licenses

46. As a result of the termination of MPP, some aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and will obtain Texas driver's licenses. AR555; AR587-588. Texas provides driver's licenses to aliens so long as their presence in the United States is authorized by the federal government. App. 426. Each additional customer

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CBP encountered an average of **6,779** individuals per day, including 616 unaccompanied children and 2,583 individuals in family units. Overall, according to preliminary data, CBP is likely to have encountered about 210,000 individuals in July, the highest monthly encounter number since Fiscal Year 2000. July also likely included a record number of unaccompanied child encounters, exceeding 19,000, and the second-highest number of family unit encounters, at around 80,000.

. . .

Based on current trends, the Department expects that total encounters this fiscal year are likely to be **the highest ever recorded**.

seeking a Texas driver's license imposes a cost on Texas. App. 427.

47. Because "driving is a practical necessity in most of" Texas, "there is little doubt that many" aliens present in Texas because of MPP's termination would apply for driver's licenses. *Texas v. United States*, 809 F.3d 134, 156 (5th Cir. 2015). The Chief of the Texas Department of Public Safety's Driver License Division gave estimates of the costs of providing additional driver's licenses. App. 428.

48. Missouri likewise faces a cost of verifying lawful immigration status for each additional customer seeking a Missouri driver's license. App. 006.

b. Education

49. Some school-age child aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States. AR423; AR431; AR496; AR547; AR617. Texas estimates that the average funding entitlement for 2021 will be $9,216 per student in attendance for an entire school year. App. 440. For students qualifying for bilingual education services, it would cost Texas $11,432 for education per child for attendance for an entire school year. *Id.* The total costs to Texas (and Missouri) of providing public education for illegal alien children will rise in the future as the number of illegal alien children present in the State increases. App. 442.

c. Healthcare

50. Some aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and will use state-funded healthcare services or benefits in Texas and Missouri. AR555; AR587-

588; App. 006. Texas funds three healthcare programs that require significant expenditures to cover illegal aliens: the Emergency Medicaid Program, the Family Violence Program, and the Texas Children's Health Insurance Program. App. 450. Texas is required by federal law to include illegal aliens in its Emergency Medicaid Program. 42 C.F.R. § 440.255(c). Texas also incurs costs for uncompensated care provided by state public hospital districts to illegal aliens. App. 452. The total costs to the State will increase as the number of aliens within the state increases. *Id.*

51. Missouri is similarly situated. App. 006.

d. Law enforcement and correctional costs

52. Some aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and will commit crimes in Texas and Missouri. AR555; AR587-588; App. 006; App. 362-63; App. 372; App. 388. In 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, with less than $15 million reimbursed by the federal government. App. 460. "[T]o the extent the number of aliens in [Texas Department of Criminal Justice] custody increases, TDCJ's unreimbursed expenses will increase as well." App. 460.

53. Some aliens who would have otherwise been enrolled in MPP are victimized by human traffickers in Texas. App. 406; App. 418. Aliens "are particularly susceptible to being trafficked." App. 419. Increasing the number of aliens "present in the United States, including those claiming asylum, is likely to increase hu-

man trafficking." App. 423; App. 409. Missouri is likewise a destination and transit State for human trafficking of migrants from Central America who have crossed the border illegally. App. 409-410.

54. Human trafficking causes fiscal harm to Texas and Missouri. App. 418-19.

e. *Parens patriae*

55. Aliens who would have otherwise been enrolled in MPP are being paroled into the United States. App. 307; App.330 n.7; AR 183-84. Aliens paroled into the United States are eligible for work authorization thereby increasing the supply of workers by some amount. App. 337; App. 555. Some aliens who would have otherwise been enrolled in MPP will work for employers in Texas or Missouri. AR 555; AR 587-88; App. 362-63; App. 372; App. 388.

IV. CONCLUSIONS OF LAW

The Court's opinion proceeds in the following order: (1) the Court finds that it has jurisdiction and Plaintiffs have established standing; (2) the Court concludes there are no other jurisdictional or procedural hurdles to judicial review of Plaintiffs' claims; (3) the Court proceeds to the merits of Plaintiffs' APA and statutory claims; (4) and then the Court declines to address the merits of Plaintiffs' constitutional and Agreement-based claims.

A. Plaintiffs have standing

1. Federal courts are courts of limited jurisdiction which possess only that power authorized by Constitution and statute. *Xitronix Corp. v. KLA-Tencor Corp.*, 916 F.3d 429, 435 (5th Cir. 2019). "The requirement that jurisdiction be established as a threshold matter

spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception." *Id.* (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998)).

2. "[T]he states have the burden of establishing standing," *Texas*, 809 F.3d at 150, by showing "(1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014).

3. "Each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation" *Lujan v. Defender of Wildlife*, 504 U.S. 555, 561 (1992). "And at the final stage, those facts (if controverted) must be 'supported adequately by the evidence adduced at trial.'" *Id.* (quoting *Gladstone, Relators v. Village of Brentwood,* 441 U.S. 91, 115 n. 31 (1979)).

4. Here, the Court consolidated the preliminary injunction hearing with trial on the merits, so the preponderance of evidence standard applies. *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 367 (5th Cir. 2020).

1. Texas and Missouri have suffered harms that are concrete, non-speculative, and are traceable to Defendants' conduct—and are redressable.

5. First, Texas and Missouri have both shown that they have suffered and will continue to suffer "concrete

and particularized" injuries attributable to Defendants' actions. *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007).

6. Plaintiffs have established that the termination of MPP will increase the cost of providing driver's licenses to aliens released and paroled into the United States, inflicting on the States an actual and imminent injury. *See Texas*, 809 F.3d at 155 ("[L]icenses issued to beneficiaries would necessarily be at a financial loss.").

7. Second, Plaintiffs' injuries are fairly traceable to the actions of Defendants. As stated above, the termination of MPP necessarily increases the number of aliens released and paroled into the United States and the Plaintiff States specifically.

8. Paroled and released aliens seeking to obtain driver's licenses is the "the predictable effect of Government action on the decisions of third parties." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019); *Texas,* 809 F.3d at 156 ("[T]here is little doubt that many [aliens] would [apply for driver's licenses] because driving is a practical necessity in most of the state.").

9. Third, the Court has the power to redress Plaintiffs' injuries. The APA allows the Court to "set aside agency action . . . [that is] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Additionally, injunctive relief authorizing DHS officers to return aliens to Mexico via the MPP program pending the resolution of their asylum claims would decrease the number of aliens paroled and released into the United States and into Plaintiff States specifically. Consequently, the amount of fiscal injury suffered by Plaintiffs would decrease.

10. Accordingly, the Court finds Plaintiffs have more likely than not established Article III standing under the driver's license theory of injury approved by applicable Fifth Circuit precedent.[10]

11. The same line of reasoning applies to the increased healthcare costs, education costs, and enforcement and correctional costs that Plaintiffs will suffer because of the termination of MPP.

2. Plaintiffs have not established parens patriae standing

12. Texas and Missouri have not established by a preponderance of the evidence that they are entitled to *parens patriae* standing.

13. *Parens patriae* is a type of standing that allows a state to sue a defendant to protect the interests of its citizens. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982).

14. Preliminarily, in *Alfred L. Snapp*, the Supreme Court stated "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Id.* at 610 n.16 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923)). This so-called *Mellon* bar does not sweep as widely as it may seem. In *Massachusetts v. EPA*, the Supreme Court crafted a distinction: "There is a critical difference between allowing a

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[10] Even if Missouri has failed to establish standing, it does not prevent the Court from proceedings to the merits because Texas has standing. *See, e.g.*, *Texas v. United States*, No. 1:18-CV-00068, 2021 WL 3025857, at *18 (S.D. Tex. July 16, 2021) (Hanen, J.) ("Texas has standing. Since one of the Plaintiff States has standing, this Court need not analyze the standing of any other plaintiff."); *Massachusetts*, 549 U.S. at 518.

State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do)." 549 U.S. at 520 n.17 (citing *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 447 (1945)).

15. Here, Texas is asserting rights *under* the INA rather than attempting to protect its citizens from the *operation* of the INA. Accordingly, the *Mellon* bar does not apply. *See, e.g.*, *Texas v. United States*, 328 F. Supp. 3d 662, 694-98 (S.D. Tex. 2018).

16. "To have [*parens patriae*], standing the State must assert an injury to what has been characterized as a 'quasi-sovereign' interest, which is a judicial construct that does not lend itself to a simple or exact definition." *Alfred L. Snapp*, 262 U.S. at 601. The Supreme Court then articulated two general categories of "quasi-sovereign" interests: a state has an interest "in the health and well-being—both physical and economic—of its residents in general" and a state has an "interest in not being discriminatorily denied its rightful status within the federal system." *Id.* at 607.

17. Plaintiffs aver that they have standing under the first category because they allege the termination of MPP forces their citizens to compete in distorted labor markets in which it is more difficult to obtain a job. ECF No. 53 at 27-28. The Court finds this is a valid "quasi-sovereign" interest. *Texas*, 328 F. Supp. 3d at 698.

18. Plaintiffs fail, however, to prove by a preponderance of the evidence that the termination of MPP caused or will cause a distorted labor market. Plaintiffs' entire

argument rests on the proposition that "the basic economic law of supply and demand applies to the labor market, so an increase in the supply of illegal aliens authorized to work will harm the employment prospects of Texans and Missourians competing with them." ECF No. 53 at 28. There are no citations to studies, articles, analyses, or anything else that would allow the Court to conclude that the termination of MPP has distorted Texas's or Missouri's labor markets. *See, e.g.*, *Texas v. United States*, No. 1:18-CV-068, 2021 WL 3025857, at *15 (S.D. Tex. July 16, 2021) (discussing the addition of 114,000 work-eligible individuals who "Texas employers are financially incentivized under the [Affordable Care Act] to hire.").

19. Plaintiffs' simple invocation of the law of supply and demand is not enough for the Court to conclude that Plaintiffs carried their burden at the *merits* stage.

3. Plaintiffs are entitled to special solicitude

20. Texas and Missouri are entitled to special solicitude because "States are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts v. EPA*, 549 at 518.

21. The Fifth Circuit has identified two additional factors that must be present in a case for States to be entitled to special solicitude: the presence of a procedural right to challenge agency action and the invasion of a "quasi-sovereign" interest. *Texas*, 809 F.3d at 152-53.

22. First, the Fifth Circuit has already held that the APA provides Texas the procedural right needed for special solicitude. *Id.* at 152 ("The Clean Air Act's review provision is more specific than the APA's, but the

latter is easily adequate to justify 'special solicitude' here.").

23. Second, the termination of MPP "affects the states' 'quasi-sovereign' interests by imposing substantial pressure on them to change their laws, which provide for issuing driver's licenses to some aliens and subsidizing those licenses." *Id.* at 153. As the Supreme Court noted: "When a State enters the Union, it surrenders certain sovereign prerogatives." *Massachusetts v. EPA*, 549 at 519. Like Massachusetts, Texas and Missouri surrendered their power over immigration when they joined the Union. *See Arizona v. United States*, 567 U.S. 387, 394-400 (2012). Plaintiffs States, like Massachusetts, "now rely on the federal government to protect their interests." *Texas*, 809 F.3d at 154.

24. Accordingly, "[t]hese parallels confirm that [the termination of MPP] affects the states 'quasi-sovereign' interests." *Id.*

25. As a result, although unnecessary to the Court's finding of standing, the Court finds Texas and Missouri are entitled to special solicitude in its standing analysis.

B. There are no jurisdiction or procedural hurdles to judicial review

1. The termination of MPP is final agency action

26. The APA states that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. In the Fifth Circuit, "whether an agency action is final is a jurisdictional issue, not a merits question." *Peoples Nat'l Bank v. Office of the Comptroller of the Currency of the U.S.*, 362 F.3d 333, 336 (5th Cir. 2004). "The Supreme Court has

long taken a pragmatic approach to finality." *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019) (internal marks omitted).

27. Agency action is "final" only if it both (1) "consummate[es] the agency's decisionmaking process" and (2) determines "rights or obligations" or produces "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

28. The June 1 Memorandum meets both *Bennett* standards and is thus an action amenable to judicial review.

29. First, the parties do not contest that the June 1 Memorandum marks the consummation of the decisionmaking process. AR 002 (The June 1 Memorandum was published after the Secretary "completed the further review undertaken pursuant to Executive Order 14010.").

30. Second, the June 1 Memorandum produces legal consequences and determines rights and obligations. *EEOC*, 933 F.3d at 445 ("[W]hether the agency action binds the *agency* indicates whether legal consequences flow from that action.").

31. The June 1 Memorandum had the immediate legal consequence of "terminating the MPP program." AR 002.

32. The June 1 Memorandum had the immediate legal consequence of rescinding "the Memorandum issued by Secretary Nielsen dated January 25, 2019 entitled 'Policy Guidance for Implementation of the Migrant Protection Protocols,' and the Memorandum issued by Acting

Secretary Pekoske dated January 20, 2021 entitled 'Suspension of Enrollment in the Migrant Protection Protocols Program.'" AR 007.

33. The June 1 Memorandum directed "DHS personnel, *effective immediately*, to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives issued to carry out MPP." *Id.* (emphasis added).

34. Moreover, the June 1 Memorandum determined rights and obligations. The June 1 Memorandum prevents DHS line officers from using MPP, a tool that was previously available to them. "Where agency action withdraws an entity's previously-held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action." *EEOC*, 933 F.3d at 442 (quoting *Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 56 (D.C. Cir. 2016)).

35. Accordingly, the June 1 Memorandum constitutes final agency action.

2. No statute precludes judicial review

36. Judicial review is presumptively available under the APA "except to the extent that statutes preclude judicial review." 5 U.S.C 701(a)(1); *Texas*, 809 F.3d at 163 ("[T]here is a 'well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action,' and we will accordingly find an intent to preclude such review only if presented with 'clear and convincing evidence.'") (quoting *Reno v. Catholic Soc. Servs., Inc.,* 509 U.S. 43, 63-64 (1993)).

37. "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the

statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Id.* at 164 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984)).

38. First, 8 U.S.C. § 1252(g) does not preclude judicial review.

39. Section 1252(g) states that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."

40. Texas and Missouri are not bringing this case on "behalf of any alien." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) ("We have previously rejected as 'implausible' the Government's suggestion that § 1252(g) covers 'all claims arising from deportation proceedings' or imposes 'a general jurisdictional limitation.'") (quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999)). This is further confirmed by the fact that the remedy ordered by the Court in this case does not affect the status of any alien or immigration proceeding.

41. Second, 8 U.S.C. § 1252(b)(9) does not preclude judicial review.

42. Section 1252(b)(9) states: "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from *any action taken or proceeding* brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this Section." (emphasis added). This

Section functions as a limit on where aliens can seek judicial review of their immigration proceedings.

43. But the Supreme Court has recently stated: "As we have said before, § 1252(b)(9) does not present a jurisdictional bar where those bringing suit are not asking for review of an order of removal, the decision to seek removal, or the process by which removability will be determined." *Regents*, 140 S. Ct. at 1907 (quoting *Jennings v. Rodriguez*, 138 S. Ct. 830, 841, 875-76 (2018) (plurality opinion) (internal marks omitted)). "And it is certainly not a bar where, as here, the parties are not challenging any removal proceedings." *Id.*

44. Third, 8 U.S.C. § 1252(f)(1) does not preclude judicial review.

45. Section 1252(f)(1) states: "No court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter."

46. But this section does not apply because Plaintiffs are not seeking to *restrain* Defendants from enforcing Section 1225. Plaintiffs are attempting to make Defendants *comply* with Section 1225.

47. Fourth, 8 U.S.C. § 1252(a)(2)(B)(ii) does not preclude judicial review.

48. Section 1252(a)(2)(B)(ii) states: "no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under Section 1158(a) of this title."

49. But Plaintiffs are not challenging the substantive exercise of the Attorney General's discretion. Instead, they are challenging whether the government complied with its legal obligations under the APA in terminating MPP. *See e.g.*, *Nora v. Wolf*, No. 20-0993, 2020 WL 3469670, at *7 (D.D.C. June 25, 2020) ("But Claim One does not take on the individual decisions made to return each plaintiff to Mexico; it is directed at an agency decision—the decision to "expand" MPP implementation to Tamaulipas."); *E.O.H.C. v. Sec'y U.S. Dep't of Homeland Sec.*, 950 F.3d 177, 191 (3d Cir. 2020) (same); *Cruz v. Dep't of Homeland Sec.*, No. 19-CV-2727, 2019 WL 8139805, at *4 (D.D.C. Nov. 21, 2019) (same).

50. This reading of the statute is further confirmed by Section 1252(a)(2)(B)(ii)'s title: "**Denials of discretionary relief**." This title indicates the objective of the statute is to prevent aliens from challenging the federal government's refusal to grant discretionary relief. *Texas*, 809 F.3d at 164.

51. Lastly, the overall structure of the INA does not evidence a clear intent by Congress to preclude judicial review. *Texas*, 809 F.3d at 163. Congress's choice to expressly preclude certain types of claims does not show by "clear and convincing evidence" that Congress also meant to implicitly preclude all *other* types of claims. *Id.*; *see Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (An "express exception . . . implies that there are no other[s]"); ANTONIN SCALIA & BRYAN A. GARNER, *Reading Law* 107 (2012) ("Negative-Implication Canon[:] The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*).").

52. Accordingly, no statute or statutory scheme precludes judicial review of Plaintiffs' APA claim.

3. The termination of MPP is not an agency action committed to agency discretion by law

53. The APA precludes review "of certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion.'" *Texas*, 809 F.3d at 165 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)); 5 U.S.C. § 701(a)(2).

54. Section 1225(b)(2)(c) states: "In the case of an alien described in subparagraph (A) who is arriving on land . . . from a foreign territory contiguous to the United States, [DHS] *may* return the alien to that territory pending a proceeding under Section 1229a of this title." (emphasis added). But the mere presence of the word "may" does not place the agency's actions outside of the ambit of judicial review. *Regents*, 140 S. Ct. at 1905 ("The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so.").

55. Rather, "[t]o honor the presumption of review, [courts] read the exception in § 701(a)(2) quite narrowly, confining it to those rare administrative decisions traditionally left to agency discretion." *Id.* (internal citations omitted).

56. First, this limited category of unreviewable actions includes an agency's decision not to institute enforcement proceedings. *Id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985)). But the decision to terminate MPP "is more than a non-enforcement policy." *Regents*, 140 S. Ct. at 1907. Although the termination of

MPP *itself* does not confer affirmative benefits, the interaction between the termination of MPP and the lack of detention capacity necessarily means more aliens will be released and paroled into the Plaintiff States. And parole *does* create affirmative benefits for aliens such as work authorization. App. 337; *Texas*, 809 F.3d at 167 ("Likewise, to be reviewable agency action, DAPA *need not directly confer* public benefits.") (emphasis added).

57. Moreover, the MPP program is not about enforcement proceedings *at all*. Any alien eligible for MPP has already been placed into enforcement proceedings under Section 1229a. The only question MPP answers is *where* the alien will *be* while the federal government pursues removal—in the United States or in Mexico.

58. Second, under Fifth Circuit precedent, agency decisions are "completely unreviewable under the committed to 'agency discretion by law' exception" if "the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised." *Texas*, 809 F.3d at 168.

59. The INA provides guidance as to how DHS should exercise its discretion "according to the general requirements of reasoned agency decisionmaking." *New York*, 139 S. Ct. at 2569. Section 1225 imposes mandatory-detention obligations on Defendants. § 1225(b)(2)(A) ("[T]he alien shall be detained"); AR 682 ("The law provides for mandatory detention of aliens who unlawfully enter the United States between ports of entry if they are placed in expedited removal proceedings."). To avoid violating Section 1225's obligations, DHS must use its authority to return aliens to Mexico when an influx of aliens exceeds DHS's detention capacity. These statutory obligations provide courts guidance on how DHS's

contiguous-territory-return authority should be exercised.

60. DHS does not *have* to use this authority; it could always detain every alien required by Section 1225. But if it is incapable of detaining such a large number, then the statute implicitly demands, or, at the very least, directs DHS use its authority to return certain aliens to Mexico.

61. Accordingly, the decision to terminate MPP is "not one of those areas traditionally committed to agency discretion." *New York*, 139 S. Ct. at 2568.

4. Plaintiffs are within the zone of interests of the INA

62. "Because the states are suing under the APA, they 'must satisfy not only Article III's standing requirements, but an additional test: The interest they assert must be arguably within the zone of interests to be protected or regulated by the statute that they say was violated.'" *Texas*, 809 F.3d at 162 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (internal marks omitted)).

63. "That 'test . . . is not meant to be especially demanding' and is applied 'in keeping with Congress's 'evident intent' when enacting the APA 'to make agency action presumptively reviewable.'" *Id.* "The Supreme Court 'has always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff.'" *Id.* "The test forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in

the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.*

64. First, the Court concludes that the proper scope of the zone-of-interest inquiry is the entirety of the INA. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 401 (1987) ("In considering whether the "zone of interest" test provides or denies standing in these cases, we first observe that the Comptroller's argument focuses too narrowly on 12 U.S.C. § 36, and does not adequately place § 36 in the overall context of the National Bank Act."). The Court is "not limited to considering the statute under which respondents sued, but may consider any provision that helps us to understand Congress' overall purposes." *Id.* And, historically, the Fifth Circuit's "treatment of APA claims in the immigration context [] considers the INA as a whole." *Texas v. United States*, No. 6:21-CV-003, 2021 WL 2096669, at *22 (S.D. Tex. Feb. 23, 2021); *Texas*, 809 F.3d at 193 n.80.

65. Here, Plaintiffs are seeking to require the Secretary to engage in reasoned decisionmaking under the APA before the Secretary terminates MPP requiring the state to choose between "spending millions of dollars to subsidize driver's licenses or changing its statutes." *Id.*

66. The INA and Section 1225 in particular protect the states' interest by mandating the detention or return to Mexico of aliens who would otherwise impose costs on the states.

67. Accordingly, "[t]he interests the states seek to protect fall within the zone of interests of the INA." *Texas*, 809 F.3d at 193.

C. The termination of MPP violated the APA

68. The APA prohibits agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This means "[f]ederal administrative agencies are required to engage in reasoned decisionmaking." *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (internal marks omitted). To do so, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 43.

69. Review under the APA's arbitrary and capricious standard is "highly deferential." *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983). District courts must "accord the agency's decision a presumption of regularity" and "are prohibited from substituting [the court's] judgment for that of the agency." *United States v. Garner*, 767 F.2d 104, 116 (5th Cir. 1985).

70. "Because the central focus of the arbitrary and capricious standard is on the rationality of the agency's 'decisionmaking,' rather than its actual decision, '[i]t is

well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" *Garner*, 767 F.2d at 116 (quoting *State Farm*, 463 U.S. at 50). This "record rule" normally dictates that "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

71. But courts allow extra-record evidence when it is necessary to determine whether the agency "considered all the relevant factors." *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981).[11]

72. If a court finds that an administrative agency failed to engage in reasoned decisionmaking, the reviewing court "shall hold unlawful and set aside" such "agency action, findings, and conclusions" as arbitrary and capricious. 5 U.S.C. § 706(2)(A).

1. DHS ignored critical factors

73. "Agency action is lawful only if it rests on a consideration of the relevant factors." *Michigan*, 576 U.S. at 750 (internal marks omitted). Although the June 1 Memorandum claims that Defendants "reviewed all relevant evidence and weighed the costs and benefits of" their decision, AR 006, an agency merely "[s]tating that a factor was considered, however, is not a substitute for considering it." *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986). Courts "do not defer to the agency's conclusory or unsupported suppositions." *United Techs. Corp. v. U.S. Dep't of Def.*, 601

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[11] See ECF No. 76 at 11-12. There, the Court discussed the applicable exceptions to the "record rule" and found that Plaintiffs may submit extra-record evidence on its APA claims.

F.3d 557, 562 (D.C. Cir. 2010). Rather, the Court "must make a "searching and careful" inquiry to determine if [DHS] actually *did* consider [the relevant factors]. *Getty*, 805 F.3d at 155 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)) (emphasis in original).

74. Defendants failed to consider several critical factors.

75. First, the Secretary failed to consider several of the main benefits of MPP. As the Court stated above in the findings of fact, DHS had previously found that "aliens without meritorious claims—which no longer constitute[d] a free ticket into the United States—[were] beginning to voluntarily return home." AR 684. DHS also found that MPP addressed the "perverse incentives" created by allowing "those with non-meritorious claims . . . [to] remain in the country for lengthy periods of time." AR 687.

76. The June 1 Memorandum never once mentions these benefits. At the very least, the Secretary was required to show a reasoned decision for discounting the benefits of MPP. Instead, the June 1 Memorandum does not address the problems created by false claims of asylum or how MPP addressed those problems. Likewise, it does not address the fact that DHS previously found that "approximately 9 out of 10 asylum claims from Northern Triangle countries are ultimately found non-meritorious by federal immigration judges," App. 303, and that MPP discouraged such aliens from traveling and attempting to cross the border in the first place. AR 687.

77. To be sure, DHS could have determined, "in the particular context before it, that other interests and policy concerns outweigh[ed] any [benefits MPP had]. Making that difficult decision was the agency's job, but the agency failed to do it." *Regents*, 140 S. Ct. at 1914.

78. By ignoring its own previous assessment on the importance of deterring meritless asylum applications without "a reasoned analysis for the change," Defendants acted arbitrarily and capriciously. *State Farm*, 463 U.S. at 42.

79. Second, the Secretary also failed to consider the warnings by career DHS personnel that "the suspension of the MPP, along with other policies, would lead to a resurgence of illegal aliens attempting to illegally" cross the border. App. 399.[12] This is all the more important because the Secretary had the opportunity to see if the warnings were predictive because the Secretary suspended enrollments in MPP on January 20, 2021. From that date until June 1, 2021 when MPP was permanently terminated, the Secretary had the opportunity to observe the ever-increasing number of border encounters. U.S. Customs and Border Protection, *Southwest Land Border Encounters*, CBP (Aug. 3, 2021), https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters. But the Secretary never discussed the rise in border encounters in the June 1 Memorandum or discussed why the warnings by career DHS personnel were misguided or incorrect even as the data appeared to show that the career officials were, in fact, prescient.

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[12] The briefing materials from the career officials were not part of the administrative record.

80. Third, the Secretary failed to consider the costs to Plaintiffs and Plaintiffs' reliance interests in the proper enforcement of federal immigration law. The Court has already found that the states face fiscal harm from the termination of MPP. But the fact that Plaintiffs suffer fiscal injuries does not indicate the June 1 Memorandum is arbitrary and capricious. Rather, it is the fact that the agency did *not* consider the costs to the States *at all*.

81. Fiscal burdens on states are "one factor to consider" —even if the agency could conclude that "other interests and policy concerns outweigh" those costs. *Regents*, 140 S. Ct. at 1914 (listing possible valid reliance interests, including damage to a state's coffers; "State and local governments could lose $1.25 billion."). But once again, even though "[m]aking that difficult decision was the agency's job, [] the agency failed to do it." *Id.*

82. Moreover, the Secretary failed to address whether the States had any "reliance interests" in the ongoing implementation of MPP. "When an agency changes course, as DHS did here, it must 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'" *Id.* at 1913 (*Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)). "It would be arbitrary and capricious to ignore such matters." *Id.* (quoting *Encino Motorcars*, 136 S. Ct. at 1800).

83. Fourth, the Secretary also failed to meaningfully consider more limited policies than the total termination of MPP. "When an agency rescinds a prior policy its reasoned analysis must consider the alternatives that are within the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913 (quoting *State Farm*, 463 U.S. at 51)

(internal marks omitted). The entirety of the Secretary's reasoning in not modifying MPP is contained in a single sentence: "I also considered whether the program could be modified in some fashion, but I believe that addressing the deficiencies identified in my review would require a total redesign that would involve significant additional investments in personnel and resources." AR 005. The Secretary does not identify a single example of what a modified MPP would look like or what kind of investment would be needed to modify or scale back MPP. Courts "do not defer to the agency's conclusory or unsupported suppositions." *United Techs. Corp.*, 601 F.3d at 562.

2. DHS's given reasons were arbitrary

84. On the other hand, one of the key reasons the Secretary gave for terminating for MPP is arbitrary. In discounting the expeditious pace at which MPP completed removal proceedings, the Secretary stated:

> It is certainly true that some removal proceedings conducted pursuant to MPP were completed more expeditiously than is typical for non-detained cases, but this came with certain significant drawbacks that are cause for concern. The focus on speed was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their immigration proceedings. In particular, the high percentage of cases completed through the entry of *in absentia* removal orders (approximately 44 percent, based on DHS data) *raises questions for me* about the design and operation of the program.

AR 004 (emphasis added).

85. Certainly, the June 1 Memorandum was concerned about the rate of *in absentia* removals, which were around 44 percent under MPP. And that concern was a key factor in the Secretary's decision to terminate MPP.

86. But the June 1 Memorandum never provides any reason why DHS determined that *in absentia* removals resulted from aliens abandoning *meritorious* asylum claims when DHS previously concluded that *in absentia* removals were a result of aliens abandoning *meritless* claims. AR 684 ("Moreover, aliens without meritorious claims . . . are beginning to voluntarily return home."). Instead, the June 1 Memorandum states only that this data "raises questions." AR 004. But it is the Secretary's job to answer such questions. *Regents*, 140 S. Ct. at 1914.

87. It is true that "the APA "imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies." *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021). But it is also true that the agency must *actually reach* some sort of conclusion. *State Farm*, 463 U.S. at 52 (("Rescission of [agency action] would not be arbitrary and capricious simply because there was no evidence in direct support of the agency's *conclusion* . . . the agency must then exercise its judgment in moving from the facts and probabilities on the record *to a policy conclusion*.") (emphasis added).

88. Merely noting the presence of "questions" provides no "justification for rescinding [MPP] before engaging in a search for further evidence" that could answer those questions. *Id.*; *see also Whitman-Walker Clinic, Inc. v. HHS*, 485 F. Supp. 3d 1, 44 (D.C. Cir. 2020) (finding

agency action arbitrary when the agency "took no position whatsoever on the actual effects that a [policy change] would have").

89. Besides assuming without evidence that the 44% *in absentia* rate was attributable to MPP, the Secretary never explained why 44% is itself an unacceptably high number. The June 1 Memorandum does not consider any relevant comparator for determining whether the rate of in absentia removal orders under MPP was unusually high. *See State Farm*, 463 U.S. at 43 ("[T]he agency must examine the relevant data.").

90. The federal government's data shows similarly high rates of *in absentia* removals *prior to* implementation of MPP. Executive Office for Immigration Review, Adjudication Statistics: *Comparison of* In Absentia *Rates*, https://www.justice,gov/eoir/page/file/1153866/download. For example, the *in absentia* rate was 42% in 2015 and 43% in 2017. *Id.* Failing to exam the relevant data is arbitrary and capricious. Again, "the agency must examine the relevant data." *State Farm*, 463 U.S. at 43.

91. In their briefing, Defendants posit a new theory not mentioned in the June 1 Memorandum. ECF No. 63 at 32-33; *but see Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1014 (5th Cir. 2019) (A court "may uphold agency action only on the grounds that the agency invoked when it took the action."). Defendants argue that 44 percent of MPP cases resulted in *in absentia* removal orders, while only 11 percent of non-MPP cases resulted in *in absentia* orders during the same time period. *Id.* at 33. And the disparity between MPP and non-MPP *in absentia* removal orders is evidence of the ineffectiveness of the program in deterring fraudulent claims. *Id.*

92. But even if the Court considered this argument, it is not persuasive. A higher rate of *in absentia* removal is consistent with DHS's findings that MPP reduced the "perverse incentives" to pursue meritless asylum applications. There is nothing in the record that provides any analysis or reasoning explaining how higher *in absentia* removals resulted from aliens abandoning meritorious, rather than unmeritorious, asylum claims as DHS had previously found. AR 684 ("Moreover, aliens without meritorious claims—which no longer constitute a free ticket into the United States—are beginning to voluntarily return home."); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) ("If the "new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must offer "a reasoned explanation . . . for disregarding facts and circumstances that underlay . . . the prior policy.").

93. Another of the Secretary's stated conclusions is arbitrary. In the June 1 Memorandum, the Secretary justified, in part, terminating MPP because of the court closures caused by the COVID-19 pandemic:

> As immigration courts designated to hear MPP cases were closed for public health reasons between March 2020 and April 2021, DHS spent millions of dollars each month to maintain facilities incapable of serving their intended purpose. Throughout this time, of course, tens of thousands of MPP enrollees were living with uncertainty in Mexico as court hearings were postponed indefinitely. As a result, any benefits the program may have offered are now far outweighed by the challenges, risks, and costs that it presents.

94. The Secretary's reasoning is without any merit. Even according to the June 1 Memorandum, immigration courts were reopened by the end of April 2021. *Past* problems with *past* closures are irrelevant to the decision to *prospectively* terminate MPP in June 2021. This is especially true when the Secretary admits DHS had maintained the facilities during the pandemic.

3. DHS failed to consider or acknowledge the effect terminating MPP would have on its compliance with Section 1225

95. As detailed more below, the June 1 Memorandum failed to consider the effect terminating MPP would have on DHS's ability to detain aliens subject to *mandatory* detention under Section 1225.

96. DHS had previously recognized that "[t]he law provides for mandatory detention of aliens who unlawfully enter the United States between ports of entry if they are placed in expedited removal proceedings." AR 682. But "resource constraints during the crisis, as well as other court-ordered limitations on the ability to detain individuals, made many releases inevitable." *Id.*

97. MPP addressed the resource problem by reducing the number of aliens DHS would have to detain by returning certain aliens to Mexico. *Id.*; AR 687. In terminating MPP, the Secretary was required to consider whether DHS could meet its statutory obligation to detain aliens seeking asylum without MPP as a tool. This the Secretary did not do.

98. Not once did the June 1 Memorandum discuss DHS's mandatory-detention obligation. In fact, a perusal of the *entire* administrative record shows *zero* evidence of DHS's detention capacity. Trial Tr. 114 (DHS

counsel: "the [administrative] record doesn't contain *any* information about detention capacity.") (emphasis added). By "fail[ing] to consider an important aspect of the problem," the Secretary acted arbitrarily and capriciously. *State Farm*, 463 U.S. at 43.

99. For the above stated reasons, Defendants' termination of MPP was arbitrary and capricious and in violation of the APA. Accordingly, the Court concludes that Plaintiffs' APA claim is meritorious.

D. The termination of MPP causes Defendants to violate Section 1225

100. The Court begins by quickly re-summarizing the relevant statutory framework.

101. Section 1225 provides that if an immigration officer determines that an alien subject to expedited removal *does not* have a credible fear of persecution, the alien "*shall be detained* pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (emphasis added).

102. An alien subject to expedited removal and determined by an immigration officer to have a credible fear of persecution "*shall be detained* for further consideration of the application for asylum." § 1225(b)(1)(B)(ii) (emphasis added).

103. An alien seeking admission and not subject to expedited removal, whom an examining immigration officer determines is not clearly and beyond a doubt entitled to be admitted, "*shall be detained*" for removal proceedings. § 1225(b)(2)(A) (emphasis added).

104. Aliens who are not subject to expedited removal and arrive on land from a foreign territory contiguous to the United States may be returned by the government to that territory pending asylum proceedings as an alternative to detention. § 1225(b)(2)(C); AR 682.

105. MPP used this statutory authority to return aliens to Mexico pending their removal proceedings. AR 682.

106. Accordingly, Section 1225 provides the government two options vis-à-vis aliens seeking asylum: (1) mandatory detention; or (2) return to a contiguous territory. Failing to detain or return aliens pending their immigration proceedings violates Section 1225.[13]

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[13] DHS does have the discretion to parole some aliens. But parole is available "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). Nor is parole intended "to replace established refugee processing channels." App. 336. By enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress "specifically narrowed the executive's discretion" to grant parole due to "concern that parole . . . was being used by the executive to circumvent congressionally established immigration policy." *Cruz-Miguel v. Holder*, 650 F.3d 189, 199 & n.15 (2d Cir. 2011). Any class-wide parole scheme that paroled aliens into the United States simply because DHS does not have the detention capacity would be a violation of the narrowly prescribed parole scheme in section 1182 which allows parole "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). *See also* AR 184 ("The number of asylum seekers who will remain in potentially indefinite detention pending disposition of their cases will be almost entirely a question of DHS's detention capacity, and *not whether the individual circumstances* of individual cases warrant release or detention,' [according to UT law professor Steve] Vladeck.") (emphasis added).

107. Without MPP, Defendants only remaining option under Section 1225 is mandatory detention. But DHS admits it does not have the capacity to meet its detention obligations under Section 1225 because of "resource constraints." AR 682; App. 330 n.7 ("Continued detention of a migrant who has more likely than not demonstrated credible fear is not in the interest of resource allocation or justice.").

108. Under *these particular* circumstances, where Defendants cannot meet their detention obligations, terminating MPP necessarily leads to the systemic violation of Section 1225 as aliens are released into the United States because Defendants are unable to detain them.

109. Accordingly, the Court concludes that Plaintiffs' statutory claim is meritorious as well.

E. The Court does not need to decide Plaintiffs' Take Care Clause claim

110. Because the Court will grant Plaintiffs full relief on their APA and statutory claims, there is no further relief related to the June 1 Memorandum that the Court can grant.

111. Where the Court has made a full disposition of the case without addressing a constitutional claim, it will not address the issue. *See Matal v. Tam*, 137 S. Ct. 1744, 1755 ("We have often stressed that it is important to avoid the premature adjudication of constitutional questions and that we ought not to pass on questions of constitutionality unless such adjudication is unavoidable.") (internal marks and citations omitted).

F. The Agreement with Texas has expired and is therefore moot.

112. Because the Court will grant Plaintiffs full relief on their APA and statutory claims, there is no further relief related to the June 1 Memorandum that the Court can grant.

113. Any further agency action responsive to this opinion shall take place after August 1, 2021, which is when Texas agrees the Agreement was terminated. Therefore, the Agreement will not apply to any new agency action either.

114. The Court accordingly dismisses this claim as moot.

V. REMEDIES

115. Having found Plaintiffs' APA and statutory claims are meritorious, it is the Court's remaining task to craft to proper relief.

A. Vacatur and Remand

116. The APA provides that "[t]he reviewing court *shall* . . . 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) (emphasis added).

117. As a textual matter,[14] the mandatory language of the APA has led courts to make remand and vacatur the

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[14] Defendants aver that "nothing in section 706(2)'s text specifies whether a rule, if found invalid, should be set side on its *face* or *as applied* to the challenger." ECF No. 93 at 11. And Defendants further argue the Court should adopt the narrower "as-applied"

default remedy for agency action that violates the APA. *United Steel v. Mine Safety and Health Admin.*, 925 F.3d 1279, 1287 (D.C. 2019); *Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928, 945 (N.D. Tex. 2019) ("[D]istrict courts have a duty to vacate unlawful agency actions."). Remand, without vacatur, is only "generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Tex. Assoc. of Mfrs. v. US Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389-90.

118. The D.C. Circuit considers two factors when deciding whether to remand without vacatur: "(1) the seriousness of the deficiencies of the action, that is, how likely it is the agency will be able to justify its decision on remand; and (2) the disruptive consequences of vacatur." *United Steel*, 925 F.3d at 1287; *accord Cent. & S. W. Servs., Inc. v. E.P.A.*, 220 F.3d 683, 692 n.6 (5th

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reading of the statute and only set aside agency action as to the named Plaintiffs. But that argument is in error. "The APA empowers courts to determine *rule validity*, not just whether the *application* of the rule is valid." Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO.WASH. L. R. 1120, 1133 (2019); *see also* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1012 (2018) ("T]he APA and these organic statutes go further by empowering the judiciary to act directly against the challenged agency action. This statutory power to 'set aside' agency action is more than a mere non-enforcement remedy. It is a veto-like power that enables the judiciary to formally revoke an agency's rules, orders, findings, or conclusions—in the same way that an appellate court formally revokes an erroneous trial-court judgment."). The question of whether courts should extend relief beyond the named litigants *in the APA context* is a question of *severability*, not a question of whether the APA authorizes such relief—it does. Mitchell, *supra*, at 1013.

Cir. 2000) ("EPA gave ample reasons for its application of the Rule to the members of the regulated community in general. It simply failed to explain why it refused to grant the national variance to the electric utilities. We conclude that it would be disruptive to vacate application of the Rule to other segments of the industry.").

119. Under the first prong, the Court finds that the deficiencies in the June 1 Memorandum are serious and are unlikely to be resolved on a simple remand. As the Court has found, Defendants failed to consider the main benefits of MPP: (1) MPP deterred aliens, especially from the Northern Triangle, from attempting to illegally cross the border, (2) MPP allowed DHS to avoid systemic violation of Section 1225's detention requirements, and (3) MPP reduced the burden on states caused by tens of thousands of aliens being released.

120. Moreover, DHS *knew* of these failings when it issued the June 1 Memorandum because Plaintiffs first brought suit on April 13, 2021—nearly two months earlier. DHS had the opportunity to consider Plaintiffs' suit and engage in reasoned decisionmaking to avoid the flaws the Court has identified in this opinion.

121. Additionally, the June 1 Memorandum is not only arbitrary and capricious for a lack of reasoned decisionmaking, but it is also substantively unlawful because, in these circumstances, termination of MPP causes Defendants to systemically violate Section 1225. It will continue to be unlawful to terminate MPP until DHS has the capacity and willingness to detain immigrants claiming asylum under Section 1225.

122. Under the second prong, the Court finds vacatur will not be unduly disruptive. In their supplemental

briefs addressing remedies, Defendants emphasizes the "chaos" and "disruptive consequences" that would follow vacatur of the June 1 Memorandum. ECF Nos. 70, 93 at 4-7 ("An order interfering with DHS's termination of MPP, or otherwise requiring DHS to reinstitute the program, would wreak havoc on the Administration's approach to managing migration in the region, including by undermining the Government's ability to engage in the delicate bilateral (and multilateral) discussions and negotiations required to achieve a comprehensive solution."). The government further states "restarting MPP would 'come at tremendous opportunity cost,' 'draw resources from other efforts,' 'create doubt about the reliability of the United States as a negotiating partner,' 'hamstring the Federal Government's ability to conduct the foreign policy discussions' necessary to manage migration, and 'have significant resource implications and be damaging to our national and economic security.'" *Id.*

123. But these problems are entirely self-inflicted. "Such inconveniences are common incidental effects of injunctions, and the government could have avoided them by delaying preparatory work until the litigation was resolved." *Texas*, 809 F.3d at 187. Here, Texas filed suit challenging the suspension of enrollments in MPP on April 13, 2021, which is nearly two months *before* DHS purported to terminate the program entirely in the June 1 Memorandum. DHS "could have avoided" any disruptions by simply informing Mexico that termination of MPP would be subject to judicial review "until

the litigation was resolved." *Id.*[15] Mexico is capable of understanding that DHS is required to follow the laws of the United States which includes the APA and INA.

124. And, as evidenced by Defendants' briefs, DHS seemingly relies on the premise that it *actually terminated* MPP back in January 2021 and has been dismantling the program ever since then, even though the January 20 Memorandum only purported to suspend the enrollment of aliens in MPP.[16]

125. DHS argues, in a brief dated July 7, 2021, that it began acting "to unwind MPP and its infrastructure," *before* the June 1 Memorandum terminating MPP, which is only two months old. ECF No. 70 at 8 ("[N]ew initiatives" to replace MPP have been "in place for nearly *six months*."). Similarly, in the same brief, Defendants stated that re-implementing MPP would be difficult because MPP "had been terminated for *some* time." *Id.* at 9 (emphasis added)

126. Again, in the same brief, Defendants argues that "Mexico had already begun taking action to redeploy resources." *Id.* at 9. But Defendants' citation shows that Mexico was redeploying resources already by April 28, a month *before* DHS issued the June 1 Memorandum. ECF No. 64 at 14. In another portion, Defendants state MPP began being wound down on "February 11,

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[15] The Court notes that only slightly more than two months has passed between the issuance of the June 1 Memorandum and the Court's *final* disposition of this case on the merits.

[16] There is no question that the January 20, 2021 Memorandum would have been found to be arbitrary and capricious as there is *no* administrative record or any stated basis for agency action for the Court to review. *See* ECF No. 45.

2021." *Id.* at 17-18. Defendants also state that vacatur would nullify "more than four months of diplomatic and programmatic engagement," ECF No. 70 at 11, even though MPP had only been terminated for one month when that brief was submitted.

127. In other words, DHS's apparent argument is that MPP has been in the process of termination for *months*, far preceeding the actual issuance of the June 1 Memorandum, and it is simply *too late* for a court to vacate their actions. But if the decision to terminate MPP was made far in advance of the June 1 Memorandum, that reduces the entire June 1 Memorandum into *post hoc* arguments for a decision that was already made. *Compare* ECF No. 64 at 5 ("Upon completion of the required review, the Secretary announced his decision to terminate MPP [on June 1, 2021.]") *with id.* at 17 ("[T]he U.S. government announced the wind-down of the MPP policy on February 11, 2021.").

128. Additionally, DHS's arguments also only relate to the effect vacatur would have on its diplomatic engagements with foreign countries.[17] ECF No. 70 at 7-11.

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[17] At various points, Defendants argue that the Court is unable to redress Plaintiffs' injuries because any relief would be dependent on Mexico's cooperation. *See, e.g.*, ECF No. 913 at 10-11. This is not correct. The United States initiated MPP unilaterally pursuant to U.S. law, not pursuant to bilateral agreement or treaty with Mexico. App. 307. The program was then "implemented and expanded . . . through ongoing discussions with Mexico." *Id.* In other words, MPP was adopted and launched unilaterally, just as it was later terminated unilaterally. App. 307; *see also* App. 303. And even if Mexico's cooperation may be required to return an alien who has already been admitted, nothing prevents DHS from refusing to admit asylum applicants at ports of entry in the first place—before they ever enter the United States.

129. DHS's reliance on the effects of foreign affairs is unpersuasive. DHS's first duty is to uphold *American* law. It cannot just point at diplomatic efforts as an excuse to not follow the APA or fulfill its statutory obligations.

130. Accordingly, Plaintiffs are entitled to vacatur and remand because the June 1 Memorandum violates the APA and is in substantive violation of Section 1225.

B. Injunctive Relief is warranted

131. "According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. *eBay Inc. v. MercExchange, LLC.*, 547 U.S. 388, 391 (2006). The four factors are: "(1) that [Plaintiffs have] suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.*

132. Regarding the first factor, as discussed in the Section on standing, *supra* § IV.A.1, Plaintiffs have shown that they are suffering ongoing and future injuries as a result of the termination of MPP.

133. Regarding the second factor, Texas and Missouri are unable to recover the additional expenditures from the federal government. *Texas*, 2021 WL 2096669, at *48 ("[N]o Party has suggested that Texas could recover any of its likely financial injury here, and the Court cannot conceive of any path for Texas to pierce the federal government's usual sovereign immunity or contrive a

remedial cause of action sufficient to recover from its budgetary harm."); *see also Texas*, 328 F. Supp. 3d at 737 (deeming an injury irreparable because "there [was] no source of recompense").

134. Regarding the third and fourth factors,[18] the ongoing and future injuries sustained by Plaintiffs outweigh any harms to Defendants as Defendants have no "interest in the perpetuation of unlawful agency action." *League of Women Voters of United States, v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). Rather, there is a "public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994).

135. Moreover, the public interest favors Plaintiffs because the public has an "interest in stemming the flow of illegal immigration." *United States v. Escobar*, No. 2:17-CR-529, 2017 WL 5749620 at *2 (S.D. Tex. Nov. 28, 2017) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976)). And the public has interest in the enforcement of immigration laws, including Section 1225. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115, 100 Stat 3359, 3384 (1986) ("[T]he immigration laws of the United States should be enforced vigorously and uniformly.")

136. Lastly, the Supreme Court has cautioned that a district court vacating an agency action under the APA

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[18] Federal courts may consider the third and fourth together as they overlap considerably. *Texas*, 809 F.3d at 187; *Nken v. Holder*, 556 U.S. 418, 435 (2009) ("Once an applicant satisfies the first two factors [for a stay of an alien's removal pending judicial review], the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party.").

should not issue an injunction unless an injunction would "have [a] meaningful practical effect independent of its vacatur." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010).

137. Here, an injunction is warranted for two reasons. First, an injunction is needed to prevent the continued systemic violation of Section 1225. Second, Defendants have indicated that, *even if* the June 1 Memorandum were declared invalid, they would not necessarily return any aliens to Mexico. ECF No. 63 at 9 ("Reinstating MPP would not *require* DHS to return anyone to Mexico.") (emphasis in original). ECF No. 92 at 47 ("DHS retains discretion to . . . release *all* noncitizens inspected for admission under Section 1225(b)(2)(A) or arrested while present in the United States under Section 1226.") (emphasis added).

138. Defendants are correct in stating that this Court does not have the power to tell a DHS line officer which individual aliens are amenable to MPP and must be enrolled. But Defendants are *incorrect* in arguing this Court has no power to enjoin a "blanket policy" that removes all discretion from line officers to utilize MPP. *Texas*, 2021 WL 2096669, at *51 ("But this injunction does not enjoin *individual* removal decisions. As described above, it enjoins a *blanket* policy that is contrary to law. The Government makes much of its discretion in individual matters. . . . But nothing in this preliminary injunction changes that."); ECF No. 63 at 9 ("Reinstating MPP . . . would merely authorize line-level officers to [return aliens to Mexico] in their discretion.").

139. Lastly, Fifth Circuit precedent dictates that, in immigration related cases, proper relief includes nationwide injunctions. A geographically limited injunction

would be improper because federal *immigration* law must be uniform. *Texas*, 809 F.3d at 187-88; *see also Texas*, 2021 WL 2096669, at *52; *Texas*, 2021 WL 247877, at *7-8. Furthermore, a geographically limited injunction would likely "be ineffective because [aliens] would be free to move among states." *Id.* at 188.

140. Accordingly, the Court will grant the narrowest injunction possible that afford Plaintiffs full relief on their claims.

VI. CONCLUSION

For the reason stated above, the Court finds that Plaintiffs have proven their APA and statutory claims by the preponderance of the evidence. Accordingly, it is **ORDERED**:

1. Defendants and all their respective officers, agents, servants, employees, attorneys, and other persons who are in active concert or participation with them are hereby **PERMANENTLY ENJOINED** and **RESTRAINED** from implementing or enforcing the June 1 Memorandum.
2. The June 1 Memorandum is **VACATED** in its entirety and **REMANDED** to DHS for further consideration.
3. Defendants are **ORDERED** to 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.

4. To ensure compliance with this order, starting September 15th, 2021, the Government must file with the Court on the 15th of each month, a report stating (1) the total monthly number of encounters at the southwest border; (2) the total monthly number of aliens expelled under Title 42, Section 1225, or under any other statute; (3) Defendants' total detention capacity as well as current usage rate; (4) the total monthly number of "applicants for admission" under Section 1225; (5) the total monthly number of "applicants for admission" under Section 1225 *paroled* into the United States; and (6) the total monthly number of "applicants for admission" under Section 1225 released into the United States, *paroled or otherwise*.
5. This injunction is granted on a nationwide basis.
6. Nothing in this injunction requires DHS to take any immigration or removal action nor withhold its statutory discretion towards any individual that it would not otherwise take.
7. The Court retains jurisdiction of this matter for purposes of construction, modification, and enforcement of this permanent injunction.
8. The Court **STAYS** the applicability of this opinion and order for **7 days** to allow the federal government time to seek emergency relief at the appellate level.

SO ORDERED.

Aug. 13, 2021.

/s/ MATTHEW J. KACSMARYK
MATTHEW J. KACSMARYK
United States District Judge

APPENDIX D

(ORDER LIST: 594 U.S.)

TUES., AUG. 24, 2021

ORDER IN PENDING CASE

21A21 BIDEN, PRESIDENT OF U.S., ET AL. V. TEXAS, ET AL.

The application for a stay presented to Justice Alito and by him referred to the Court is denied. The applicants have failed to show a likelihood of success on the claim that the memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious. See *Department of Homeland Security* v. *Regents of Univ. of Cal.*, 591 U.S. ___ (2020) (slip op., at 9-12, 17-26). Our order denying the Government's request for a stay of the District Court injunction should not be read as affecting the construction of that injunction by the Court of Appeals.

Justice Breyer, Justice Sotomayor, and Justice Kagan would grant the application.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-10806

STATE OF TEXAS; STATE OF MISSOURI,
PLAINTIFFS-APPELLEES

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA; UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, ACTING COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION; UNITED STATES CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, DEFENDANTS-APPELLANTS

[Filed: Aug. 19, 2021]

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:21-cv-67

Before: ELROD, OLDHAM, and WILSON, *Circuit Judges*.

PER CURIAM:

This case concerns the Migrant Protection Protocols ("MPP") created by the Secretary of the Department of Homeland Security on December 20, 2018, and purportedly rescinded by DHS in a memorandum on June 1, 2021 ("June 1 Memorandum").[1] After a full bench trial and 53 pages of findings of fact and conclusions of law, the district court concluded that DHS's purported rescission of MPP violated, *inter alia*, the Administrative Procedure Act ("APA"). DHS seeks a stay pending appeal. After carefully considering full briefing from the parties, we hold DHS failed to satisfy the four stay factors. *See Nken v. Holder*, 556 U.S. 418 (2009). The motion is denied.

I.

A.

On December 20, 2018, the Trump Administration implemented MPP in response to an immigration surge at the southern border. D. Ct. Op. at 7. The statutory authority for MPP is found in 8 U.S.C. § 1225(b)(2)(C), which authorizes the Government to return certain third-country nationals arriving in the United States to Mexico or Canada for the duration of their removal proceedings under 8 U.S.C. § 1229a. *Id.* at 8. Also on December 20, 2018, the United States obtained Mexico's agreement to permit entry of MPP enrollees. *Id.*

[1] We refer to the Secretary's actions as those of "DHS" unless otherwise stated.

The goal of MPP was to ensure that "[c]ertain aliens attempting to enter the U.S. illegally or without documentation . . . will no longer be released into the country, where they often fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim." *Id.* (quotation omitted).

In January 2019, "DHS began implementing MPP, initially in San Diego, California, then El Paso, Texas, and Calexico, California, and then nationwide." *Id.* (citing AR.155-56, AR.684). In February 2019, U.S. Immigration and Customs Enforcement issued guidance on MPP to its field offices, anticipating the expansion of MPP across the border. *Id.* at 9 (citing AR.165-70). By December 31, 2020, DHS had enrolled 68,039 aliens in MPP. *Id.* at 12 (citing AR. 555).

DHS and Texas entered into a Memorandum of Understanding (the "Agreement"), which the parties finalized on January 8, 2021. *Id.* at 13 (citing Compl., Ex. B at 8). The Agreement required Texas to provide information and assist DHS to "perform its border security, legal immigration, immigration enforcement, and national security missions." *Id.* (quoting Compl., Ex. B at 2). In return, DHS agreed to consult Texas and consider its views before taking actions that could modify immigration enforcement. *See id.* at 13-14 (citing Compl., Ex. B at 2). DHS also agreed to "'[p]rovide Texas with 180 days' written notice . . . of any proposed action' subject to the consultation requirement," *id.* at 14 (quoting Compl., Ex. B at 3), so that Texas would have an opportunity to comment on the proposal. The Agreement further required DHS to consider Texas's input "in good faith" and, if it decided to reject

Texas's input, "provide a detailed written explanation" of its reasons for doing so. *Id.* (emphasis omitted) (quoting Compl., Ex. B at 3).

On Inauguration Day, the Biden Administration announced that it would suspend further enrollments in MPP. The Acting Secretary of DHS wrote that "[e]ffective January 21, 2021, the Department will suspend new enrollments in the Migrant Protection Protocols (MPP), pending further review of the program. Aliens who are not already enrolled in MPP should be processed under other existing legal authorities." *Id.* at 15 (quoting AR. 581).

On February 2, 2021, DHS sent a letter to Texas purporting to terminate the Agreement "effective immediately." *Id.* at 14. Because it believed that the letter did not comply with the Agreement's required procedures, Texas interpreted the letter "as a notice of intent to terminate" the Agreement. *Id.* (citing ECF No. 53 at 21).

On April 13, 2021, Texas and Missouri (the "States") sued, challenging the temporary suspension of MPP. *Id.* at 1 (citing ECF No. 1). The States alleged that DHS's January 20 Memorandum violated the APA, the Immigration and Nationality Act ("INA"), the Constitution, and the Agreement. *See id.* at 2 (citing ECF No. 1 at 4; ECF No. 45). On May 14, the States moved for a preliminary injunction that would enjoin the Government from enforcing and implementing the January 20 Memorandum. Prelim. Inj. Mot., ECF No. 30.

On June 1, before briefing on the preliminary injunction had concluded, DHS issued a new memorandum permanently terminating MPP. D. Ct. Op. at 2. The

district court concluded that the June 1 Memorandum mooted the States' complaint, and the court allowed the States to amend their complaint and file a new preliminary injunction motion. *Id.* The parties agreed to consolidate the preliminary injunction hearing with the trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2). *Id.* at 3.

B.

Following the bench trial, the district court issued a 53-page memorandum opinion and order, concluding that the States were entitled to relief on their APA and statutory claims. *See* D. Ct. Op. at 1. The district court made many findings of fact that are relevant here. Among other things, the district court found that MPP had significant benefits before DHS purported to rescind it. For example, DHS's October 2019 Assessment of MPP concluded that "aliens without meritorious claims—which no longer constitute[d] a free ticket into the United States—[were] beginning to voluntarily return home." D. Ct. Op. at 10. And the court noted that DHS also found MPP effective in addressing the prior "perverse incentives" created by allowing "those with non-meritorious claims . . . [to] remain in the country for lengthy periods of time." *Id.* The court found that this caused a significant decrease in immigration-enforcement encounters along the southern border. *Id.* And more directly, the court found that caused a decrease in "the number of aliens released into the interior of the United States for the duration of their U.S. removal proceedings." *Id.* at 11 (citing AR. 554). These benefits, DHS emphasized, were a "cornerstone" of the agency's prior immigration policy. D. Ct. Op. at 12.

The court made specific (and largely uncontested) factual findings that "[t]he termination of MPP has [increased] and will continue to increase the number of aliens being released into the United States," and that this increase "has [imposed] and will continue to impose harms on Plaintiff States Texas and Missouri." *Id.* at 17. On the basis of its factual findings, the district court determined that the States had Article III standing, that the court had jurisdiction to review the agency action, and that the States were within the zone of interests of the INA. *Id.* at 21-34. The court then concluded that DHS's termination of MPP was unlawful under the APA because the action was arbitrary and capricious and contrary to the INA. *Id.* at 34-44. Based on those conclusions, the district court "permanently enjoined and restrained [DHS] from implementing or enforcing the June 1 Memorandum" and ordered DHS "to 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 52-53 (emphases omitted).

DHS noticed an appeal. On August 17, 2021, the Government requested an emergency stay under Federal Rule of Appellate Procedure 8. The States opposed that request on August 18. On August 19, the Government filed a reply. The Government requested that we rule the same day, August 19. In considering the Government's request, we must consider four factors: (1) whether the Government makes a strong showing that it is likely to succeed on the merits; (2) whether the Government will be irreparably injured in the absence of a

stay; (3) whether other interested parties will be irreparably injured by a stay; and (4) where the public interest lies. *See Nken*, 556 U.S. at 426.

II.

We begin with whether the Government has made a strong showing that it is likely to succeed on the merits. The Government makes two merits arguments: (A) the case is not justiciable, and (B) DHS's rescission of MPP did not violate federal law. The Government is likely wrong on both.

A.

The Government first argues that it is likely to succeed on the merits because two justiciability doctrines—standing and non-reviewability—operate as insuperable obstacles to the States' suit. We consider and reject each argument in turn.

1.

First, the States' standing. To establish standing, the States "must show an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Texas v. United States*, 809 F.3d 134, 150 (5th Cir. 2015) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). "Only one of the [appellants] needs to have standing to permit us to consider the [complaint]."[2] *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *accord Nat'l Rife Ass'n Am., Inc. v. McCraw*, 719

[2] For this reason, we focus on Texas's standing. We note, however, that Missouri brings largely similar arguments with respect to driver's-license, educational, healthcare, and other costs.

F.3d 338, 344 n.3 (5th Cir. 2013). Because the Government is seeking a stay, we must ask whether it has made a strong showing that the States lack standing. *See Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020).

After a bench trial, we review the district court's factual determinations for clear error. *See, e.g.*, *Texas*, 809 F.3d at 171-72 (reviewing a factual finding for clear error); *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 367 (5th Cir. 2020) ("Because this case was tried, Plaintiffs needed to prove standing by a preponderance of the evidence. A factual finding that a plaintiff met that burden is reviewed for clear error." (citation omitted)). And any argument not raised on appeal (including a challenge to a district court's factual finding) is forfeited. *See, e.g.*, *United States v. Edwards*, 303 F.3d 606, 647 (5th Cir. 2002) ("Many of the 'errors' cited by the defendants are unbriefed. These issues have been [forfeited]."); *cf.* Fed. R. App. P. 28(a)(9)(A) ("The appellant's brief must contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.").

We begin with (a) the district court's uncontested factual findings. Then we hold that the Government fails to make a strong showing that it is likely to succeed on appeal because it has not shown that the States lack (b) an injury-in-fact that is (c) traceable and (d) redressable. Finally, any doubt about the States' standing is resolved by (e) the special solicitude guaranteed to sovereign States in our federal system.

a.

The district court found eight facts central to the standing issue. These include:

1. The court found that because of MPP's termination, the Government has been "forced to release and parole aliens into the United States because [the Government] simply [does] not have the resources to detain aliens as mandated by statute." D. Ct. Op. at 17; *see also id.* at 18 (finding that Texas's "border state" status means some of those aliens have ended up in Texas).

2. The court found that DHS previously acknowledged that "MPP implementation contributed to decreasing the volume of inadmissible aliens arriving in the United States on land from Mexico." *Id.* at 17 (quotation and alteration omitted).

3. The court found that "the termination of MPP has contributed to the current border surge." *Id.*

4. The court found that "[s]ince MPP's termination, the number of enforcement encounters on the southwest border has skyrocketed." *Id.*; *see also id.* at 18 n.7 (noting "the sworn statement of David Shahoulian, Assistant Secretary for Border and Immigration Policy at DHS," including Shahoulian's statement that "[b]ased on current trends, the Department expects that total encounters this fiscal year are likely to be the highest ever recorded" (emphasis omitted)).

5. The court found that many "aliens present in Texas because of MPP's termination would apply for driver's licenses," the granting of which would impose a cost on Texas. *Id.* at 19.

6. The court found that "[s]ome school-age child aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States," and that (according to state estimates) Texas will expend an average of $9,216 per additional student in the 2021 school year. *Id.* at 19.

7. The court found that "[s]ome aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and will use state-funded healthcare services or benefits in Texas," imposing a cost on the state. D. Ct. Op. at 19-20 (citing AR. 555, AR. 587-88).

8. Finally, the court found that "[s]ome aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and [some] will commit crimes in Texas," imposing costs on the state's correctional apparatus. *Id.* at 20.

The Government does not challenge *any* of these findings.[3] But even if it did, we would not find any of them clearly erroneous in the light of the record as a whole. *See, e.g.*, *United States v. Ismoila*, 100 F.3d 380, 396 (5th Cir. 1996) ("[A]s long as the determination

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[3] On one reading of the Government's brief, it does contest the fifth finding. *See* Stay Mot. at 7 (discussing "speculation about an increase in the number of aliens released and paroled who will seek driver's licenses" (quotation omitted)). But in any case, neither our precedent nor the district court's record allows us to conclude the Government is likely to show the finding is clearly erroneous. *See Texas*, 809 F.3d at 156 (making a similar inference about driver's license applications).

is plausible in light of the record as a whole, clear error does not exist.").

b.

Texas's injuries are actual and imminent. As just described, MPP's termination has caused an increase in immigration into Texas. And as discussed at length in *Texas v. United States*, Texas law requires the issuance of a license to any qualified person—including noncitizens who "present . . . documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States." 809 F.3d at 155-56 (alteration in original) (quoting Tex. Transp. Code § 521.142(a)); *see also id.* (discussing other Texas requirements for a driver's license). Of course, unlike in the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program, the challenged action here does not *ipso facto* guarantee that a given alien will satisfy that requirement. Yet the district court's uncontested findings of fact likely compel the conclusion that MPP's termination has led to an increase in the number of aliens in Texas, many of whom will apply for driver's licenses. And the district court found that Texas incurs a cost every time it *inquires* into whether an alien satisfies the requirements for a license—even if the person does not in fact qualify for a license. D. Ct. Op. at 19 ("Each additional customer seeking a Texas driver's license imposes a cost on Texas."); *see also* Decl. of Sheri Gipson, Chief of the Texas Department of Public Safety Driver License Division, ¶ 8 ("DPS estimates that for an additional 10,000 driver['s] license customers *seeking* a limited term license, DPS would incur a biennial cost of approximately $2,014,870.80." (emphasis added)). So Texas has shown

imminent injury in this case. *See Texas*, 809 F.3d at 156 (reaching the same conclusion on similar facts). Driver's licenses aside, the district court's unchallenged factual findings regarding educational, healthcare, and correctional costs provide equally strong bases for finding cognizable, imminent injury.

The Government's counterargument (limited to the driver's-license theory) is that the district court's analysis was "primarily based on speculation about an increase in the number of aliens released and paroled who will seek driver's licenses." Stay Mot. at 7 (quotation omitted). But the Government has done nothing to show that district court's findings of fact about the increased number of aliens were clearly erroneous. And it is grounded in our precedent. *Texas*, 809 F.3d at 156 ("[T]here is little doubt that many [DAPA beneficiaries] would [apply for driver's licenses] because driving is a practical necessity in most of the state.").

c.

Texas's injury is also traceable to the Government's termination of MPP. The district court's uncontested factual findings establish as much: MPP's termination has caused an increase in unlawful immigration into Texas. Many new immigrants are certain to apply for driver's licenses—and evaluating each application will impose costs on Texas. *Cf. Texas*, 809 F.3d at 160 (noting that new immigrants—in that case, DAPA recipients —"have strong incentives to obtain driver's licenses, and it is hardly speculative that many would do so if they became eligible."). Likewise, at least some MPP-caused immigrants will certainly seek educational and healthcare services from the state. And the States have incurred and will continue to incur costs associated

with the border crisis, at least part of which the district court found is traceable to rescinding MPP. The causal chain is easy to see, and the Government does not meaningfully contest this point. *See also Massachusetts v. EPA*, 549 U.S. at 523 (finding traceability where the EPA's challenged action may have caused people to drive less fuel-efficient cars, which may in turn contribute to a prospective rise in sea levels, which may in turn cause the erosion of Massachusetts's shoreline).

d.

An injunction would remedy Texas's injury by requiring reinstatement of MPP. And with MPP back in place, immigration officers would once again have discretion to return (some) aliens to Mexico. The Government gives two arguments that it says undercut redressability. First, the Government contends, an injunction would provide no redress because immigration officers under MPP would have discretion about whether to return any given immigrant to Mexico. Stay Mot. at 8. This argument ignores the fact that, during MPP's operative period, immigration agents did in fact order over 50,000 aliens back to Mexico from the Texas border. ECF 11 at 2. The Government offers no basis to conclude that a renewed MPP would have any different impact.

Second, the Government argues there is no redressability because aliens cannot be returned to Mexico without Mexico's consent. Stay Mot. at 8. This argument fails because for at least some aliens, MPP would permit DHS to simply refuse admission at ports of entry in the first place. *See* 8 U.S.C. § 1225(b)(2)(C) (allowing the Attorney General to "return [an] alien" "who is arriving on land (whether or not at a designated port of

arrival) from a foreign territory contiguous to the United States . . . to that territory pending a" removal proceeding). Further, Mexico issued a statement in 2018 consenting to admit aliens excluded from the United States under MPP—and nothing in the record suggests Mexico has since retracted that consent. *See* AR.153 (Secretaría do Relaciones Exteriores, *Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act* (Dec. 20, 2018)).

e.

To eliminate any doubt as to standing, we emphasize that the States are entitled to "special solicitude" in the standing analysis. *Massachusetts v. EPA*, 549 U.S. at 520; *see also Texas*, 809 F.3d at 151 (beginning with the special-solicitude question). Such special solicitude has two requirements: (1) the State must have a procedural right to challenge the action in question, and (2) the challenged action must affect one of the State's quasi-sovereign interests. *Texas*, 809 F.3d at 151-52 (citing *Massachusetts*, 549 U.S. at 516-20). In both *Massachusetts* and *Texas*, the first prong was satisfied where a State challenged an agency action as invalid under a statute. 549 U.S. at 516-17 (Clean Air Act); 809 F.3d at 152-53 (APA). And in both cases, the second prong was satisfied where a State's challenge involved an agency's alleged failure to protect certain formerly "sovereign prerogatives [that] are now lodged in the Federal Government." *Massachusetts*, 549 U.S. at 520; *see Texas*, 809 F.3d at 152-54. Particularly relevant here is *Texas*, where this Court held that DAPA, by authorizing the presence of many previously unlawful aliens in the United States, affected "quasi-sovereign

interests by imposing substantial pressure on them to change their laws, which provide for issuing driver's licenses to some aliens and subsidizing those licenses." 809 F.3d at 153 (quotation omitted).

Texas is indeed entitled to special solicitude. First, just as in the DAPA suit, Texas is asserting a procedural right under the APA to challenge an agency action. *See id.* at 152 ("In enacting the APA, Congress intended for those 'suffering legal wrong because of agency action' to have judicial recourse, and the states fall well within that definition." (quoting 5 U.S.C. § 702)). And second, Texas asserts precisely the same driver's-license-based injury here that it did there. *See id.* at 153-54 (explaining that DAPA, by greatly increasing the class of people to whom existing Texas law would entitle a subsidized driver's license, pressured Texas to change its own law—thus affecting a quasi-sovereign interest). Thus, Texas is entitled to special solicitude in the standing inquiry.

That solicitude means redressability is easier to establish for certain state litigants than for other litigants —and this should remove any lingering doubt as to that prong. *See Massachusetts*, 549 U.S. at 517-18 (holding a State "can assert [its] right[s] without meeting all the normal standards for redressability and immediacy" (quotations and citations omitted)). Texas would be able to establish redressability without this special solicitude—but it reinforces our conclusion that the States have standing and that the Government has failed to make a strong showing to the contrary.

2.

The Government next argues this suit is non-justiciable under the APA. The Government makes three arguments on this score. None is persuasive.

a.

First, the Government argues that its termination of MPP is not a "final agency action" under the APA. The APA allows judicial review for "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. And for an agency action to qualify as final, the action must (1) mark[] the consummation of the agency's decisionmaking process," and (2) either determine "rights or obligations" or produce "legal consequences." *Texas v. EEOC*, 933 F.3d 433, 441 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

The Government does not contest that the June 1 Memorandum was the consummation of the decisionmaking process. As for the second prong, the Government simply asserts the Memorandum is a general policy statement—and therefore can neither determine rights nor produce obligations or legal consequences. Stay Mot. at 10-11. This argument ignores Circuit precedent establishing that a "policy statement" can nonetheless be "final agency action" under the APA. *See Merchs. Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 919-20 (5th Cir. 1993). It also ignores the principle that "where agency action withdraws an entity's previously-held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action" under the APA. *EEOC*, 933 F.3d at 442 (quotation omitted). As the district court ably explained, the Memo-

randum withdrew DHS officers' previously existing discretion when it directed "DHS personnel, effective immediately, to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives issued to carry out MPP." D. Ct. Op. at 27 (emphasis omitted) (quoting AR.7).

b.

Second, the Government argues that the decision to terminate MPP is unreviewable under 5 U.S.C. § 701(a). Stay Mot. at 8. The APA creates a "basic presumption of judicial review." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quotation omitted). And to vindicate that presumption, the Supreme Court has read § 701(a)(2) "quite narrowly." *Id.* (quotation omitted). The presumption can be overcome "by a showing that the relevant statute precludes review, § 701(a)(1), or that the agency action is committed to agency discretion by law, § 701(a)(2)." *Id.* (quotations and alterations omitted). Here, the Government has tried but failed to make both showings.

The Government argues that 8 U.S.C. § 1225(b)(2)(C) is a "statute[] [that] preclude[s] judicial review." 5 U.S.C. § 701(a)(1). Section 1225(b)(2)(C) provides:

> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

That provision does confer the discretion to choose among various detention and non-detention options for

aliens placed in § 1229a removal proceedings. But the question presented in the States' complaint is *not* whether a particular alien is subject to detention in any particular set of circumstances. The States are instead challenging DHS's June 1 decision to rescind MPP—which is a government program that creates rules and procedures for *entire classes* of aliens. It remains true—with or without MPP—that DHS has discretion to make individualized detention and non-detention decisions in accordance with the strictures of § 1225. What DHS cannot do, the States allege, is rescind the MPP program in a way that is arbitrary, capricious, and contrary to law. DHS cites nothing to suggest that latter decision is committed to agency discretion. In fact, cases like *Regents* prove it is not. *See* 140 S. Ct. at 1905-06 (decision to rescind DACA not committed to agency discretion); *Texas*, 809 F.3d at 168-69 (decision to implement DAPA not committed to agency discretion).

The Government's argument that the decision to rescind MPP is "committed to agency discretion by law" fails for similar reasons. 5 U.S.C. § 701(a)(2); *see Regents*, 140 S. Ct. at 1905. This form of non-reviewability occurs where a statute is "drawn so that it furnishes no meaningful standard by which to judge the [agency's] action." *Dep't of Commerce v. New York*, 139 S. Ct. 2251, 2568 (2019); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (holding a decision is committed to agency discretion when there is "no law to apply" (quotation omitted)). The Government argues that § 1225 provides no standard by which to evaluate DHS's action in this case. Stay Mot. at 8-9.

Once again, Supreme Court precedent undercuts the Government's argument. Even a statute that "leave[s] much to [an agency's] discretion" does not necessarily "leave [that] discretion unbounded." *Dep't of Commerce*, 139 S. Ct. at 2567-68 (holding a statute granting the Secretary of Commerce broad discretion to take the census "in such form and content as he may determine" did not commit the decision to reinstate a citizenship question to the Secretary's discretion (quotation omitted)). So too here. Section 1225(b)(2)(C) certainly confers discretion, but there is no reason to think that discretion is infinite—just as there is no reason to think the discretion extends beyond the bounds of individualized, case-by-case determinations to begin with. And like the statute in *Department of Commerce*, which included provisions that meaningfully restrained the Secretary of Commerce, *see* 139 S. Ct. at 2568-69, § 1225 includes provisions restraining the DHS in this case. *See* § 1225(b)(1)(B)(iii)(IV) (an alien subject to expedited removal, but without a credible fear of persecution, "shall be detained pending a final determination of credible fear of persecution"); § 1225(b)(1)(B)(ii) (an alien with a credible fear of persecution "shall be detained for further consideration of the application for asylum"); § 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."); § 1225(b)(2)(C) (Attorney General "may return" an alien not subject to expedited removal as an alternative to detention). We conclude that this is not a "case in which there is no law to apply." *Dep't of Commerce*, 139 S. Ct. at 2569 (quotation omitted).

c.

The Government's final justiciability argument is that the MPP-termination decision is nothing more than a non-enforcement decision, unreviewable under *Heckler v. Chaney*, 470 U.S. 821 (1985). This argument fails for two reasons. The first is that the termination of MPP is more than a non-enforcement policy, just like the DACA program at issue in *Regents* and the DAPA program at issue in *Texas*. As the district court explained, the termination of MPP will necessarily lead to the release and parole of aliens into the United States. And that will "create affirmative benefits for aliens such as work authorization." D. Ct. Op. at 31; *see also Texas*, 809 F.3d at 167 ("Likewise, to be reviewable agency action, DAPA need not directly confer public benefits—removing a categorical bar on receipt of those benefits and thereby making a class of persons newly eligible for them 'provides a focus for judicial review.'" (quoting *Chaney*, 470 U.S. at 832)).

Second and independently, the termination of MPP was simply not a non-enforcement decision. MPP was a government program—replete with rules procedures and dedicated infrastructure. It is precisely because MPP was a government program—and *much more* than a non-enforcement decision—that the Government now claims that it will be difficult to resume it. *See infra* Part III. And the Government cites nothing to suggest that the elimination of a such a program can be dismissed as mere "non-enforcement." The Government therefore has failed to make a strong showing that the States' claims are non-justiciable.

B.

The Government next argues that it is likely to succeed on appeal because the June 1 Memorandum accords with federal law. The district court held otherwise on two independent grounds. First, the district court determined that the termination of MPP violated the APA because the June 1 Memorandum was arbitrary and capricious. D. Ct. Op. at 34-42. Second, the district court concluded that in "these particular circumstances," the termination violated 8 U.S.C. § 1225. *Id.* at 42-44 (emphasis removed). We hold the Government has not come close to showing that it is likely to succeed in challenging either conclusion, let alone both.

1.

First, the APA. The APA directs courts to "hold unlawful and set aside agency action[s]" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). "The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). While applying this "deferential" standard, we must not "substitute" our "own policy judgment for that of the agency." *Id.* But we must ensure that "the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.*; *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'" (quoting *Burlington Truck Lines v. United States*,

371 U.S. 156, 168 (1962))). "Put simply, we must set aside any action premised on reasoning that fails to account for 'relevant factors' or evinces 'a clear error of judgment.'" *Univ. of Tex. M.D. Anderson Cancer Ctr. v. HHS*, 985 F.3d 472, 475 (5th Cir. 2021) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)). This review "is not toothless." *Sw. Elec. Power Co. v. United States Env't Prot. Agency*, 920 F.3d 999, 1013 (5th Cir. 2019). And in all events, we can consider only the reasoning "articulated by the agency itself"; we cannot consider *post hoc* rationalizations. *State Farm*, 463 U.S. at 50; *see also Regents*, 140 S. Ct. at 1909 ("An agency must defend its actions based on the reasons it gave when it acted.").

The Government has not shown a strong chance of success on appeal. That is because when terminating MPP in the June 1 Memorandum, the Secretary failed to consider several "relevant factors" and "'important aspect[s] of the problem.'" *Michigan v. E.P.A.*, 576 U.S. 743, 750, 752 (2015) (quotations omitted); *see also Regents*, 140 S. Ct. at 1910. These include (a) the States' legitimate reliance interests, (b) MPP's benefits, (c) potential alternatives to MPP, and (d) § 1225's implications. These four omissions likely doom the Government's appeal. The Governments counterarguments (e) are unpersuasive.

a.

DHS "failed to address whether there was 'legitimate reliance' on" MPP. *Regents*, 140 S. Ct. at 1913 (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996)). In its seven-page June 1 Memorandum, DHS does not directly mention any reliance interests, espe-

cially those of the States. The closest the June 1 Memorandum gets is a reference to "the impact [terminating MPP] could have on border management and border communities." AR. 5. But the Memorandum makes clear that "border communities" do not include border states. *See id.* ("referring only to "nongovernmental organizations and local officials"). And the vague reference to "border management" is insufficient to show specific, meaningful consideration of the States' reliance interests.

In response, the Government concedes that it failed to consider the States' reliance interests. But it argues that is irrelevant because "the States have no cognizable reliance interest in a *discretionary* program." Stay Mot. at 18. We reject that argument for several reasons.

Most importantly, the Government's contention is squarely foreclosed by *Regents*. There, the Supreme Court acknowledged that the Deferred Action for Childhood Arrivals ("DACA") program was a discretionary program. 140 S. Ct. at 1910. Still, the Court faulted DHS for not considering reliance interests, including in particular those of the states. As the Supreme Court explained, "[w]hen an agency changes course, . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Id.* at 1913 (quotation omitted). Those reliance interests included states' interests. *See id.* at 1914 (highlighting assertions that "[s]tates and local governments could lose $1.25 billion in tax revenue each year"). So if the termination of DACA—a discretionary, immigration program—must consider states' "potential reliance interests," then so does termination

of MPP. *Id.* at 1913. That is particularly true here because the district court found as a matter of fact—and the Government does not contest—that states like Texas face fiscal harm from the termination of MPP. *See* D. Ct. Op. at 18-20.

The district court also found that the "termination of MPP has and will continue to increase the number of aliens being released into the United States." *Id.* at 17. The Supreme Court has recognized that border states "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). It therefore follows that a "potential reliance interest" that DHS must consider includes Texas.

The DHS-Texas Agreement reinforces the Government's awareness of the State's reliance interests. In that Agreement, DHS stipulated:

- "Texas, like other States, is directly and concretely affected by changes to DHS rules and policies that have the effect of easing, relaxing, or limiting immigration enforcement." Compl., Ex. B at 1.
- "The harm to Texas is particularly acute where its budget has been set months or years in advance and it has no time to adjust its budget to respond to DHS policy changes." *Id.*
- "[A]n aggrieved party will be irreparably damaged." *Id.* at 5.

The Agreement further states that it "establishes a binding and enforceable commitment between DHS and Texas." *Id.* at 2. Texas therefore could reasonably rely on the Agreement. And Texas did in fact rely on the

Agreement by including DHS's breach as a cause of action in its complaint—filed months before the June 1 Memorandum. And then—despite these reliance interests and despite being on notice of the Agreement from the States' complaint—the June 1 Memorandum said not one word about the Agreement. A "reasonable and reasonably explained" decision would have said *something*. *Prometheus*, 141 S. Ct. at 1158. That is why this "omission alone [likely] renders [the Secretary's] decision arbitrary and capricious." *Regents*, 140 S. Ct. at 1913.[4]

b.

The June 1 Memorandum also failed to consider DHS's prior factual findings on MPP's benefits. In its October 2019 Assessment of MPP, DHS found that "aliens without meritorious claims—which no longer constitute[d] a free ticket into the United States—[were] beginning to voluntarily return home." D. Ct. Op. at 10. DHS also found that MPP addressed the "perverse

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[4] As the D.C. Circuit has emphasized in a different APA context, "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012) (Sentelle, C.J.) (quotation omitted). We do not suggest that DHS needed notice-and-comment rulemaking to rescind MPP. But it did need to consider "relevant factors" to that rescission decision. *Id.* And you might reasonably think that one "relevant factor[]" to that decision was DHS's pledge "to consult Texas and consider its views before taking any action, adopting or modify[ing] a policy or procedure, or making any decision that" affects MPP. Compl., Ex. B at 2. Perhaps DHS has a good reason for its action. But it is likely arbitrary and capricious for DHS not even to acknowledge its agreement—let alone do anything to consult Texas or consider its views.

incentives" created by allowing "those with non-meritorious claims . . . [to] remain in the country for lengthy periods of time." *Id.* These benefits, DHS emphasized, were a "core component" or "cornerstone" of the agency's prior immigration policy. *Id.* at 12.

Nonetheless, the June 1 Memorandum did not expressly mention, let alone meaningfully discuss, DHS's prior factual findings. Instead, the Secretary changed policies based on his own findings that contradict DHS's October 2019 findings. But an agency must provide "a more detailed justification" when a "new policy rests upon factual findings that contradict those which underlay its prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The Secretary did not provide the required "more detailed justification." *Id.* This further indicates that the termination of MPP was arbitrary and capricious.

c.

The June 1 Memorandum also insufficiently addressed alternatives to terminating MPP. "[W]hen an agency rescinds a prior policy[,] its reasoned analysis must consider the alternatives that are within the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913 (quotation omitted). While considering alternatives, DHS "*was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* at 1915. As explained above, DHS did not adequately assess reliance interests. So it would be impossible for the June 1 Memorandum to properly weigh the relevant interests against competing policy concerns while considering alternatives.

The June 1 Memorandum offers a single conclusory sentence addressing potential modifications to MPP: "I also considered whether the program could be modified in some fashion, but I believe that addressing the deficiencies identified in my review would require a total redesign that would involve significant additional investments in personnel and resources." AR. 5. But "belief" that a "total redesign" was required, *id.*, is no substitute for a "reasonable and reasonably explained" decision. *Prometheus*, 141 S. Ct. at 1158.

Of course, "DHS was not required . . . to consider *all* policy alternatives in reaching [its] decision," and the agency has "considerable flexibility" to "wind-down" a program. *Regents*, 140 S. Ct. at 1914 (emphasis added) (quotation omitted). But the problem is that the Secretary failed to mention *any* modification to MPP as a possible alternative, even though "the alternatives . . . are within the ambit of the existing policy." *Id.* at 1913 (quotations omitted). And merely stating that an alternative was considered is not enough to show reasoned analysis. *Cf. United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010) ("We do not defer to the agency's conclusory or unsupported suppositions." (quotation omitted)).

The Government's principal counterargument is that DHS considered an alternative *outside* "the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913. Specifically, the June 1 Memorandum pointed to a "Dedicated Docket" program designed to provide counsel to aliens in removal proceedings. AR. 4-5 & n.6; *see* Stay Mot. at 16; Reply at 7. This argument is unpersuasive for at least two reasons. First, by the Government's own admission, the "Dedicated Docket" is outside the ambit of

MPP—and hence it does not count as a reasoned consideration of alternatives "*within* the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913 (emphasis added). And second, neither the June 1 Memorandum nor the Government in its stay motion explains why MPP and the "Dedicated Docket" are mutually exclusive.

d.

The June 1 Memorandum also failed to consider the legal implications of terminating the policy. After the Government suspended MPP—but before it rescinded the program—Texas filed this lawsuit. In its original complaint, and in its initial motion for preliminary injunction, Texas argued that the suspension of MPP violated § 1225. *See* Compl. at 36-38; Prelim. Inj. Mot., ECF No. 30. About a month and a half later, the Secretary issued the memorandum terminating MPP. So the government was on notice of the legal implications. Yet in the memorandum, the Secretary does not mention the lawfulness concerns involving § 1225—even though, the "natural response" to this "newly identified problem" would be to consider the problem. *Regents*, 140 S. Ct. at 1916. This further indicates that "the process by which" the Secretary reached that result was neither "logical" nor "rational." *Michigan*, 576 U.S. at 750.

e.

The Government offers a hodgepodge of counterarguments to justify the June 1 Memorandum's omissions. None is persuasive.

The Government repeatedly argues that DHS's statement that it considered this or that factor is enough to avoid any arbitrary-and-capricious problems. *See*

Stay Mot. at 16. The law says otherwise. "Stating that a factor was considered . . . is not a substitute for considering it." *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986); *see also Corrosion Proof Fittings v. E.P.A.*, 947 F.2d 1201, 1226 (5th Cir. 1991) ("The EPA's failure to consider the regulatory alternatives, however, cannot be substantiated by conclusory statements. . . . "); *United Techs.*, 601 F.3d at 562 ("We do not defer to the agency's conclusory or unsupported suppositions." (quotation omitted)); *cf. Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002) ("And stating that a factor was considered—or found—is not a substitute for considering or finding it." (quotation omitted)); *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020) ("Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking."). This well-established principle makes sense. After all:

> [A]n agency's "experience and expertise" presumably enable the agency to provide the required explanation, but they do not substitute for the explanation, any more than an expert witness's credentials substitute for the substantive requirements applicable to the expert's testimony under Fed. R. Evid. 702. The requirement of explanation presumes the expertise and experience of the agency and still demands an adequate explanation in the particular matter.

CS Wind Viet. Co. v. United States, 832 F.3d 1367, 1377 (Fed. Cir. 2016) (citations omitted).

The Government also points to the June 1 Memorandum's observations on MPP's shortcomings. *See* Stay Mot. at 16-17. Even if creditable, these observations cannot justify the other omissions discussed above.

But in any event, many of those observations are neither "logical" nor "rational." *Michigan*, 576 U.S. at 750. Take DHS's termination justification based on *in absentia* removal orders. DHS observed that "the high percentage of cases completed through the entry of *in absentia* removal orders (approximately 44 percent, based on DHS data) *raises questions* for me about the design and operation of the program." AR.4 (emphasis added). The district court found that "[t]he federal government's data shows similarly high rates of *in absentia* removals *prior* to implementation of MPP." D. Ct. Op. at 40. The Government has not said one word to suggest the district court's factual finding was clearly erroneous.[5] We therefore cannot conclude that the Secretary "examine[d] the relevant data and articulate[d] a satisfactory explanation" with "a rational connection between the facts found and the choice" to terminate MPP. *State Farm*, 463 U.S. at 43 (quotation omitted). And even on the Government's own terms—considering *only* half the statistics and ignoring the district court's factual finding—the June 1 Memorandum only said that *in absentia* statistics "raise[d] questions for [DHS] about the design and operation of the program." AR. 4. But the process required by the APA requires agencies

[5] In its reply brief, the Government argues that it need not have commissioned an "in-depth empirical analysis" of the *in absentia* statistics before rescinding MPP. Reply at 9. Of course that is true. But it is equally true that the Government cannot cherry-pick only the statistics it likes in the administrative record. Nor can the Government fail to address statistics that already exist in that record. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (holding "an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice" (quotation omitted)).

to *seek answers* and reasonably explain the outcome of that effort, including its conclusions.

The June 1 Memorandum places much weight on COVID-19. According to the Memorandum, the pandemic "compounded" "challenges faced by MPP" when "immigration courts designated to hear MPP cases were closed for public health reasons between March 2020 and April 2021." AR.4. But DHS issued its memorandum terminating MPP at least one month *after* courts reopened. As the district court explained: "*Past* problems with *past* closures are irrelevant to the decision to *prospectively* terminate MPP in June 2021. This is especially true when the Secretary admits DHS had maintained the facilities during the pandemic." D. Ct. Op. at 41. The Government challenges this conclusion on the ground that "infrastructure used for MPP remains shuttered." Stay Mot. at 19 n.4. But the Government provides no indication that the facilities are not maintained or are shuttered because of the pandemic—as opposed to the choice the Government itself made when it suspended MPP in January 2021.

2.

In addition to the APA, the district court also relied on 8 U.S.C. § 1225. The Government claims that the district court determined that "the Secretary is *required* to return any noncitizen he fails to detain" and that the district court's "core legal analysis" is that DHS has "a binary choice between detention or return to Mexico for noncitizens arriving from Mexico." Stay Mot. at 11-13. In essence, the Government characterizes the district court's decision and injunction as removing the Government's ability to use its discretion under 8 U.S.C. §§ 1182(d)(5)(A) and 1226. But as we explain in Part

III, *infra*, the Government has mischaracterized the district court's order. This matters because all of the Government's § 1225 arguments hinge on an incorrect premise.

Therefore, we cannot conclude that the Government is likely to succeed on either its APA arguments or its § 1225 arguments—let alone that the Government is likely to succeed on both. The Government therefore has not come close to a "strong showing" that it is likely to succeed on the merits. *Nken*, 556 U.S. at 426.

III.

The Government also has not shown that it will be irreparably injured absent a stay pending appeal. The Government's arguments are largely built on two strawmen. We consider and reject those before turning to the Government's other arguments.

First, the Government complains that it will be irreparably harmed absent a stay because DHS is incapable of reinstating MPP "in a matter of days." Stay Mot. at 21; *see also* Decl. of David Shahoulian ¶ 16 (Aug. 16, 2021) (arguing DHS cannot immediately "reestablish the entire infrastructure upon which [MPP] was built"). This is a strawman. The district court did not order the Government to restore MPP's infrastructure overnight. It ordered that, once the injunction takes effect on August 21, DHS must "enforce and implement MPP *in good faith*." D. Ct. Op. at 52. DHS does not argue that good faith is an unreasonably high standard to meet.

Second, the Government asserts it will be irreparably injured because the injunction obligates DHS to detain "every single person described in 8 U.S.C. § 1225,"

which DHS cannot do because it lacks "sufficient detention capacity." Decl. of David Shahoulian ¶ 5 (Aug. 16, 2021). This is a second strawman. The injunction does not require the Government to detain every alien subject to § 1225. Nor does it order the Government to "build or obtain" additional detention facilities. Stay Mot. at 21. Instead, it requires the Government to "enforce and implement MPP *in good faith* . . . *until such a time* as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention." D. Ct. Op. at 52 (second emphasis added).

And far from ordering the Government to detain "every single person described in 8 U.S.C. § 1225," Decl. of David Shahoulian ¶ 5 (Aug. 16, 2021), the district court specifically acknowledged that the Government has other options. Under § 1225(b)(2)(A), which provides the statutory authority for MPP, an alien arriving on land from a contiguous foreign territory can be returned to that territory. *See* D. Ct. Op. at 43 & n.11 (noting this discretion). Under 8 U.S.C. § 1182(d)(5)(A), DHS can parole an alien into the United States "on a *case-by-case basis* for urgent humanitarian reasons or significant public benefit." (Emphasis added); *see* D. Ct. Op. at 43 & n.11 (noting this discretion). Under 8 U.S.C. § 1226, DHS can release on "bond" or "conditional parole" an alien arrested on a warrant and detained "pending a decision on whether the alien is to be removed." *See also* Stay Mot. at 12; D. Ct. Op. at 51 (noting this discretion). Last but not least, of course, the Government can choose to detain an alien in accordance with § 1225. *See* D. Ct. Op. at 43 (noting this discretion).

What the Government cannot do, the district court held, is simply release every alien described in § 1225 *en masse* into the United States. The Government has not pointed to a single word anywhere in the INA that suggests it can do that. And the Government cannot claim an irreparable injury from being enjoined against an action that it has no statutory authorization to take.

Third and finally, we turn to the Government's non-strawmen arguments for its irreparable injuries. Most of these are self-inflicted and therefore do not count. *See* 11A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2021) ("[A] party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted"). For example, the Government notes that "DHS has been in the process of unwinding MPP and its infrastructure for months," such that restarting the program now would be difficult. Stay Mot. at 21. But as the district court noted, "Texas filed suit challenging the suspension of enrollments in MPP . . . nearly two months *before* DHS purported to terminate the program entirely in the June 1 Memorandum." D. Ct. Op. at 47. Therefore, DHS could have avoided this problem by waiting to unwind MPP until this litigation was resolved. The self-inflicted nature of the government's asserted harm "'severely undermines' its claim for equitable relief." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) (quoting *Hirschfeld v. Bd. of Elections in City of N.Y.*, 984 F.2d 35, 39 (2d Cir. 1993)); *accord Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003) ("[S]elf-inflicted wounds are not irreparable injury."); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) ("If the harm

complained of is self-inflicted, it does not qualify as irreparable.").

Before the district court, the Government also suggested that it began unwinding MPP four or more months *before* the June 1 Memorandum. *See* D. Ct. Op. at 48. That understandably would make it harder for DHS to restart MPP on Saturday. But it also makes DHS's legal position dramatically weaker. It is a fundamental precept of administrative law that an administrative agency cannot make its decision first and explain it later. *See, e.g.*, *Regents*, 140 S. Ct. at 1908-10. Insofar as DHS concedes that its June 1 Memorandum is a *post hoc* rationalization for a decision that it made many months earlier, it has conceded that the June 1 Memorandum is arbitrary, capricious, and not a good faith explanation for its decision. Such inequitable conduct is "sufficient to deny" DHS's request for an equitable stay pending appeal. *See In re GGW Brands, LLC*, No. 2:13-bk-15130, 2013 WL 6906375, at *26-*27 (Bankr. C.D. Cal. Nov. 15, 2013).

The Government also asserts that reinstating MPP will cause harm because "DHS cannot restart MPP without significant cooperation with Mexico," and the injunction implicates "delicate and ongoing discussions with Mexico." Stay Mot. at 21. There are at least four problems with that. First, as the district court noted, DHS created MPP unilaterally and without any previous agreement with Mexico. *See* D. Ct. Op. at 49 & n.15. DHS does not explain why it cannot likewise restart MPP unilaterally. Second, the Government does not point to any evidence that Mexico has withdrawn its support for MPP. *See* AR. 152-53 (Mexico's December 20, 2018 statement of support). Third, the Government

"'could have avoided' any disruptions by simply informing Mexico that termination of MPP would be subject to judicial review." D. Ct. Op. at 47 (quoting *Texas*, 809 F.3d at 187). Insofar as the Government failed to do that, again, its injury is self-inflicted. Fourth, even assuming Mexico's support is required, assuming Mexico has withdrawn its support, and assuming Mexico will not support a new MPP, the injunction *still* does not irreparably harm the Government. The injunction only requires good faith on the part of the United States—if the Government's good-faith efforts to implement MPP are thwarted by Mexico, it nonetheless will be in compliance with the district court's order, so long as it also adheres to the rest of the statutory requirements.

Finally, because the Government has requested a stay pending completion of appellate proceedings, the relevant question is whether the Government will be irreparably harmed *during the pendency of the appeal*. Even if the Government were correct that long-term compliance with the district court's injunction would cause irreparable harm, it presents no reason to think that it cannot comply with the district court's requirement of good faith while the appeal proceeds. Therefore, the Government has failed to demonstrate that it will be irreparably injured absent a stay pending appeal.

IV.

The final two *Nken* factors also do not warrant a stay. *See Nken*, 556 U.S. at 434.

The district court concluded that the States have suffered, and will continue to suffer, harms as a result of the termination of MPP. *See* D. Ct. Op. at 17 ("The ter-

mination of MPP has [increased] and will continue to increase the number of aliens being released into the United States and has [imposed] and will continue to impose harms on Plaintiff States Texas and Missouri."). We agree. *See supra* Part II.A.1 (standing). A stay "would enable" aliens released into the interior "to apply for driver's licenses and other benefits, and it would be difficult for the states to retract those benefits or recoup their costs even if they won on the merits." *Texas*, 787 F.3d at 768.

Likewise, the "public interest [is] in having governmental agencies abide by the federal laws that govern their existence and operations." *Washington v. Reno*, 35 F.3d 1093, 1102 (6th Cir. 1994). Here, the Government has failed to carry its burden to show that its conduct comports with federal law. And "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

The Government is also wrong to say that a stay would promote the public interest by preserving the separation of powers. All the district court's injunction requires of the Government is that it act in accordance with the INA. And in all events, "it is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect" principles of "separation of powers and federalism." *Texas*, 787 F.3d at 768.

The DHS-Texas Agreement also suggests the public interest counsels against issuing a stay. That Agreement expressly acknowledged that if DHS failed to comply with the Agreement's terms, Texas would "be irrep-

arably damaged" and would "not have an adequate remedy at law." Compl., Ex. B at 4. The Agreement remained binding until August 1, 2021, and the parties agree DHS violated its terms. *See* D. Ct. Op. at 14 ("The parties agree DHS did not follow the[] procedures" required by the Agreement.). The district court concluded that the expiration of the Agreement mooted Texas's claim under it. *See id.* at 44. As noted in Part II above, however, the States' likelihood of success on the merits of their APA claims means that DHS will have to consider all relevant factors before attempting to rescind MPP—including its effects on the States. The public interest plainly lies in not allowing DHS to circumvent those federalism concerns.

V.

Finally, the Government argues a stay is warranted because the district court should have remanded without vacating the June 1 Memorandum or issuing an injunction. Stay Mot. at 22; *see also* Reply at 12. "Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Texas Ass'n of Manufacturers v. United States Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021). But it is unclear how DHS can substantiate its decision on remand. Neither in its opening stay motion nor in its reply does the Government suggest how it can. *See generally* Stay Mot. at 22-23; Reply at 12. And Supreme Court precedent suggests that any later memorandum on remand elaborating on the June 1 Memorandum would be irrelevant to an arbitrary-and-capricious analysis because it is a *post hoc* rationalization. *See Regents*, 140 S. Ct. at 1907-09. So at this stage,

without any argument whatsoever to the contrary, it appears that DHS would have to issue "a *new* rule implementing a *new* policy" that "compl[ies] with the procedural requirements for new agency action." *Id.* at 1908 (emphases added).

Vacatur, by contrast, would not cause "disruptive consequences". *See United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (also considering "the disruptive consequences of vacatur" (internal quotation marks omitted)). The Government makes no argument materially different from its irreparable-injury argument. So we reject the Government's arguments here for the same reasons we rejected them in Part III, *supra*.

* * *

The Government has failed to make the requisite showing for all four *Nken* factors. The Government's motion for a stay pending appeal is therefore DENIED. The Government's appeal is hereby EXPEDITED for consideration before the next available oral argument panel.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
660 S. MAESTRI PLACE,
SUITE 115
NEW ORLEANS, LA 70130

Aug. 19, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 21-10806 State of Texas v. Biden
USDC No. 2:21-CV-67

Enclosed is the opinion entered in the case captioned above.

In light of the court's decision to expedite this appeal, an expedited briefing schedule is forthcoming.

Sincerely,

LYLE W. CAYCE, Clerk

By: CHARLES B. WHITNEY
CHARLES B. WHITNEY, Deputy Clerk
504-310-7679

Mrs. Blaine Bookey
Mr. Joseph Anton Darrow
Mr. Thomas Molnar Fisher
Ms. Karen S. Mitchell
Mr. Jesus Armando Osete
Mr. Erez Reuveni
Mr. Dean John Sauer

Mr. Brian Walters Stoltz
Mr. Judd Edward Stone II
Mr. William Thomas Thompson
Mr. Brian Christopher Ward
Mr. Cody Wofsy

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

2:21-CV-067-Z

THE STATE OF TEXAS, ET AL., PLAINTIFFS

v.

JOSEPH R. BIDEN, JR., ET AL., DEFENDANTS

Filed: Aug. 17, 2021

ORDER

Defendants' Emergency Motion to Stay Court's Order Pending Appeal (ECF No. 98) is **DENIED**. *See* FED. R. APP. P. 8(a)(1).

SO ORDERED.

Aug. [17], 2021.

/s/ MATTHEW J. KACSMARYK
MATTHEW J. KACSMARYK
United States District Judge

APPENDIX G

Secretary

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

Oct. 29, 2021

MEMORANDUM TO: Tae D. Johnson
Acting Director
U.S. Immigration and Customs Enforcement

Troy A. Miller
Acting Commissioner
U.S. Customs and Border Protection

Ur M. Jaddou
Director
U.S. Citizenship and Immigration Services

Robert Silvers
Under Secretary
Office Strategy, Policy, and Plans

FROM: Alejandro N. Mayorkas
Secretary
/s/ ALEJANDRO N. MAYORKAS

SUBJECT: **Termination of the Migrant Protection Protocols**

On January 25, 2019, then-Secretary of Homeland Security Kirstjen Nielsen issued a memorandum entitled "Policy Guidance for Implementation of the Migrant Protection Protocols." On February 2, 2021, President Biden issued Executive Order (EO) 14010, *Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*. In this Executive Order, President Biden directed the Secretary of Homeland Security "to promptly review and determine whether to terminate or modify the program known as the Migrant Protection Protocols." After completing a comprehensive review as directed by EO 14010, I concluded that the Migrant Protection Protocols (MPP) should be terminated and, on June 1, 2021, issued a memorandum to that effect (the "June 1 memo").

On August 13, 2021, the U.S. District Court for the Northern District of Texas determined that the June 1 memo was not issued in compliance with the Administrative Procedure Act (APA) because it failed to address all the relevant considerations. *See Texas v. Biden*, No. 2:21-cv-067, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021). As a result, the District Court vacated the June 1 memo in its entirety and remanded the matter to the Department for further consideration. *Id.* at *27. The District Court additionally ordered DHS to "enforce and implement MPP *in good faith*" until certain conditions are satisfied, including that MPP be "lawfully rescinded in compliance with the APA." *Id.* (emphasis in original). The Department is fully complying

with the District Court's order. At the same time, the Department has filed a notice of appeal and continues to vigorously contest several of the District Court's conclusions.

Pursuant to the District Court's remand and in continuing compliance with the President's direction in EO 14010, I have once more assessed whether MPP should be maintained, terminated, or modified in a variety of different ways. In conducting my review, I have studied multiple court decisions, filings, and declarations related to MPP; considered relevant data regarding enrollments in MPP, encounters at the border, and outcomes in removal proceedings; reviewed previous Departmental assessments of MPP, as well as news reports and publicly available sources of information pertaining to conditions in Mexico; met with a broad and diverse array of internal and external stakeholders, including officials from across the federal government working on border management, state and local elected officials from across the border region, border sheriffs and other local law enforcement officials, and representatives from nonprofit organizations providing legal access and humanitarian aid across the southwest border; and considered the impact of other Administration initiatives related to immigration and the southern border. I also examined considerations that the District Court determined were insufficiently addressed in the June 1 memo, including claims that MPP discouraged unlawful border crossings, decreased the filing of non-meritorious asylum claims, and facilitated more timely relief for asylum seekers, as well as predictions that termination of MPP would lead to a border surge, cause the Department to fail to comply with alleged detention obligations under

the Immigration and Nationality Act, impose undue costs on states, and put a strain on U.S.-Mexico relations.

After carefully considering 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, I have determined that MPP should be terminated. In reaching this conclusion, I recognize that MPP likely contributed to reduced migratory flows. But it did so by imposing substantial and unjustifiable human costs on the individuals who were exposed to harm while waiting in Mexico. The Biden-Harris Administration, by contrast, is pursuing a series of policies that disincentivize irregular migration while incentivizing safe, orderly, and humane pathways. These policies—including the ongoing efforts to reform our asylum system and address the root causes of migration in the region—seek to tackle longstanding problems that have plagued our immigration system for decades and achieve systemic change. Once fully implemented, I believe these policies will address migratory flows as effectively, in fact more effectively, while holding true to our nation's values.

To reiterate what the President has stated previously, the United States is a nation with borders and laws that must be enforced. It is also a nation of immigrants. This Administration is, as a result, committed to the twin goals of securing our borders and offering protection to those fleeing persecution and torture. MPP is neither the best, nor the preferred, strategy for achieving either of these goals. Significant evidence indicates that individuals awaiting their court hearings in Mexico under MPP were subject to extreme violence

and insecurity at the hands of transnational criminal organizations that profited by exploiting migrants' vulnerabilities. It is possible that such humanitarian challenges could be lessened through the expenditure of significant government resources currently allocated to other purposes. Ultimately, however, the United States has limited ability to ensure the safety and security of those returned to Mexico. Other significant issues with MPP, including the difficulties in accessing counsel and traveling to courts separated by an international border, are endemic to the program's design.

In reaching my determination, I have carefully considered what I deem to be the strongest argument in favor of retaining MPP: namely, the significant decrease in border encounters following the determination to implement MPP across the southern border. Of course, correlation does not equal causation and, even here, the evidence is not conclusive. I have nonetheless presumed, for the sake of this review, that MPP resulted in a significant decrease in irregular border crossings and persons approaching the U.S. border to pursue non-meritorious asylum claims. I still conclude that the benefits do not justify the costs, particularly given the way in which MPP detracts from other regional and domestic goals, foreign-policy objectives, and domestic policy initiatives that better align with this Administration's values.

Importantly, the effective management of migratory flows requires that we work with our regional partners to address the root causes that drive migrants to leave their countries and to tackle this challenge before it arrives at our border. This is a shared responsibility of all countries across the region. MPP distracts from

these regional efforts, focusing resources and attention on this singular program rather than on the work that is needed to implement broader and more enduring solutions.

Efforts to implement MPP have played a particularly outsized role in diplomatic engagements with Mexico, diverting attention from more productive efforts to fight transnational criminal and smuggling networks and address the root causes of migration. This was true under the previous implementation of MPP, and it is even more true today given the shared belief that the program should not be implemented without, at the very least, significant improvements. Notably, Mexico has made clear that it will not agree to accept those the United States seeks to return to Mexico under MPP unless substantial improvements are made to the program. But these much-needed efforts to enhance humanitarian protections for those placed in MPP are resource-intensive, exacerbating one of the flaws of the program: the concentration of resources, personnel, and aid efforts on the northern border of Mexico rather than on broader regional assistance efforts that would more effectively and systematically address the problem of irregular migration and better protect our border.

Moreover, the personnel required to adequately screen MPP enrollees to ensure they are not returned to persecution or torture in Mexico, process them for court hearings, and manage their cases pulls resources from other priority efforts, including the ongoing efforts to implement effective, fair, and durable asylum reforms that reduce adjudication delays and tackle the immigration court backlog. Both the Dedicated Docket, designed so that immigration judges can adjudicate cases within

300 days, and the proposed Asylum Officer Rule, which would transfer the initial responsibility for adjudicating asylum claims from immigration judges to USCIS asylum officers to produce timely and fair decision-making, are expected to yield transformative and lasting changes to the asylum system. MPP, which can require unproductive, redundant screenings per case given the many different times individuals are returned to Mexico during the pendency of a single removal proceeding, diverts asylum officers and immigration judges away from these priority efforts. MPP not only undercuts the Administration's ability to implement critically needed and foundational changes to the immigration system, but it also fails to provide the fair process and humanitarian protections that all persons deserve.

Having assessed the benefits and costs of the previous implementation of MPP, including how the program could potentially be improved, I have concluded that there are inherent problems with the program that no amount of resources can sufficiently fix. Others cannot be addressed without detracting from key Administration priorities and more enduring solutions.

It is, as a result, my judgment that the benefits of MPP are far outweighed by the costs of continuing to use the program on a programmatic basis, in whatever form. For the reasons detailed more fully in the attached memorandum, the contents of which are adopted and incorporated into the decision contained here, I am hereby terminating MPP. Effective immediately, I hereby supersede and rescind the June 1 memorandum, Secretary Nielsen's January 25, 2019 memorandum, and any other guidance or other documents prepared by the Depart-

ment to implement MPP. The Department will continue complying with the *Texas* injunction requiring good-faith implementation and enforcement of MPP. But the termination of MPP will be implemented as soon as practicable after a final judicial decision to vacate the *Texas* injunction.

APPENDIX H

Explanation of the Decision to Terminate the Migrant Protection Protocols

Oct. 29, 2021

I. Executive Summary

On February 2, 2021, President Biden issued an Executive Order directing the Secretary of Homeland Security to "promptly review and determine whether to terminate or modify the program known as the Migrant Protection Protocols."[1] After extensive review, the Secretary of Homeland Security concluded that the Migrant Protection Protocols (MPP) should be terminated,

[1] Exec. Order No. 14010, *Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, 86 Fed. Reg. 8267 (Feb. 2, 2021).

and on June 1, 2021, issued a memorandum to that effect.[2] On August 13, 2021, however, the U.S. District Court for the Northern District of Texas determined that the June 1, 2021, memorandum was not issued in compliance with the Administrative Procedure Act (APA) and caused DHS to violate 8 U.S.C. § 1225, vacated the memorandum, and remanded it to the Department for further consideration. The court additionally ordered DHS to "enforce and implement MPP *in good faith*" until certain conditions are satisfied, including that MPP be "lawfully rescinded in compliance with the APA"—a ruling that the government is vigorously appealing.

Pursuant to the Texas court's remand, and in continuing compliance with the President's direction in the Executive Order, the Secretary has considered anew whether MPP should be maintained, terminated, or modified in a variety of different ways. After carefully considering the arguments, evidence, and perspectives of those who support continuing to use MPP, those who support terminating the program, and those who have argued for the use of MPP with modifications, the Secretary has determined that MPP should be terminated. In reaching this conclusion, the Secretary recognizes that MPP likely contributed to reduced migratory flows. But it did so by imposing substantial and unjustifiable human costs on migrants who were exposed to harm while waiting in Mexico. The Biden-Harris Administration, by contrast, is pursuing a series of policies that

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[2] Memorandum from Alejandro N. Mayorkas, Sec'y of Homeland Security, *Termination of the Migrant Protection Protocols Program* (June 1, 2021) [hereinafter June 1 Memo].

will disincentivize irregular migration while incentivizing safe, orderly, and humane pathways. These policies —including the ongoing efforts to reform our asylum system and address the root causes of migration in the region—seek to tackle longstanding problems that have plagued our immigration system for decades and achieve systemic change.

To reiterate what the President has stated previously, the United States is a nation with borders and laws that must be enforced. It is also a nation of immigrants. This Administration is, as a result, committed to the twin goals of securing our borders and offering protection to those fleeing persecution and torture. MPP is neither the best, nor the preferred, strategy for achieving either of these goals. Significant evidence indicates that individuals were subject to extreme violence and insecurity at the hands of transnational criminal organizations that profited from putting migrants in harms' way while awaiting their court hearings in Mexico. It is possible that some of these humanitarian challenges could be lessened through the expenditure of significant government resources currently allocated to other purposes. Ultimately, however, the United States has limited ability to ensure the safety and security of those returned to Mexico. Other significant issues with MPP, including the difficulties in accessing counsel and traveling to courts separated by an international border, are endemic to the program's design.

Importantly, as the Secretary has emphasized, the management of migratory flows is a shared responsibility among all countries in the hemisphere. MPP distracts from these regional efforts, focusing resources and attention on this singular program rather than on

the work that is needed to implement broader, and more enduring, solutions. Efforts to implement MPP have played a particularly outsized role in diplomatic engagements with Mexico, diverting attention from more productive efforts to fight transnational criminal and smuggling networks and address the root causes of migration.

Notably, Mexico has made clear that it will not agree to accept those the United States seeks to return to Mexico under MPP unless substantial improvements are made to the program. But these much-needed efforts to enhance humanitarian protections for those placed in MPP are resource-intensive, exacerbating one of the flaws of the program—the concentration of resources, personnel, and aid efforts on the northern border of Mexico rather than on broader regional assistance efforts that would more effectively and systemically tackle the problem of irregular migration and protect our border. Moreover, the personnel required to adequately screen MPP enrollees, potentially multiple times—to ensure they are not returned to persecution or torture in Mexico, process them for court hearings, and manage their cases—pulls resources from other priority efforts, including the ongoing efforts to implement effective, fair, and durable asylum reforms that reduce adjudication delays and tackle the immigration court backlog.

Having assessed the benefits and costs of the previous implementation of MPP as well as how the program could potentially be improved, the Secretary has concluded that there are inherent problems with the program—including the vulnerability of migrants to criminal networks, and the challenges associated with accessing counsel and courts across an international

border—that resources cannot sufficiently fix. Others cannot be addressed without detracting from other key Administration priorities. It is thus the Secretary's judgment that the benefits of MPP are far outweighed by the costs of the program, in whatever form.

As a result, for the many reasons described in what follows, the Secretary in a memorandum issued today entitled, "Termination of the Migrant Protection Protocols," has decided to terminate MPP.[3] This determination will be implemented as soon as practicable after a final judicial decision to vacate the Texas injunction that currently requires good-faith enforcement of MPP.

II. Background

On January 25, 2019, Secretary of Homeland Security Kirstjen Nielsen issued a memorandum entitled "Policy Guidance for Implementation of the Migrant Protection Protocols." On January 20, 2021, Acting Secretary David Pekoske issued a memorandum temporarily suspending new enrollments into the Migrant Protection Protocols (MPP) pending further review.[4] Two weeks later, on February 2, 2021, President Biden issued Executive Order (EO) 14010, *Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly*

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[3] Memorandum from Alejandro Mayorkas, Sec'y of Homeland Sec., *Termination of the Migrant Protection Protocols* (Oct. 29, 2021).

[4] Memorandum from David Pekoske, Acting Sec'y of Homeland Sec., *Suspension of Enrollment in the Migrant Protection Protocol Program* (Jan. 20, 2021) [hereinafter MPP Suspension Memorandum].

Processing of Asylum Seekers at the United States Border.[5] In this Executive Order, President Biden directed the Secretary of Homeland Security to "promptly review and determine whether to terminate or modify the program known as the Migrant Protection Protocols" and "promptly consider a phased strategy for the safe and orderly entry into the United States, consistent with public health and safety and capacity constraints, of those individuals who have been subject to MPP."[6] In response, Secretary Mayorkas initiated a comprehensive review of MPP. The Secretary, in conjunction with other agencies, also implemented a phased process for the safe and orderly entry into the United States of thousands of individuals who had been placed in MPP and certain of their immediate family members for proceedings.[7]

At the conclusion of his review, on June 1, 2021, Secretary Mayorkas issued a memorandum announcing and explaining his determination that MPP should be terminated (the "June 1 Memorandum").[8] On August 13, 2021, the U.S. District Court for the Northern District of Texas determined that the June 1 Memorandum did not reflect reasoned decision-making and thus was not issued in compliance with the Administrative Procedure Act (APA), and that the memorandum caused the Department to violate detention provisions found in 8

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[5] Exec. Order No. 14010, 86 Fed. Reg. 8267 (Feb. 2, 2021).

[6] *Id.* at 8270.

[7] *See* Press Release, DHS, "DHS Announces Process to Address Individuals in Mexico with Active MPP Cases," Feb. 11, 2021, https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-activempp-cases.

[8] *See supra* note 2.

U.S.C. § 1225.[9] The court vacated the June 1 Memorandum in its entirety and remanded it to the Department of Homeland Security (DHS) for further consideration.[10] The court additionally ordered DHS to "enforce and implement MPP *in good faith*" until certain conditions are satisfied, including that MPP be "lawfully rescinded in compliance with the APA."[11] The government is complying with that injunction while appealing the decision.

Pursuant to the district court's remand, and consistent with the President's direction in EO 14010, the Secretary has considered anew whether MPP should be maintained, terminated, or modified. This memorandum sets forth the results of that analysis and the basis for the Secretary's decision to terminate MPP by way of a separate memorandum being issued today. The Secretary's memorandum immediately supersedes and rescinds the June 1 Memorandum, as well as Secretary Nielsen's January 25, 2019 memorandum and any other guidance or other documents prepared by the Department to implement it. The Secretary's decision to terminate MPP is to be implemented as soon as practicable after a final judicial decision to vacate the *Texas* injunction that currently requires good faith implementation and enforcement of MPP.

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[9] *See Texas v. Biden*, No. 2:21-cv-067, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021), *appeal pending*, No. 21-10806 (5th Cir. filed Aug. 16, 2021).

[10] *Id.* at *27.

[11] *Id.* (emphasis in original).

A. MPP's Statutory Basis and Implementation

Enacted in 1996, Section 235(b)(2)(C) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1225(b)(2)(C), grants DHS discretionary authority to return to Mexico or Canada certain noncitizens who are arriving on land from those contiguous countries pending their removal proceedings before an immigration judge under Section 240 of the INA, 8 U.S.C. § 1229a. Historically, DHS and the legacy Immigration and Naturalization Service (INS) used this discretionary authority on a case-by-case basis to return certain Mexican and Canadian nationals who were arriving at land border ports of entry; occasionally, the provision also was used for third-country nationals under certain circumstances provided they did not have a fear of persecution or torture related to return to Canada or Mexico.[12] On December 20, 2018,

[12] Prior to MPP, DHS and the former INS primarily used Section 235(b)(2)(C) on an ad-hoc basis to return certain Mexican and Canadian nationals who were arriving at land border ports of entry. CBP, for instance, invoked Section 235(b)(2)(C) to return certain Mexican nationals who were U.S. lawful permanent residents (LPRs) and whose criminal histories potentially subjected them to removal, as well as LPRs who appeared to have abandoned their permanent residence in the United States but were not willing to execute a Form I-407, Record of Abandonment of Lawful Permanent Residence. At the Northern Border, CBP used Section 235(b)(2)(C) to return certain Canadian nationals or those with status in Canada who, for instance, appear to be subject to a criminal ground of inadmissibility. Although guidance is scant, DHS and the former INS also used Section 235(b)(2)(C), on a case-by-case basis, for certain third country nationals even prior to MPP. For example, CBP issued field guidance in 2005 advising that a Cuban national arriving at a land border port of entry may "be returned to contiguous territory pending section 240 proceedings . . . if: (1) the alien cannot demonstrate eligibility for the exercise of parole discretion; (2) the alien has valid immigration status in Canada

the Department announced a decision to initiate MPP—a novel programmatic implementation of Section 235(b)(2)(C)—along the Southwest Border (SWB). That same day, Mexico announced its independent decision to accept those returned to Mexico through the program—a key precondition to implementation.[13]

At the time of its initial announcement, DHS stated that the program was intended to: (1) reduce unlawful migration and false claims of asylum; (2) ensure that migrants are not able to "disappear" into the United States prior to a court decision; (3) focus attention on more quickly assisting legitimate asylum seekers; (4) free up personnel and resources to better protect U.S. territory and clear the backlog of unadjudicated asylum applications; and (5) offer protection to vulnerable populations while they wait in Mexico for their removal proceedings.[14]

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or Mexico; (3) Canadian or Mexican border officials express a willingness to accept the returning alien; and (4) the alien's claim of fear of persecution or torture does not relate to Canada or Mexico." Mem. from Jayson P. Ahern, Asst. Comm'r, Office of Field Ops., CBP, *Treatment of Cuban Asylum Seekers at Land Border Ports of Entry* 2-3 (June 10, 2005). The INS also issued guidance in 1997 and 1998 contemplating the use of Section 235(b)(2)(C) only as a "last resort" and only when the individual does not claim a fear of persecution related to Canada or Mexico. Mem. from Michael A. Pearson, Executive Assoc. Comm'r, Office of Field Ops., INS, *Detention Guidelines Effective October 9, 1998* 3 (Oct. 7, 1998); Mem. from Chris Sale, Deputy Comm'r, INS, *Implementation of Expedited Removal* 4 (Mar. 31, 1997) (same).

[13] Secretaría de Relaciones Exteriores, *Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act* (Dec. 20, 2018).

[14] Press Release, DHS, "Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration," Dec. 20, 2018,

On January 25, 2019, DHS issued policy guidance for implementing MPP,[15] which was augmented a few days later by operational guidance from U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS).[16] Under MPP, certain non-Mexican applicants for admission who arrived on land at the SWB were placed in removal proceedings and returned to Mexico to await their immigration court proceedings under Section 240 of the INA.[17] For those enrolled in MPP, DHS attempted to facilitate entry to and exit from the United States to attend their immigration proceedings, which were prioritized on the non-detained docket by the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR).

MPP was initially piloted at the San Ysidro port of entry and San Diego Immigration Court. In July 2019, the program was expanded into Texas and as of January 2020, individuals could be enrolled in MPP at locations across the SWB. Individuals returned to Mexico were processed back into the United States to attend their re-

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https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegalimmigration [hereinafter Nielsen Release].

[15] Memorandum from Kirstjen M. Nielsen, Sec'y of Homeland Sec., *Policy Guidance for Implementation of the Migrant Protection Protocols* (Jan. 25, 2019).

[16] Guidance documents are available at the archived MPP landing page under the *MPP Guidance Documentation heading:* https://www.dhs.gov/archive/migrant-protection-protocols.

[17] Individuals who could be enrolled into MPP were, generally, individuals from Spanish-speaking countries and Brazil.

moval proceedings at one of four immigration court locations in California and Texas.[18] It was initially anticipated that enrollees' first hearings would be scheduled within 30-45 days, consistent with the goal of timely adjudication of cases. But enrollment quickly outpaced EOIR's capacity to hear cases. Over time, capacity constraints meant that even initial hearings were scheduled many months after enrollment. Large numbers of migrants ended up living in camps in Northern Mexico that were, as well-documented in numerous reports and as described below, crowded, unsanitary, and beset by violence.[19]

Due to public health concerns brought on by the COVID-19 pandemic, EOIR paused immigration court

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[18] Individuals enrolled in MPP in the San Diego or El Paso jurisdictions attended hearings at the immigration courts in San Diego or El Paso; individuals enrolled in MPP in San Antonio or Harlingen jurisdictions attended hearings at the Immigration Hearing Facilities (IHFs) in Laredo or Brownsville, respectively.

[19] *See infra* Section III.A; see also Caitlin Dickerson, *Inside the Refugee Camp on America's Doorstep*, N.Y. Times, Oct. 23, 2020; Miriam Jordan, *'I'm Kidnapped': A Father's Nightmare on the Border*, N.Y. Times, Dec. 21, 2019; Nomaan Merchant, *Tents, stench, smoke: Health risks are gripping migrant camp*, A.P. News, Nov. 14, 2019; Human Rights Watch, *Like I'm Drowning: Children and Families Sent to Harm by the US 'Remain in Mexico' Program*, Jan. 6, 2021 ("As a result [of MPP], thousands of people are concentrated in dangerous Mexican border towns indefinitely, living lives in limbo. . . . Migrant shelters in Ciudad Juárez and Tijuana quickly filled, and a large shelter run by Mexican federal authorities in Ciudad Juárez also quickly hit capacity soon after it opened in late 2019. In Matamoros, dangers in the city have led as many as 2,600 people to live in an informal camp on the banks of the river marking the border between Mexico and the United States, a location prone to flooding.").

hearings for all non-detained individuals, including those enrolled in MPP, in March 2020.[20] MPP hearings never resumed prior to the program's January 2021 suspension, but new enrollments into MPP continued during this period, albeit at significantly reduced rates.[21]

In total, between the initial implementation of MPP on January 25, 2019, and the suspension of new enrollments that became effective on January 21, 2021,[22] DHS returned to Mexico approximately 68,000 individuals, according to DHS and EOIR data.[23] During that same period, CBP processed a total of 1.5 million SWB encounters, including approximately 1 million encounters processed under Title 8 authorities (including the 68,000 processed through MPP) and approximately 500,000 Title 42 expulsions.[24]

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[20] *See* Press Release, DHS, "Joint DHS/EOIR Statement of MPP Rescheduling," Mar. 23, 2020, https://www.dhs.gov/news/2020/03/23/joint-statement-mpp-rescheduling.

[21] *See* U.S. Customs and Border Protection, "Migrant Protection Protocols FY2021," https://www,cbp.gov/newsroom/stats/migrant-protection-protocols; U.S. Customs and Border Protection, "Migrant Protection Protocols FY2020," https://www.cbp.gov/newsroom/stats/migrant-protection-protocols-fy-2020; *see also* MPP Suspension Memorandum, *supra* note 4.

[22] MPP Suspension Memorandum, *supra* note 4.

[23] *See* "Migrant Protection Protocols Metrics and Measures," Jan. 21, 2021, https://www.dhs.gov/publication/metrics-and-measures.

[24] DHS Office of Immigration Statistics analysis of U.S. CBP administrative records. In March 2020, the U.S. Centers for Disease Control and Prevention (CDC) issued a public health order under 42 U.S.C. §§ 265 and 268 to prevent the spread of COVID-19 in CBP holding facilities and in the United States. 85 Fed. Reg. 16,559 (Mar. 24, 2020). The Order temporarily suspending the introduction of certain persons into the United States from countries where

B. Prior Evaluations of MPP

Prior to the Secretary's June 1, 2021, termination memorandum, the Department produced two notable assessments of the program that reached divergent conclusions.

In June 2019, as the Department prepared to expand MPP across the entire SWB, it formed a committee of senior leaders from multiple components (known as the "Red Team") to conduct a "top-down review of MPP's policies and implementation strategy and provide overall recommendations to increase the effectiveness of the program."[25] The Red Team members were chosen, in part, because they had "little to no involvement developing policy or with implementing MPP," thus helping to ensure an independent assessment.[26] The report and recommendations (the "Red Team Report") was issued October 25, 2019, but not publicly released.[27] In preparing its report, the Red Team reviewed key MPP background documents, conducted dozens of interviews, made site visits, and performed additional research.[28]

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a communicable disease exists. *Id.* In August 2021, CDC issued a new Order, which replaced, reaffirmed, and superseded the previous Orders. *See* 86 Fed. Reg. 42,828 (Aug. 5, 2021).

[25] Memorandum from Kevin McAleenan, Acting Sec'y of Homeland Sec., *Review of Migrant Protection Protocols Policy and Implementation* (June 12, 2019).

[26] *Id.* Working under the oversight of the Acting Deputy Secretary of Homeland Security, the Red Team was composed of individuals from the Offices of Privacy, Management, Civil Rights and Civil Liberties, and the Coast Guard.

[27] DHS Office of Operations Coordination, *The Migrant Protection Protocols Red Team Report* (Oct. 25, 2019) [hereinafter Red Team Report].

[28] *Id.* at 4.

The Red Team identified significant deficiencies in MPP and made multiple recommendations for improving MPP, organized around five different areas: the need for standardization and clarity with respect to information provided to migrants upon initial screening and processing; the need for better access to counsel and better mechanisms for communication with counsel; the need to ensure better *non-refoulement* protections;[29]

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[29] Article 33 of the 1951 Convention Relating to the Status of Refugees provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Convention Relating to the Status of Refugees, done July 28, 1951, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 176. The United States is not a party to the 1951 Convention, but the United States is a party to the 1967 Protocol Relating to the Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. 6577, which incorporates Article 33 of the 1951 Convention. The phrase "life or freedom would be threatened" is interpreted in U.S. law as meaning that it is more likely than not that the individual would be persecuted. *See, e.g.*, *INS v. Stevic*, 467 U.S. 407, 428 & n.22 (1984). Separately, Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) provides, "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." *See* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-2822 (8 U.S.C. § 1231 note). Article 3 of the CAT likewise is understood in U.S. law as requiring a "more likely than not" standard. *See, e.g.*, *Auguste v. Ridge*, 395 F.3d 123, 149 (3d Cir. 2005) (citing Senate Resolution, 136 Cong. Rec. S17,486, S17491-92 (daily ed. 1990)). These *non-refoulement* obligations are non-self-executing, *see, e.g.*, *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009) (1967 Refugee Protocol); *Al-Fara v. Gonzales*, 404 F.3d 733, 743 (3d Cir. 2005) (CAT), and are not specifically required by statute with respect to MPP returns.

the need for safe housing and protections for those returned to Mexico; and the need for administrative and logistical improvements, including the establishment of measures of effectiveness and better mechanisms for the sharing of key information between migrants and relevant government agencies. In December 2020—at a point when new enrollments into MPP had already dropped significantly and only a month before the program's suspension—the Department issued supplementary policy and operational guidance designed to address several of the Red Team's recommendations.[30]

Three days after the issuance of the Red Team Report, the Department released publicly a separate review of MPP (the "October 2019 Assessment"), which offered a very different assessment of the program.[31] The October 2019 Assessment declared that MPP had demonstrated operational effectiveness, including by helping to address "the ongoing crisis at the southern

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[30] The policy and operational guidance was published on an MPP website and took the form of a series of memoranda that provided clarity on matters like access to counsel during the *non-refoulement* interview, the importance of maintaining family unity, and more consistent application of the "known mental and physical health" exclusion for enrollment in MPP. DHS, *Supplemental Policy Guidance for Implementation of the Migrant Protection Protocols* (Dec. 7, 2020); CBP, *Supplemental Migrant Protection Protocols Guidance, Initial Document Service* (Dec. 7, 2020); CBP, *Supplemental Migrant Protection Protocol Guidance, MPP Amenability* (Dec. 7, 2020).

[31] DHS, "Assessment of the Migrant Protection Protocols (MPP)," Oct. 28, 2019, https://www.dhs.gov/publication/assessment-migrant-protection-protocols-mpp [hereinafter Oct. 2019 Assessment].

border and restoring integrity to the immigration system."[32] The assessment noted that apprehensions of noncitizens at and between ports of entry decreased from May through September 2019; reported that rapid and substantial declines in apprehensions occurred in areas where the greatest number of MPP-amenable noncitizens had been processed and returned to Mexico through MPP; asserted that MPP was restoring integrity to the immigration system; claimed that both the U.S. Government and the Government of Mexico (GOM) were endeavoring to provide safety and security for migrants returned to Mexico; and stated that the screening protocols in place were appropriately assessing noncitizens' fear of persecution or torture in Mexico.

The public October 2019 Assessment presented MPP as a resounding success, whereas the internal Red Team Report raised serious concerns with the program. Notably, the October 2019 Assessment did not acknowledge or address any of the shortcomings identified by the Red Team Report, despite the fact that the Assessment was released *after* the Red Team Report was completed.

C. Litigation Regarding the Prior Implementation of MPP

MPP was challenged many times on multiple grounds in federal court and remains the subject of ongoing litigation in several jurisdictions. Among other claims, litigants challenged the program as an impermissible exercise of the underlying statutory authority; argued that MPP caused DHS to return noncitizens to Mexico

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[32] *Id.*

to face persecution, abuse, and other harms and that its procedures inadequately implemented *non-refoulement* protections; argued that their right to access counsel before and during *non-refoulement* interviews had been violated; contested the return to Mexico pursuant to MPP of noncitizens with mental and physical disabilities; asserted that the program had been implemented in violation of the APA; and contended that MPP's expansion across the SWB was unlawful because it led to the return of migrants to places that were particularly dangerous.[33] Both in the course of litigation and otherwise, litigants described, and some courts credited, extreme violence and substantial hardships faced by those returned to Mexico to await their immigration court proceedings, as well as substantial danger traveling to and from ports of entry to those hearings. Litigants described being exposed to violent crime, such as rape and kidnapping, as well as difficulty obtaining needed support and services in Mexico, including adequate food and shelter.[34] In addition, more than one hundred MPP en-

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[33] *See, e.g.*, *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *vacated as moot*, 5 F.4th 1099 (9th Cir. 2021); *Bollat Vasquez v. Wolf*, 520 F. Supp. 3d 94 (D. Mass. 2021); *Doe v. Wolf*, 432 F. Supp. 3d 1200 (S.D. Cal. 2020); *E.A.R.R. v. Dep't of Homeland Sec.*, No. 3:20-cv-2146 (S.D. Cal. filed Nov. 2, 2020); *Adrianza v. Trump*, 505 F. Supp. 3d 164 (E.D.N.Y. 2020), *dismissed*, No. 1:20-cv-03919 (E.D.N.Y. Sept. 2, 2021); *Nora v. Wolf*, No. 20-993, 2020 WL 3469670 (D.D.C. June 25, 2020); *Turcios v. Wolf*, No. 1:20-cv-1982, 2020 WL 10788713 (S.D. Tex. Oct. 16, 2020).

[34] For example, in *Innovation Law Lab v. Wolf*, the Ninth Circuit observed:

> The MPP has had serious adverse consequences for the individual plaintiffs. Plaintiffs presented evidence in the district court that they, as well as others returned to Mexico under the

rollees who received final orders of removal have petitioned the federal courts of appeal for review of such orders on the grounds that various features of MPP, including limited access to counsel and inability to access court hearings, prejudiced their ability to pursue relief in removal proceedings.[35]

D. Suspension of New Enrollments and Phased Strategy for the Safe and Orderly Entry of Individuals Subjected to MPP

MPP, face targeted discrimination, physical violence, sexual assault, overwhelmed and corrupt law enforcement, lack of food and shelter, and practical obstacles to participation in court proceedings in the United States. The hardship and danger to individuals returned to Mexico under the MPP have been repeatedly confirmed by reliable news reports.

951 F.3d at 1078; *see also Bollat Vasquez*, 520 F. Supp. 3d at 111-12 (describing plaintiffs' unrebutted descriptions of rape, death threats, kidnapping risks, and insufficient food and shelter as supported by the U.S. State Department's assignment to Tamaulipas of a "Level 4: Do Not Travel" warning "due to crime and kidnapping").

[35] *See, e.g.*, *Hernandez Ortiz v. Garland*, No. 20-71506 (9th Cir. filed Mar. 15, 2021) (describing repeated failed attempts to contact legal service providers from within Mexico and ultimately agreeing to proceed pro se because the alternative was to wait longer in Mexico at continued risk to the family's safety); *Del Toro v. Garland*, No. 2060900 (5th Cir. filed Dec. 14, 2020) (explaining that MPP restricted access to counsel, which prevented the individual from filing an update State Department country report on Cuba for his individual hearing); *Del Carmen Valle v. Garland*, No. 20-72071 (9th Cir. filed July 16, 2020) (arguing that the individual's "extreme distress and vulnerability in Mexico, lack of access to counsel, and difficulty in preparing and presenting her asylum application" as grounds for appeal).

On January 20, 2021, Acting Secretary David Pekoske issued a memorandum suspending new enrollments into MPP, effective January 21, 2021, pending further review of the program.[36] The MPP Suspension Memorandum was followed by the President's issuance of EO 14010 on February 2, 2021, which, in addition to requiring the Secretary to review the program, directed the Secretary to "promptly consider a phased strategy for the safe and orderly entry into the United States, consistent with public health and safety and capacity constraints, of those individuals who have been subject to MPP."[37]

From February 19, 2021, until the effective date of the district court's order on August 25, 2021, DHS implemented a phased process for the safe and orderly entry into the United States of thousands of individuals who had been placed in MPP and remained outside the United States.[38] Certain individuals whose removal proceedings were pending before EOIR or whose proceedings resulted in an *in absentia* order of removal or termination, and certain of their immediate family members, were processed into the United States to continue their Section 240 removal proceedings.[39] About 13,000 individuals were processed into the United States to

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[36] MPP Suspension Memorandum, *supra* note 4.

[37] Exec. Order No. 14010, 86 Fed. Reg. at 8270.

[38] *See* Press Release, DHS, "DHS Announces Process to Address Individuals in Mexico with Active MPP Cases," Feb. 11, 2021, https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases.

[39] *Id.*; Press Release, DHS, "DHS Announces Expanded Criteria for MPP-Enrolled Individuals Who Are Eligible for Processing into the United States," June 23, 2021, https://www.dhs.gov/news/2021/06/23/dhs-announces-expandedcriteria-mpp-enrolled-individuals-who-are-eligible-processing.

participate in Section 240 removal proceedings as a result of this process.[40]

E. Challenge to the Suspension and Termination

On April 13, 2021, the States of Missouri and Texas filed suit in the U.S. District Court for the Northern District of Texas, challenging the suspension of new enrollments into MPP on the grounds that the January 20, 2021, suspension memorandum violated the APA, 8 U.S.C. § 1225, the Constitution, and a purported agreement between Texas and the federal government. Subsequent to the Secretary's June 1, 2021, termination memorandum, Missouri and Texas amended their complaint to challenge the June 1 Memorandum and filed a motion to enjoin the memorandum.

On August 13, 2021, the district court issued a nationwide permanent injunction requiring DHS "to enforce and implement MPP *in good faith*" until certain conditions were satisfied.[41] The district court determined that the June 1 Memorandum was arbitrary and capricious because, according to the court, the Department ignored critical factors and reached unjustified conclusions. In particular, the district court found that the June 1 Memorandum failed to sufficiently account for several considerations, including the prior administration's assessment of the benefits of MPP; warnings allegedly made by career DHS personnel during the presidential transition process that suspending MPP would

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[40] Data on the number of people permitted to enter the United States under this phased process, February 19-August 25, 2021, provided by the Department of State on October 24, 2021.

[41] *Texas*, 2021 WL at 3603341, at *27 (emphasis in original).

lead to a surge of border crossers; the costs of terminating MPP to the States as well as their reliance on MPP; the impact that terminating MPP would have on the Department's ability to comply with detention provisions in the INA, which the court construed to require detention and to foreclose release based on detention capacity concerns; and modifications to MPP short of termination that could similarly achieve the Department's goals.[42] As a result, the district court enjoined the June 1 Memorandum in its entirety and "remanded" it to the Department for further consideration.[43] The district court denied a request for a stay of the injunction pending appeal, and the U.S. Court of Appeals for the Fifth Circuit and the Supreme Court of the United States also denied stays.[44] As a result, the district court's order, as construed by the Fifth Circuit, went into effect at 12:01 a.m. on August 25, 2021.

Since August, the Department has worked actively to reimplement MPP in good faith, as required by the district court's order.[45] At the same time, pursuant to the district court's order and in continuing compliance with the President's direction in EO 14010, the Secretary has considered anew whether to maintain, terminate, or modify MPP in various ways.

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[42] *Id. at *17-22.*

[43] *Id.* at *27.

[44] *See Biden v. Texas*, No. 21A21, 2021 WL 3732667 (U.S. Aug. 24, 2021); *Texas v. Biden*, 10 F.4th 538 (5th Cir. 2021).

[45] *See* Declaration of Blas Nuñez-Neto, *Texas v. Biden*, No. 2:21-cv-67 (N.D. Tex. Oct. 14, 2021); Defendants' First Supplemental Notice of Compliance with Injunction, *Texas v. Biden*, No. 2:21-cv-67 (N.D. Tex. Oct. 14, 2021).

III. Evaluation of MPP

In considering whether to maintain, terminate, or modify MPP anew, the Department considered, among other things, the decisions of the *Texas* district court, Fifth Circuit, and Supreme Court; the decisions of multiple other courts in litigation challenging MPP or its termination; the briefs and declarations filed in all such lawsuits pertaining to MPP; various Departmental assessments of MPP, including both the Red Team Report and agency responses and the October 2019 Assessment; a confidential December 2019 Rapid Protection Assessment from the U.N. High Commissioner for Refugees (UNHCR) and publicly available sources of information, including news reports and publicly available sources of information, pertaining to conditions in Mexico; records and testimony from Congressional hearings on MPP and reports by nongovernmental entities; and data regarding enrollments in MPP, encounters at the border, and outcomes in removal proceedings conducted for MPP enrollees; and the impact of other government programs and policies concerning migration and the southern border. In addition, over the course of several months, the Secretary and his staff met with a broad array of internal and external stakeholders with divergent views about MPP, including members of the DHS workforce engaged in border management, state and local elected officials across the border region, including from Texas, California, Arizona, and New Mexico, border sheriffs and other law enforcement officials, representatives from multiple nonprofit organizations providing legal access and humanitarian aid to noncitizens across the SWB, and dozens of Members of Congress focused on border and immigration policy. The

Secretary also assessed other migration-related initiatives the Administration is undertaking or considering undertaking. And he examined the considerations that the district court determined were insufficiently addressed in the June 1 Memorandum, including the view that MPP discouraged unlawful border crossings, decreased the filing of non-meritorious asylum claims, and facilitated more timely relief for asylum seekers, as well as predictions that termination of MPP would lead to a border surge, impose undue costs on states, put a strain on U.S.-Mexico relations, and cause DHS to fail to comply with its obligations under 8 U.S.C. § 1225.

After carefully considering the arguments, evidence, and perspectives of those who support resuming MPP, with or without modification, as well as those who support termination, the Secretary has determined that MPP should be terminated. The following outlines the considerations that informed the Secretary's decision.

A. Conditions for Migrants in Mexico

In January 2019, the Department implemented MPP with the stated expectation that vulnerable populations would get the protection they needed while they waited in Mexico during the pendency of their removal proceedings.[46] In practice, however, there were pervasive and widespread reports of MPP enrollees being exposed to extreme violence and insecurity at the hands of transnational criminal organizations that prey on vulnerable migrants as they waited in Mexico for their immigration

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[46] *See* Nielsen Release, *supra* note 14; *see also* Memorandum from Kirstjen M. Nielsen, Sec'y of Homeland Sec., *Policy Guidance for Implementation of the Migrant Protection Protocols* (Jan. 25, 2019).

court hearings in the United States. These security concerns, together with barriers many individuals faced in accessing stable and safe housing, health care and other services, and sufficient food, made it challenging for some to remain in Mexico for the duration of their proceedings. Notably, the United States has limited ability to fix these issues, given that they relate to migrant living conditions and access to benefits in Mexico —an independent sovereign nation.

Concerns about migrants' safety and security in Mexico, and the effect this had on their ability to attend and effectively participate in court proceedings in the United States, have been highlighted in internal Department documents, court filings, and a range of external studies and press reports. In its internal evaluation of the program, the Department's Red Team Report emphasized the need for safe housing for vulnerable populations.[47] The Ninth Circuit, in affirming a district court ruling that enjoined implementation of MPP, determined that "[u]ncontested evidence in the record establishes that non-Mexicans returned to Mexico under the MPP risk substantial harm, even death, while they await adjudication of their applications for asylum."[48] A Massachusetts district court similarly described the plaintiffs' claims of extreme violence and insecurity in Mexico and observed that "[t]heir personal accounts are unrebutted and are supported by affidavits from employees of two nongovernmental organizations and the U.S. State Department's assignment to Tamaulipas of a 'Level 4: Do Not Travel' warning 'due to crime and

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[47] Red Team Report, *supra* note 27, at 7.

[48] *Innovation Law Lab*, 951 F.3d at 1093.

kidnapping.'" [49] The court further cited a Human Rights First report that included a list of 1,544 allegations of serious harm (including homicide, rape, and kidnapping) faced by individuals placed in MPP from January 2019 to February 2021.[50]

Multiple other reports have similarly highlighted security and treatment concerns. A December 2019 UNHCR Rapid Protection Assessment found that 81% of individuals and families returned to Mexico under MPP did not feel safe in Mexico, and that 48% had been a victim or witness of violence in Mexico.[51] According to this assessment, children represented about half (48%) of targets for physical violence, and about half (48%) of

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[49] *Bollat Vasquez*, 520 F. Supp. 3d at 111-12 (issuing a preliminary injunction ordering the Department to return to the United States seven plaintiffs who had been enrolled in MPP).

[50] Human Rights First, Delivered to Danger; Trump Administration sending asylum seekers and migrants to danger, Feb. 19, 2021, https://www.humanrightsfirst.org/campaign/remain-mexico; see Bollat Vasquez, 520 F. Supp. 3d at 99 n.10 (citing a declaration by Kennji Kizuka, Senior Researcher and Policy Analyst at Human Rights First, regarding an earlier version of this list explaining that "'[a]s of December 15, 2020, Human Rights First has identified 1,314 public reports of murder, torture, rape, kidnapping, and other violent assaults against asylum seekers returned to Mexico under MPP and that 'the security situation in Mexico, including in the state of Tamaulipas has worsened' with one of Mexico's 'most powerful and violent cartels' reportedly increasing its activities in Tamaulipas and migrants in Matamoros and Nuevo Laredo have been repeatedly targeted'").

[51] UNHCR, *Rapid Protection Assessment: MPP Returnees at the Northern Border of Mexico* 15, Dec. 2019. The UNHCR assessment, shared confidentially with the United States government, is cited here with the express permission of UNHCR.

kidnapping victims.[52] The organization Médecins Sans Frontières (Doctors Without Borders) noted that 75% of its patients who were in Nuevo Laredo in October 2019 due to MPP reported having been kidnapped.[53] In 2019, a U.S. Commission on Civil Rights report similarly credited several news and NGO reports in noting that "asylum seekers [awaiting proceedings in Mexico] have been killed, women have been raped, and children have been kidnapped."[54] Similar accounts of insecurity and violence were the subject of numerous press reports describing squalor and violence in the "camps" where many MPP enrollees lived as they waited their court hearings.[55] But as bad as conditions often were in the makeshift border camps, migrants gathered there be-

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[52] According to the UNHCR survey, it did not take long for MPP enrollees to experience danger in Mexico. Just over half of the individuals surveyed (51%) had been in Mexico for less than one month and more than nine-in-ten had been in Mexico for less than three months. *Id*. at 7, 17.

[53] Médecins Sans Frontières, *The devastating toll of 'Remain in Mexico' asylum policy one year later*, Jan. 29, 2020, https://www.msf.org/one-year-inhumane-remain-mexico-asylum-seeker-policy; *cf*. Emily Green, *Trump's Asylum Policies Sent Him Back to Mexico. He was Kidnapped 5 Hours Later By a Cartel.*, Vice, Sept. 16, 2019.

[54] U.S. Commission on Civil Rights, Trauma at the Border; The Human Cost of Inhumane Immigration Policies, Oct. 2019, https://www.usccr.gov/files/pubs/2019/10-24-Trauma-at-the-Border.pdf.

[55] *See*, *e.g.*, Dickerson, *supra* note 19; Jordan, *supra* note 19; Merchant, *supra* note 19; This American Life, *The Out Crowd*, Nov. 15, 2019, https://www.thisamericanlife.org/688/transcript.

cause the threat of violence and kidnapping in surrounding areas outside of the camps could be greater.[56] Poor conditions and violence in the Matamoros camp also created an operational challenge when migrants at the camp blocked traffic in both directions on the Gateway International Bridge for hours as a sign of protest.[57] The security and treatment of MPP enrollees also been the subject of congressional oversight and investigation.[58]

The adverse living conditions and violence experienced by migrants returned to Mexico pursuant to MPP are of grave concern to the Secretary. The return of noncitizens to Mexico under MPP is predicated, by statute, upon individuals' ability to remain in Mexico during

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[56] *See*, *e.g.*, María Verza and Fernanda Llano, *Lawless Limbo Within Sight of America*, Associated Press, Nov. 18, 2019; Delphine Schrank, *Asylum seekers cling to hope, safety in camp at U.S.-Mexico Border*, Reuters, Oct. 16, 2019, https://www.reuters.com/article/us-usa-immigration-mexico-matamoros-feat-idUSKBN1WV1DY.

[57] Adolfo Flores, "Asylum-Seekers Protesting Squalid Conditions Shut Down A US Border Crossing For 15 Hours," Buzzfeed, Oct. 11, 2019, https://www.buzzfeednews.com/article/adolfoflores/asylum-seekers-protesting-bridgeclose-matamoros-texas.

[58] *See*, *e.g.*, Press Release, H. Comm. on the Judiciary, "Chairman Nadler Announces House Judiciary Investigation into Trump Administration's 'Remain in Mexico' Policy," Jan. 14, 2020, https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2397; *Examining the Human Rights and Legal Implications of DHS's "Remain in Mexico" Policy*: Hearing Before the H. Comm. on Homeland Sec., 116th Cong. *passim* (2019).

the pendency of their removal proceedings.[59] In practice, however, myriad problems faced by noncitizens returned to Mexico impeded their ability to access those removal proceedings. As a result, the Secretary has determined that the key predicate on which the statutory authority underlying the program is built—that noncitizens stay in Mexico and continue to participate in their removal proceedings—was upended by reality in too many cases. This is an intolerable result that is inconsistent with this Administration's values, which include ensuring the rights of migrants to seek lawful protection from removal in a safe environment.

Moreover, these are problems that cannot easily be fixed. Once migrants are returned to Mexico—an independent sovereign nation—the United States' ability to respond and provide adequate conditions and safety is diminished.

B. *Non-Refoulement* Concerns

Concerns about the *non-refoulement* process under MPP as it was previously implemented and the additional costs and resources that would be required to address those concerns also weigh against continued reliance on MPP. As previously designed and implemented, MPP's *non-refoulement* screening process—used to assess whether individuals would likely face persecution on account of a protected ground or torture in Mexico—was limited in at least four respects.

First, as originally implemented, individuals processed for MPP were not questioned by CBP about their

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[59] *See* 8 U.S.C. § 1225(b)(2)(C) (specifying that the Secretary may return a noncitizen to a contiguous territory "pending a proceeding under [8 U.S.C. §] 1229a").

fear of persecution or torture in Mexico, but were instead required to affirmatively articulate such a fear regarding return to Mexico—a sharp contrast to the approach used in the expedited removal context, in which individuals are affirmatively asked standard questions about fear of return to their home countries and the responses are recorded.[60]

Second, rather than using a screening standard familiar to asylum officers (such as the "significant possibility" standard used for credible fear interviews or the "reasonable possibility" standard used for reasonable fear interviews to screen for possible withholding or deferral of removal claims), *non-refoulement* screenings for MPP applied a more restrictive "more likely than not" standard.[61] Under this standard, noncitizens had

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[60] *See* 8 C.F.R. § 235.3(b)(2). Importantly, even if migrants processed for MPP expressed a fear of repatriation to their home country, they were never asked about any fear of being returned to Mexico. Assessing this feature of the program, Judge Watford of the U.S. Court of Appeals for the Ninth Circuit stated in *Innovation Law Lab* that it was "virtually guaranteed to result in some number of applicants being returned to Mexico in violation of the United States' *non-refoulement* obligations," as many individuals returned under MPP who feared persecution or torture in Mexico would "be unaware that their fear of persecution in Mexico is a relevant factor in determining whether they may lawfully be returned to Mexico, and hence is information they should volunteer to an immigration officer. *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 511 (9th Cir. 2019) (Watford, J. concurring).

[61] Prior to MPP implementation, this standard had been used almost exclusively by immigration judges to adjudicate statutory withholding of removal or withholding or deferral of removal under regulations implementing the Convention Against Torture (CAT). *See* 8 C.F.R. §§ 208.16(a), (c)(4); 208.17(b)(1); 208.31(c); 1208.16(b); 1208.17(b). It was, as a result, not a standard that had previously

to demonstrate to an asylum officer that it was more likely than not that they would be persecuted or tortured if returned to Mexico in order to avoid a return to Mexico—a higher substantive standard than they would ultimately have had to establish to secure asylum and the same substantive standard they would have had to establish to an immigration judge if they were ineligible for asylum but were seeking withholding or deferral of removal under the INA or regulations implementing CAT.

Third, the Department did not initially allow counsel to participate in the *non-refoulement* interviews.[62] This differs from how fear interviews are conducted during the expedited removal process; in that context, noncitizens receive at least at 48-hour period to find and consult with a legal representative.[63] Eventually, and

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been used by asylum officers in the screening context, which resulted in additional, burdensome training and implementation requirements.

[62] U.S Citizenship and Immigration Services, *Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols*, PM-602-0169 3 (Jan. 28, 2019) ("DHS is currently unable to provide access to counsel during the [*non-refoulement*] assessments given the limited capacity and resources at ports-of-entry and Border Patrol stations as well as the need for the orderly and efficient processing of individuals."). This differs from how fear interviews are conducted during the expedited removal process; in that context, noncitizens receive at least at 48-hour period to find and consult with a legal representative. *See* Form M444, Information about Credible Fear Interview (May 17, 2019).

[63] *See* Form M-444, Information about Credible Fear Interview (May 17, 2019).

in part as response to a district court order, these restrictions were eased.[64]

Fourth, in practice, there were multiple challenges and inconsistencies in the implementation of *non-refoulement* screenings. The Red Team Report emphasized the need for standard operating procedures to ensure consistency and address problems such as the use of a "pre-screening process" by CBP personnel at some locations that "preempt[ed] or prevent[ed]" USCIS from ever having cases referred for a determination.[65] The report additionally noted that some CBP officials "pressure[d] USCIS to arrive at negative outcomes when interviewing migrants on their claim of fear of persecution or torture."[66]

Moreover, throughout the use of MPP, more than 2,500 individuals raised fear claims at multiple points in this process, leading to multiple screenings for those individuals during the pendency of their cases.[67] These

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[64] *Doe v. Wolf*, 432 F. Supp. 3d 1200 (S.D. Cal. 2020). Previously retained counsel were permitted to participate in *non-refoulement* interviews conducted at Immigration Hearing Facilities (IHFs) in Laredo and Brownsville as of December 2019 and within the Ninth Circuit in January 2020. Supplemental guidance issued in December 2020 expanded this access to counsel to all MPP locations and required DHS to ensure the ability of retained counsel to participate telephonically in USCIS' MPP *non-refoulement* assessments, but only "where it does not delay the interview, or is required by court order." Supplemental Policy Guidance for Implementation of the Migrant Protection Protocols, *supra* note 30, at 1-2.

[65] Red Team Report, *supra* note 27, at 6.

[66] *Id.* at 4-5.

[67] Data on MPP Cases with Multiple Referrals, provided by USCIS on October 28, 2021.

kinds of unproductive, redundant screenings are a drain on resources that may be more likely to occur in MPP as individuals are returned to Mexico multiple times over the pendency of a single removal proceeding, often to unsafe conditions.

For all these reasons, the Secretary has concluded that continuation of MPP in its prior form is not advisable. These concerns likely could be addressed by policy changes that require the affirmative asking, the use of a more appropriate screening standard that protects those who face a reasonable or significant possibility of persecution or torture upon return to Mexico, the opportunity for individuals to consult with counsel prior to screenings, and better training and oversight. But making these changes would likely lengthen the screenings and require DHS to devote additional asylum officers and detention space to these screenings, both of which are in short supply, especially as a result of challenges related to the COVID-19 pandemic. New procedures could lengthen the screening process. Such an approach would divert critical personnel and resources from other Administration priorities, including ongoing efforts to build a more durable, fair, and efficacious asylum system as discussed in greater detail in Section IV. The additional burdens that would be required to implement a *non-refoulement* process acceptable to the Department weigh against retention of MPP. Moreover, even if making these changes better protected individuals from being returned to persecution or torture, it would not protect people from generalized violence or other extreme hardships that have no nexus to statutorily protected grounds, and that have been experienced by many returnees.

C. Access to Counsel, Notice of Hearings, and Other Process Concerns

Individuals in MPP faced multiple challenges accessing counsel and receiving sufficient information about court hearings. First, there were several problems in communicating accurate and up-to-date information to migrants about rescheduled court hearings. As noted in the Red Team Report, some migrants in MPP had to give up their shelter space in Mexico when they returned to the United States for their court hearings. As a result, they were unable to provide the court an address for follow-up communications.[68] To submit a change of address while in Mexico, migrants had to print and mail a Change of Address Form, which posed logistical challenges for individuals who lacked internet access and who could not readily print and mail documents internationally. This made it difficult to communicate updates regarding enrollees' court cases and hearing dates.

Second, MPP enrollees faced several barriers in accessing counsel both in the United States and in Mexico. Although MPP enrollees were permitted to meet with counsel at hearing locations prior to their hearings, these meetings were limited to a single hour before the court hearing took place.[69] Opportunities for attorneys to meet with their clients outside of those organized at the hearing locations were limited due to, among other constraints, complications associated with cross-border

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[68] Red Team Report, *supra* note 27, at 7.

[69] *See* U.S. Immigration and Customs Enforcement, *Migrant Protection Protocols Guidance* 3 (Feb. 12, 2019). As noted above, DHS also did not initially allow counsel to participate in *non-refoulement* interviews conducted by USCIS.

communication. Many migrants lacked access to a telephone with international coverage or other forms of technology that could be used to communicate with counsel. Some legal services organizations also adopted policies against visiting clients in Mexico due to serious safety concerns.[70] In addition, because hearings for the tens of thousands of people enrolled in MPP were concentrated in a handful of courts along the border, demand for legal assistance far outstripped supply.[71]

These problems are of significant concern to the Secretary. Inadequate access to counsel casts doubt on the reliability of removal proceeding. It also undermines the program's overall effectiveness at achieving final resolution of immigration proceedings; in several cases, noncitizens challenged adverse immigration-judge decisions on the ground that they did not have an adequate opportunity to identify and retain counsel, or to gather or present the evidence in support of their claims.[72] More

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[70] *See* Brief for the Laredo Project, et al. as Amici Curiae Supporting Respondents at 20-21, *Wolf v. Innovation Law Lab*, No. 19-1212 (Jan. 22, 2021) ("The Laredo Project considered providing assistance across the border in Nuevo Laredo, but determined that it was far too dangerous. When Laredo Project attorneys took an exploratory trip across the border, the local pastor with whom they were scheduled to meet (who ran a shelter for migrants) was missing; he had been kidnapped by cartel members, reportedly because he attempted to stop them from kidnapping Cuban asylum seekers.").

[71] Human Rights Watch, *We Can't Help You Here"*; *U.S. Returns of Asylum Seekers to Mexico*, July 2, 2019, https://www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico ("[U]nder the MPP, thousands of asylum seekers have been forcibly concentrated in El Paso and San Diego, overwhelming the limited number of immigration attorneys who practice there.").

[72] *See supra* note 35.

broadly, access to counsel is critical to ensuring migrants receive a full and fair hearing; this Administration recognizes the importance of access to counsel in civil contexts, including in immigration proceedings, and considers fostering legal representation and access to justice a priority.[73]

Meanwhile, some of these flaws are exceedingly challenging to fix. While migrants could be provided additional means to communicate from Mexico with counsel by video or telephone, doing so requires a significant expenditure of resources to ensure that the appropriate technology is available in Mexico. In-person consultations are significantly constrained by the reality that migrants are in Mexico and space for meetings with counsel to take place at ports of entry or upon their return to court is extremely limited. Providing migrants with additional time to consult with attorneys would likely require them to spend a night in detention, which would also place additional strain on CBP facilities that have consistently been operating over their COVID restricted capacity. In fact, the holding areas in six out of nine Border Patrol Sectors are over COVID-capacity as of October 27, 2021.[74]

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[73] White House, "FACT SHEET: President Biden to Sign Presidential Memorandum to Expand Access to Legal Representation and the Courts," May 18, 2021, https://www.whitehouse.gov/briefing- room/statementsreleases/2021/05/18/fact-sheet-president-biden-to-sign-presidential-memorandum-to-expand-access-to-legalrepresentation-and-the-courts/.

[74] Data on holding area capacity by U.S. Border Patrol Sector, provided by CBP on October 28, 2021.

D. Impacts of MPP on Immigration Court Appearance Rates and Outcomes

The Department's October 2019 Assessment of MPP concluded that MPP was "restoring integrity to the immigration system" by (1) providing bona fide asylum seekers the opportunity to obtain relief in months, not years, and (2) eliminating the "perverse incentives" that reward and encourage people with non-meritorious asylum claims to enter the United States.[75] But upon further consideration and examination, the facts tell a more complex story, thus undermining the claimed benefits.

MPP did result in some removal proceedings being completed more expeditiously than is typical for non-detained cases. Overall, 41 percent of MPP cases resulted in a final enforcement disposition as of June 30, 2021, versus 35 percent of comparable non-MPP cases.[76] But the fact that MPP may have resolved cases more quickly does not mean that the cases were resolved fairly or accurately. The integrity of the nation's immigration system should be assessed by whether immigration proceedings achieve fair and just outcomes, both for individuals who merit relief and those who do not.

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[75] Oct. 2019 Assessment, *supra* note 31, at 3, 6.

[76] For the purposes of this memorandum, comparable noncitizens or comparable non-MPP cases are defined as non-Mexican single adults and family units who were apprehended along the SWB between January 25, 2019, and January 20, 2021, were not enrolled in MPP and were not detained throughout the pendency of their proceedings. Data derived from DHS Office of Immigration Statistics Enforcement Lifecycle, which is based on a comprehensive person-level analysis of DHS and EOIR enforcement and adjudication records. *See* Marc Rosenblum and Hongwei Zhang, *Fiscal Year 2020 Enforcement Lifecycle Report* (Dec. 2020) [hereinafter FY 2020 Enforcement Lifecycle Report].

In the Secretary's judgment, the data show that MPP generally failed to meet that bar.

Importantly, noncitizens in MPP were substantially more likely to receive *in absentia* removal orders than comparable noncitizens who were not placed in MPP during the relevant time period. Overall, of the 67,694 cases of individuals enrolled in MPP,[77] 21,818 were subject to an *in absentia* order of removal at some point during their removal proceedings—32 percent of all individuals enrolled in MPP.[78] For comparable noncitizens who were not processed through MPP during that same time period and who were also not detained for the

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[77] *Id.* This is based on DHS's Office of Immigration Statistics (OIS) analysis of MPP cases; this analysis excludes 345 cases originally identified as MPP enrollees in CBP data because the records are for unaccompanied children, accompanied minors, or Mexican nationals, all of whom are ineligible for the program, or because the records could not be matched to other administrative data.

[78] In his June 1 Memorandum, the Secretary referenced a 44% *in absentia* rate for this time period. The Department has since updated its methodology for measuring *in absentia* rates in two important ways. First, the Department did not count *in absentia* orders that were subject to subsequent motions to reopen or any other further action by DHS or DOJ, thus undercounting the total number of *in absentia* orders that had been issued. Second, the *in absentia* rate of 44 percent only included cases in which there was a final disposition, rather than the full universe of MPP cases including those that were still pending, thus overstating the percentage. The updated numbers in this memorandum, by contrast, take into account the total number of *in absentia* orders issued in MPP cases, irrespective of whether there was a subsequent motion to reopen or other further action in the case, as well as the total number of MPP cases, including both active cases and those with a final disposition. This analysis captures all *in absentia* orders and compares them to the full set of MPP cases.

duration of their proceedings, the *in absentia* rate was 13 percent—about two-fifths the rate of the MPP group.[79]

Moreover, an additional 6,151 MPP cases were terminated by the immigration court.[80] Courts generally issued such orders in MPP cases when a noncitizen failed to appear but the immigration judge declined to issue an *in absentia* removal given concerns that the noncitizen did not have proper notice of how to attend his or her hearing.[81] Including these cases brings the total number of cases of individuals in MPP that involved the issuance of an *in absentia* order of removal or termination to 27,969 (41 percent of all MPP cases and nearly three-and-a-half times higher than the *in absentia* rate for comparable noncitizens not enrolled in MPP).[82]

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[79] *Id.*

[80] For individuals in removal proceedings under Section 240 of the INA who are not in MPP, termination of proceedings is frequently reported by DHS OIS as a form of relief because it generally marks the end of efforts to remove the noncitizen from the country. That situation is very different for noncitizens enrolled in MPP, who are outside of the country during the pendency of removal proceedings and have no basis upon which to seek admission to the United States once proceedings are terminated.

[81] *Matter of Herrera-Vasquez*, 27 I&N Dec. 825 (BIA 2020); *Matter of Rodriguez-Rodriguez*, 27 I&N Dec. 762 (BIA 2020).

[82] The district court in *Texas v. Biden* cited EOIR data indicating that *in absentia* rates in removal proceedings were also quite high in 2015 and 2017—42% and 47% percent, respectively. 2021 WL 3603341, at *21. But there are critical methodological differences between the ways in which these numbers are calculated and the *in absentia* rates presented in this memorandum. As explained in note 77, *supra*, the data presented in this memorandum measure

The fact that *in absentia* removal order rates (and *in absentia* removal order rates plus termination rates) were considerably higher for MPP cases than for comparable non-MPP cases might not, by itself, indicate a problem with MPP. For instance, the October 2019 Assessment concluded that MPP was incentivizing people without meritorious claims to voluntarily leave Mexico and return home.[83] That assessment pointed to the fact that out of more than 55,000 MPP enrollees (at that time), only 20,000 were sheltered in northern Mexico and an additional 900 had returned home through International Organization for Migration's Assisted Voluntary Return program.

Other reports suggest, however, that individuals abandoned claims or otherwise failed to appear for proceedings because of insecurity in Mexico and inadequate notice about court hearings.[84] The difficulties that

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in absentia rates as a share of the *total* number of cases. The EOIR data measures *in absentia* orders as a share of *completed* cases only, which excludes cases that remain ongoing that are disproportionately likely to not result in such orders. *See* Ingrid Eagley and Steven Shafer, *Measuring* In Absentia *Removal in Immigration Court*, American Immigration Council, Jan. 2021, https://www.americanimmigrationcouncil.org/research/measuring-absentia removal-immigration-court. A recalculation of the 2015 and 2017 *in absentia* rates as a share of *total* cases referred to EOIR in those years yields rates of 21 percent and 20 percent, respectively. This is one-half the *in absentia* and termination rate found in MPP cases.

[83] Oct. 2019 Assessment, *supra* note 31, at 3.

[84] *See*, *e.g.*, Kevin Sieff, "They missed their U.S. court dates because they were kidnapped. Now they're blocked from applying for asylum.," Washington Post, Apr. 24, 2021; Camilo Montoya-Galvez, "'Leave me in a cell': The desperate pleas of asylum seekers inside El Paso's immigration court," CBS News, Aug. 11, 2019, https://www.

MPP enrollees faced in Mexico, including the threat of violence and kidnapping, coupled with inadequate and unreliable access to food and shelter, likely contributed to people placed in MPP choosing to forego further immigration court proceedings regardless of whether their cases had merit. Indeed, a number of petitions for review filed in federal courts of appeals by individuals in MPP who received *in absentia* removal orders explain their failure to appear based on serious threats to their personal safety.[85]

While individuals in MPP were more likely to receive *in absentia* removal orders than comparable noncitizens not enrolled in MPP, they were also less likely to receive relief or protection from removal. This was true even though the decision to place someone in MPP was not linked to any assessment of the likely merits of the individual's claim. DHS data reflect that only 732 individuals enrolled in MPP out of 67,694 cases were granted relief or protection from removal—a grant rate of just

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cbsnews.com/news/remain-in-mexico-the-desperate-pleas-of-asylum-seekers-in-el-paso-who-are-subject-to-trumps-policy/.

[85] *See*, *e.g.*, *Tabera-Columbi v. Garland*, No. 20-60978 (5th Cir. filed Oct. 26, 2020) (noting that MPP enrollee had been sexually assaulted by the police and was in a hospital as a result on the morning of the hearing); *Quinones Rodriguez v. Garland*, No. 20-61204 (5th Cir. filed Dec. 17, 2020) (describing an individual who did not attend the MPP hearing because he was hiding from gangs who threatened to kidnap him on his way to the hearing); *Miranda-Cruz v. Garland*, No. 21-60065 (5th Cir. filed Feb. 1, 2021) (describing a family that was kidnapped en route to an MPP hearing and held for ransom); *see also* Hamed Aleaziz and Adolfo Flores, "They Missed Their US Asylum Hearings Fearing the Cartel Would Kill Them. Now They're Stuck in Mexico," Buzzfeed, May 18, 2021.

1.1.[86] For the comparable set of non-MPP cases from the same time period, the relief-granted rate was nearly two-and-a-half times as high (2.7 percent).[87]

The remarkably low 1.1 percent grant rate for MPP cases—the majority of which involved individuals from

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[86] Relief or protection from removal is defined to include EOIR grants of asylum, grants of relief in non-asylum removal proceedings, withholding of removal, or conditional grants; DHS grants of Special Immigrant Juvenile (SIJ) status, lawful permanent residence, S, T, or U nonimmigrant status, and Temporary Protected Status (TPS); the exercise of DHS prosecutorial discretion; and findings by DHS that the subject is a U.S. citizen or lawfully present noncitizen not subject to removal. *See* FY 2020 Enforcement Lifecycle Report, *supra*, note 75.

[87] As discussed in note 79, this figure includes cases that were terminated. For those located in the United States, termination ends removal proceedings and effectively allows the subject to remain in the United States until further action is taken. The low relief-granted rates for both the MPP and comparable non-MPP cases are likely the result of a number of different factors. During this period, a policy was implemented that barred asylum for individuals who transited through third countries and decisions were issued that limited humanitarian protection claims based on family membership and gender; these likely depressed grant rates. *See* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019); *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019), *vacated*, 28 I&N Dec. 304 (A.G. 2021); *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), *vacated*, 28 I&N Dec. 307 (A.G. 2021). Additionally, the period of time being analyzed is both brief and recent. OIS analysis indicates that relief-granted rates tend to increase over the first three to four years after a case resulting from a credible or reasonable fear claim is initiated in immigration court. None of this, however, explains the substantial discrepancy in outcomes between MPP case and comparable non-MPP cases over the same time period. And none of this diminishes the statutory obligation to fairly assess asylum applications with the goal of producing reliable adjudications.

the Northern Triangle countries of Central America—is notable also because when MPP was first announced the Department observed that "approximately 9 out of 10 asylum claims from Northern Triangle countries are ultimately found non-meritorious by federal immigration judges."[88] DHS does not have a record of the methodology used to generate this "9 out of 10" statistic. To the contrary, an analysis of EOIR case outcomes for Northern Triangle asylum-related claims originating in border encounters (i.e., all EOIR removal proceedings originating with border encounters followed by credible fear or reasonable fear claims) in the years leading up to MPP yields a relief-granted rate of about 29 percent —significantly higher than the 10 percent reflected in Department's January 2019 statement. That relief-granted rate is more than 26 times the 1.1 percent grant rate observed for all forms of relief or protection among MPP enrollees. These discrepancies strongly suggest that at least some MPP enrollees with meritorious claims either abandoned or were unable to adequately present their claims given the conditions faced by migrants in Mexico and barriers to legal access.[89]

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[88] Nielsen Release, *supra* note 14.

[89] Indeed, that conclusion is not dissimilar to the one reached in the October 2019 Assessment, when the Department found that "MPP is one among several tools DHS has employed effectively to reduce the incentive for aliens to assert claims for relief or protection, *many of which may be meritless*, as a means to enter the United States to live and work during the pendency of multi-year immigration proceedings." Oct. 2019 Assessment, *supra* note 31, at 6 (emphasis added). Implicit in this statement is an acknowledgment that some such claims do have merit.

Based on the Department's experience with MPP and informed by the data above, the Secretary has determined that the program did not succeed in a sufficient number of cases at achieving timely and reliable adjudication of migrants' removal proceedings. Multiple features of MPP, especially combined with the difficulties in accessing counsel and migrants' living experience in Mexico as described above, have led the Secretary to conclude that the program deterred too many meritorious asylum claims at the expense of deterring non-meritorious claims. Given the Administration's values, commitments, and policy preferences, the Secretary has concluded that this is an unacceptable result. Individuals who may have abandoned meritorious protection claims should have been offered a meaningful opportunity to seek protection in the United States. As stated above, the return-to-contiguous-territory authority at INA § 235(b)(2)(C) is predicated on the notion that individuals will be able to pursue their removal proceedings from within Mexico; the fact that so many individuals enrolled in MPP were unable to complete their proceedings due to their tenuous situation in Mexico undercuts a key requirement of the statute. As a global leader in offering protection and resettlement to refugees, the United States also has a moral obligation to fairly consider such claims. The Secretary is committed to ensuring meritorious claims are heard, even if that means non-meritorious claims end up being adjudicated as well.

E. MPP and Recidivist Irregular Re-Entries

As discussed below, CBP encounters along the SWB decreased dramatically over a number of months in which MPP was fully operational across the SWB. But

the data also show that a significant share of individuals enrolled in MPP—33 percent as of June 30, 2021—were subsequently encountered attempting to reenter the country without inspection, rather than continuing to wait in Mexico for the resolution of their removal proceedings.[90] This rate is more than two-and-a-half times higher than the historical average for recidivism (defined as re-encounters within 12 months of initial apprehension) of 14 percent for individuals processed under Title 8 authorities.[91] The high rate of repeat encounters undercuts one of MPP's key claimed advantages—namely its deterrent effect on would-be border crossers. Contrary to such claims, the data show that MPP enrollees were much more likely try to cross the border after being returned to Mexico than individuals who were removed from the country under other Title 8 authorities. Such re-encounters also impose significant additional work on frontline Border Patrol agents, who had to encounter, track, and process MPP enrollees multiple times—resources that could and should have been deployed to other objectives.

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[90] FY 2020 Enforcement Lifecycle Report, *supra* note 75. When the Department previously considered this issue in June, 27 percent of MPP enrollees had been re-encountered by CBP subsequent to their enrollment in MPP (not counting encounters at POEs in connection with MPP). The increase since then reflects that individuals enrolled in MPP continued to seek entry without inspection to the United States.

[91] DHS Office of Immigration Statistics data provided on 10/29/2021.

F. Investments and Resources Required to Operate MPP

MPP was, according to the December 2018 announcement, intended to reduce burdens on border security personnel and resources to free them up to better protect the U.S. territory. It was also intended to help clear the backlog of unadjudicated asylum claims. In reality, however, backlogs in the Nation's immigration courts and asylum offices grew significantly during the period that MPP was in effect.[92] In addition, MPP created substantial additional responsibilities on Department personnel that detracted from other critically important mission sets. This played out in numerous ways.

First, each time an MPP enrollee returns to the United States to attend a court proceeding, which could happen multiple times over the life of a case, DHS personnel are required to conduct additional rounds of processing, including biographic and biometric collection, property collection and return, and medical screenings. None of this is required for those in removal proceedings in the United States. The labor-intensive process of bringing migrants back into the United States for their court proceedings directly impacts staffing at the four U.S. ports of entry where migrants re-entered, taking frontline

[92] Between January 2019 and January 2021—the period when MPP was operational—the number of pending immigration court cases increased from 829,200 to 1,283,090 (a 55 percent increase). Data on pending caseload, provided by EOIR on October 28, 2021. The backlog of pending affirmative asylum claims increased over the same time period from 331,100 to 399,100. Data on the affirmative asylum backlog, USCIS Refugee, Asylum, and International Operations Directorate on October 27, 2021.

personnel away from other key missions—such as facilitating legal cross-border trade and travel.

Second, in order to implement and operate MPP, the Department devoted significant resources and personnel to building, managing, staffing, and securing specialized immigration hearing facilities (IHFs) to support EOIR. During the period when MPP was operational during the prior Administration, IHFs cost approximately $168 million to build and operate.[93] As part of its current efforts to comply the *Texas* court order and reimplement MPP in good faith, the Department has procured new contracts for IHFs, at a cost of approximately $14.1 million to build and $10.5 million per month to operate.[94]

Third, adjudication of claims by individuals in MPP diverts asylum officers and immigration judges from other key efforts designed, as described in Section IV.B, to more effectively process cases and reduce backlogs. As initially implemented, MPP required the training of asylum officers to learn the newly applied *non-refoulement* screening standards and support an additional adjudicative caseload. Moreover, each time migrants came in and out of the United States for court hearings, there was another opportunity to claim fear—and another possible fear screening. Department data shows that in the short time that MPP was operational, more than 2,500 individuals had repeat fear screenings.[95]

Fourth, the program drew on the same limited resources that non-profits and humanitarian organizations

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[93] DHS Office of the Chief Financial Officer analysis.

[94] Nuñez-Neto Decl., *supra* note 45, at ¶ 15.

[95] *See supra* note 66.

used to help other individuals in Mexico—thus focusing efforts on northern Mexico and diverting resources and services away from other parts of Mexico and the broader region.

Each of these, and other investments or resources, divest resources from other critically important Departmental missions and undercut the Department's ability to pursue longer-term, durable reform.

G. Impact of MPP and its Termination on SWB Migration Flows

In making his determination decision, the Secretary has presumed—as is likely—that MPP contributed to a decrease in migration flows. From January through May 2019, when MPP was used in a limited number of locations, encounters rose.[96] But from June 2019, when DHS announced that MPP would be fully implemented along the entire SWB, through September 2019, border encounters decreased rapidly, falling 64 percent in just three months. Border encounters continued to decrease until April 2020. Beginning in May 2020, encounters once again started rising.[97] At that point, individuals continued to be enrolled into MPP, however, at lower rates than previously; immigration court hearings for MPP enrollees were also suspended.

The sharp decrease in SWB encounters during the months in which MPP was fully operational is notable. Of course, correlation does not equal causation. And even at the height of MPP's implementation in August

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[96] U.S. Customs and Border Protection, "Southwest Land Border Encounters," https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters.

[97] *Id.*

2019, it was not the Department's primary enforcement tool; approximately 12,000 migrants were enrolled in MPP but more than 50,000 were processed under other Title 8 authorities.[98] In addition, beginning in April 2019, Mexico surged its own enforcement, thus increasing their level of apprehensions and returns. This, coupled with a range of other push and pull factors, both known and unknown, likely contributed to the decline in encounters.[99] The relevant data is simply insufficiently precise to make an exact estimate of the extent to which MPP may have contributed to decreased flows at the southwest border.

That said, the Secretary has, nonetheless, evaluated MPP on the premise that it contributed to decreased flows.[100] Even so, the Secretary has concluded that this benefit cannot be justified, particularly given the substantial and unjustifiable human costs on the migrants who were exposed to harm while in Mexico, and the way in which MPP detracts from other regional and domestic goals and policy initiatives that better align with this Administration's values while also serving to manage migratory flows, as described in Section IV.

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[98] DHS OIS analysis of U.S. CBP administrative records.

[99] *See* Congressional Research Service, *Mexico's Immigration Control Efforts* (May 28, 2021).

[100] The district court faulted the Secretary for not taking into account alleged warnings to members of the Biden-Harris transition team by career DHS officials that terminating MPP would cause a spike in border encounters. *Texas*, 2021 WL 3603341, at *7. The Department is unaware of any such specific conversations, yet is aware of, and has taken into account, similar concerns raised by others.

H. Addressing the Concerns of States and Border Communities

In the course of litigation, plaintiffs have alleged that the Secretary's June 1 Memorandum failed to consider the additional costs that States would allegedly incur as a result of the decision to terminate MPP. Texas and Missouri, for example, argued—and the district court found—that the termination of MPP could lead to an increased number of noncitizens without proper documentation in their States, which might cause the States to incur additional costs related to the costs of driver's licenses, public education, state-funded healthcare, and law enforcement and correctional costs.[101] State-plaintiffs also alleged that terminating MPP led to an increase in organized crime, human trafficking, and drug cartel activity, specifically with respect to the illegal trafficking of fentanyl.[102] And State-plaintiffs further claimed that they had developed "reliance interests" dependent on the continued operation of MPP.

The Secretary takes these concerns seriously. He has sought to understand and address the impacts that Departmental policies and practices may have on communities and has consulted with numerous state and local officials from across the SWB about the Department's border management strategy, including the decision to terminate MPP. The Secretary has, as a result taken and will continue to take, steps designed to

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[101] *See Texas*, 2021 WL 3603341, at *9-10.

[102] First Amended Complaint at 2, 38-39, *Texas v. Biden*, No. 2:21-cv-67 (N.D. Tex. filed June 3, 2021); *see also* Complaint, *West Virginia v. Biden*, No. 2:21-cv-22 (N.D. W.Va. filed Aug. 19, 2021); First Amended Complaint, *Arizona v. Mayorkas*, No. 2:21-cv-617 (D. Ariz. filed July 12, 2021).

minimize adverse consequences of any policy shifts on border states.

Prior to the district court's injunction, for example, the Department facilitated the safe and orderly entry into the United States of about 13,000 individuals previously enrolled in MPP for purposes of participating in their removal proceedings. Prior to doing so, however, the Department ensured that these individuals received COVID-19 tests before crossing the border and entering the United States. The Department also worked in close partnership with nongovernmental organizations and local officials in border communities to connect migrants with short-term supports that facilitated their onward movement to final destinations away from the border.

In addition, the Secretary has devoted extensive resources on efforts designed to stop trafficking networks and protect border states from risks associated with criminal activity. Shortly after assuming office, the Secretary directed FEMA to increase funding for SWB law enforcement through FEMA's Operation Stonegarden, a $90 million grant that supports law enforcement partners, with more than 80% of such funds being been directed to SWB areas. Multiple and significant narcotics seizures have resulted from this initiative.[103] The Secretary also directed DHS to work with GOM partners on joint law enforcement operations designed to attack the smuggling and trafficking organizations. Operation Sentinel, which was launched in April, is a key

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[103] FEMA data on Operation Stonegarden provided on Oct. 28, 2021.

example of these efforts—a multifaceted counter-network operation focused on identifying and taking law enforcement actions against transnational criminal organizations involved in the facilitation of mass migration to the SWB of the United States. Working with the GOM, DHS law enforcement has identified over 2,200 targets associated with transnational criminal organizations and revoked multiple visas and Trusted Traveler memberships, blocked bank accounts, and blocked certain entities from conducting business with the U.S. government.[104]

These efforts build on the Department's longstanding partnership with state, local, territorial, and tribal (SLTT) governments and law enforcement agencies, including many on the SWB, to address transnational crime, including human smuggling and trafficking. ICE's Homeland Security Investigations, for example, operates 79 Border Enforcement Security Task Forces nationwide, staffed by more than 700 State and Local law enforcement officers, that work cooperatively to combat emerging and existing transnational criminal organizations. Operational successes resulted in the seizure of 2,503 weapons, 215,301 pounds of narcotics, and $104,742,957 in FY20.[105] The ICE Criminal Apprehension Program also helps SLTT law enforcement partners better identify, arrest, and remove priority noncitizens who have been convicted of crimes in the United States and are incarcerated within federal, state, and lo-

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[104] CBP data on Operational Sentinel, provided on Oct. 28, 2021.

[105] ICE data on Border Enforcement Security Task Forces, provided on Oct. 28, 2021.

cal prisons and jails. In FY21, ICE issued 65,940 immigration detainers to noncitizens booked in jails or prisons.[106] All such activities are ongoing.

The Department also has carefully reviewed the available information and has not seen any evidence that MPP had any effect on human trafficking and crime, including drug trafficking. Seizures of narcotics, while not necessarily indicative of trafficking activity, are nonetheless the best available data, and do not show any impact related to MPP's implementation. Seizure of narcotics between ports of entry have declined steadily from FY18 to FY21, including a decline of almost 40 percent since the point in time when MPP was fully implemented, through FY21, a time MPP was largely not being implemented.[107] These declines have been driven by a substantial decrease in marijuana smuggling. Meanwhile, hard narcotics, including cocaine, methamphetamine, heroin, and fentanyl, are historically smuggled through ports of entry and thus have very little connection to MPP's implementation. Seizure trends for hard drugs at ports of entry have been mixed, with fentanyl and methamphetamine seizures increasing substantially year on year since FY18, cocaine seizures remaining largely flat, and heroin seizures substantially higher in FY19 and FY21 than in FY18 and FY20.[108]

Meanwhile, the fact that some noncitizens might reside in the United States rather than being returned to Mexico and thus access certain services or impose law

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[106] ICE data on the Criminal Apprehension Program, provided on Oct. 28, 2021.

[107] Analysis of CBP data on drug seizures by U.S. Border Patrol agents, https://www.cbp.gov/newsroom/stats/drug-seizure-statistics.

[108] *Id.*

enforcement costs is not, in the Secretary's view, a sufficiently sound reason to continue MPP. Federal immigration policy virtually always affects the number of people living within the States. Notably, not all of those burdens are borne by border States—many noncitizens proceed to interior States; others are detained by the federal government. In this case, the Secretary has made the judgment that any marginal costs that might have been inflicted on the States as a result of the termination of MPP are outweighed by the other considerations and policy concerns; it is also the Secretary's view that the other policies and initiatives being pursued by this Administration will ultimately yield better outcomes than MPP.

Moreover, even after his many consultations, the Secretary is unaware of any State that has materially taken any action in reliance on the continued implementation (or in response to the prior termination) of MPP. State-plaintiffs in the litigation also have not identified any specific actions they took in reliance on MPP.[109] Moreover, any claimed reliance interest is undermined by the fact that the program itself is discretionary, as are decisions to detain or parole individuals into the country. *No* administration has ever done what State-plaintiffs in the litigation argue is required here—detain

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[109] The district court in *Texas* also discussed a purported "agreement" that the Department entered into with the State of Texas and several other states in early January 2021. *Texas*, 2021 WL 3603341, at *6-7. As the Department has explained in litigation, those documents were void *ab initio* and unenforceable. Any reliance on those documents is therefore unreasonable. To the extent those documents were ever valid, the Department has since terminated them and, in any event, Texas conceded in litigation that the "agreement" was no longer binding as of August 1, 2021.

or return to Mexico everyone that the Department encounters along the border. States cannot have a reliance interest based on something that has never previously been implemented. Notably, only 6.5 percent of noncitizens encountered along the SWB and processed through Title 8 were enrolled in MPP during the period it was in place. In no month when MPP was operating —including in August 2019, the month with the highest number of MPP enrollments—were more than one-in-five noncitizens encountered at the SWB and processed through Title 8 placed in MPP.[110] The short time in which MPP was in place, as well as the small percentage of noncitizens encountered along the SWB who were enrolled in MPP while it was in operation, undercut any claimed reliance interest, as well as any claim regarding significant burdens to the States.

I. Relationship between Implementation of MPP and Statutory Mandates

In enjoining the June 1 Memorandum, the district court faulted the Department for not considering the impact terminating MPP would have on the Department's ability to comply with the detention requirements in 8 U.S.C. § 1225.[111] In so doing, the district court accepted plaintiffs' argument that, pursuant to 8 U.S.C. § 1225, DHS has two options with regard to noncitizens seeking asylum at the border: (1) mandatory detention or (2) return to a contiguous territory.[112] This is a clear misreading of the statute for all of the reasons explained

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[110] DHS OIS analysis of CBP administrative records.

[111] *Texas*, 2021 WL 3603341, at *21-23.

[112] *Id.* at *22.

at length by the U.S. Government in the litigation—including a misreading of Section 1225 to effectively mandate detention of all those who are not subject to the contiguous-territory-return provision of 8 U.S.C. § 1225(b)(2)(C) if the agency lacks detention capacity to detain all noncitizens not otherwise subject to contiguous territory return. It is also completely at odds with the history of immigration detention in this country, and the agency's consistent and longstanding interpretation of its statutory authorities. Section 1225(b)(2)(C) is discretionary, and nothing in section 1225's text or history suggests any relationship between Congress's grant of return authority and section 1225's detention provisions.

Section 1225 does not impose a near-universal detention mandate for all inadmissible applicants for admission either as a general matter or conditionally where noncitizens are not returned to a contiguous territory. Section 1225 "does not mean" that every noncitizen "must be detained from the moment of apprehension until the completion of removal proceedings."[113] The INA provides DHS with latitude for processing noncitizens beyond returns or detention. DHS "may . . . in [its] discretion" release a noncitizen placed in Section 1229a proceedings through "parole," pursuant to 8 U.S.C. § 1182(d)(5) "for urgent humanitarian reasons or significant public benefit."[114]

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[113] *Matter of M-S-*, 27 I&N Dec. 509, 516-517 (A.G. 2019); *see Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018).

[114] 8 U.S.C. § 1182(d)(5)(A); *see* 8 C.F.R. §§ 212.5(b), 235.3(c). Additionally, "pending a decision on whether the alien is to be removed" and "[e]xcept as provided in [§ 1226(c)]," noncitizens present in the

Pursuant to Section 1182(d)(5)'s parole authority, Congress has expressly granted DHS the broad authority to release applicants for admission from detention as an exercise of the Department's parole power. That power has been exercised for as long as the federal government has been regulating immigration.[115] Indeed, Congress enacted 8 U.S.C. § 1182(d)(5) as a "codification of the [prior] administrative practice."[116] And in the decades since, immigration agencies have continued to broadly exercise their parole power to release certain noncitizens from detention. Notably, the statute does not set any limit on the number of individuals DHS can decide to release on parole. Nor does it provide that the agency cannot rely on its limited resources and detention capacity to release noncitizens otherwise subject to detention under section 1225. Rather, Congress simply required that parole decisions be made on a case-by-case basis and that they be based on "urgent humanitarian reasons" or "significant public benefit."[117] As

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United States "may" be released on "bond" or "conditional parole." 8 U.S.C. § 1226(a)(2)(A)-(B).

[115] *See, e.g.*, *Nishimura Ekiu v. United States*, 142 U.S. 651, 651, 661 (1892) (discussing release of noncitizen to care of private organization); *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (same).

[116] *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958).

[117] In a section entitled "Limitation on the Use of Parole," Congress amended the parole statute in 1996 to recharacterize the permissible purposes of parole from "emergent reasons or for reasons deemed strictly in the public interest" to "*only on a case-by-case basis* for urgent humanitarian reasons or significant public benefit." Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, §§ 302, 602, 110 Stat 3009 (emphasis added). But it did not otherwise alter DHS's parole authority and did not define these manifestly ambiguous statutory terms. Accordingly, after the 1996 amendment to the parole statute, the

the statute does not define those ambiguous terms, Congress left it to the agency to define them.[118] In implementing section 1182(d)(5), the agency has long interpreted the phrase "significant public benefit" to permit it to parole noncitizens "whose continued detention is not in the public interest as determined by" specific agency officials.[119] And in turn, the agency has for decades viewed detention as not being in the "public interest" where, in light of available detention resources, detention of a specific noncitizen would limit the agency's ability to detain another noncitizen whose release may pose a greater risk of flight or danger to the community.[120]

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agency incorporated the new "case-by-case" requirement into its regulation, while also maintaining its longstanding regulatory authority to release when "continued detention is not in the public interest," 8 C.F.R. § 212.5(b)(5), which remained consistent with the statute after the 1996 amendment. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,313 (Mar. 6, 1997).

[118] 8 U.S.C § 1103(a)(1); *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984); *cf., e.g., Ibragimov v. Gonzales*, 476 F.3d 125, 137 n.17 (2d Cir. 2007) (deferring to another aspect of same parole regulation).

[119] 8 C.F.R. § 212.5(b)(5).

[120] *See, e.g.*, *Interim Guidance for Implementation of Matter of M-S*, 27 I&N Dec. 509 (A.G. 2019): Parole of Aliens Who Entered Without Inspection, Were Subject to Expedited Removal, and Were Found to Have a Credible Fear of Persecution or Torture; ICE Policy No. 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009); *see also Jeanty v. Bulger*, 204 F. Supp. 2d 1366, 1377-78 (S.D. Fla. 2002) (referring to INS detention use policies, including parole policies, based on having to establish "priorities for the use of limited detention space"), *aff'd*, 321 F.3d 1336 (11th Cir. 2003).

Moreover, no administration has *ever* interpreted or implemented 8 U.S.C § 1225, as the district court in *Texas* has read it, to require the detention of virtually all inadmissible applicants for admission, except for those returned to Mexico. The Department does not have —and has never had under any prior administration— sufficient detention capacity to maintain in custody every single person described in section 1225. In September 2021, for example, CBP encountered approximately 192,000 individuals along the SWB.[121] And as discussed above, even in August 2019, when MPP enrollments were at their zenith, CBP encountered nearly 63,000 individuals along the SWB. Meanwhile, ICE Enforcement and Removal Operations (ERO) is generally appropriated for approximately 34,000 detention beds nationwide with some modest fluctuation from year to year.

This variance between border crossings and detention capacity is not new and was in fact the reality even when MPP was in place (see Appendix 1). From Fiscal Years 2013 to 2019, nearly three-quarters of single adult and family unit members who were encountered at the SWB were either never placed in or released from detention during the pendency of their proceedings—more than 1.1 million (41 percent) were never booked into ICE detention and nearly 900,000 (33 percent) were booked in for a period of time but released prior to the conclusion of their removal proceedings.[122] Even during the period that MPP was in effect from late January 2019 to January 20, 2021, more than two-thirds of single adults and individuals in family units encountered along

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[121] Southwest Land Border Encounters, *supra* note 95.

[122] FY 2020 Enforcement Lifecycle Report, *supra*, note 75.

the SWB and processed through non-MPP Title 8 authorities—more than 650,000 individuals—were never detained or released from ICE custody during the duration of their proceedings; a full 42 percent (more than 415,000 individuals) were never booked into ICE detention at all.[123]

By interpreting Section 1225 to mandate either detention or return to Mexico, the court essentially concluded that every single administration since 1997 has repeatedly and consistently violated Section 1225, by exercising the parole authority to release noncitizens detained under that authority, on a case-by-case basis, where detention of a specific noncitizen would limit the agency's ability to detain another noncitizen who release may pose a greater risk of flight or danger to the community. There is no indication that Congress, in enacting Section 1225, intended to *require* the Secretary to use the explicitly *discretionary* return authority found at 8 U.S.C. § 1225(b)(2)(C) for virtually any noncitizen the Department fails to detain because of resource limitations.[124] Rather, the decision to use the authority

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[123] *Id.* Indeed, when the last Administration created MPP, it expressly excluded from its coverage as a matter of discretion certain noncitizens, including citizens or nationals of Mexico, returning lawful permanent residents seeking admission, noncitizens with known physical or mental health issues, and other noncitizens. DHS, "Migrant Protection Protocols (Trump Administration Archive)," https://www.dhs.gov/archive/migrant-protection-protocols-trump-administration.

[124] Congress is aware that it would need to appropriate substantial additional funds to detain everyone potentially subject to detention under Section 1225; yet, it has never done so. *See* 8 U.S.C. § 1368(b) (providing for bi-annual reports to Congress on detention space, in-

found in 8 U.S.C. § 1225(b)(2)(C) is entrusted to the Secretary's discretion and to his discretion alone. Given these clear statutory authorities, and DHS's longstanding interpretation of the ambiguous parole statute, the Secretary's decision to terminate MPP creates no conflict with the detention authorities in Section 1225.

J. Impact on U.S.-Mexico Relationship

Mexico is a sovereign nation. This means that the U.S. Government cannot return individuals to Mexico without an independent decision by the GOM to accept their entry. It was for good reason that MPP was put into effect only *after* the U.S. government had conducted diplomatic engagement with GOM and *after* the GOM announced its independent decision to accept returnees. The initiation of MPP required substantial diplomatic engagement in 2019; it does in 2021 as well.[125]

In deciding to accept returns of non-Mexican nationals under MPP, the GOM agrees to shoulder the burden of receiving these individuals, facilitating legal status and shelter, and accounting for their safety and security.

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cluding estimates on "the amount of detention space that will be required" during "the succeeding fiscal year"). Although Congress has amended Section 1225 since 1996, *see* Pub. L. 110229, 122 Stat. 754, 867 (2008), it has never amended Section 1225 to mandate the use of return authority when the agency lacks resources to detain all applicants for admission or to override the agency's longstanding interpretation permitting the use of parole to address capacity limitations as a significant public benefit. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

[125] *Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act*, *supra* note 13.

Not only does this place a great deal of strain on the GOM's ability to provide services for its own citizens and lawful residents, it diverts Mexican law enforcement resources from other missions that are important to the United States—including addressing transnational organized crime networks and root causes of migration. Over the past nearly three years, MPP has played an outsized role in its policy and operational engagement with GOM, thus distracting from other diplomatic initiatives and programs concerning migration flows. These engagements, which have increased substantially in tempo and intensity since the court's order, require enormous amounts of time to prepare for and execute, and involve the same individuals at DHS and DOS who would otherwise be working on advancing other key bilateral priorities.

The Department is eager to expand the focus of the relationship with GOM to address broader issues related to migration to and through Mexico. This includes implementing the bilateral economic and security frameworks adopted in September and October 2021, respectively;[126] addressing the root causes of migration from Central America; improving regional migration management; enhancing protection and asylum systems throughout North and Central America; and expanding cooperative efforts to combat smuggling and trafficking networks, and more. Terminating MPP will, over time,

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[126] White House, "Joint Statement: U.S.-Mexico High-Level Security Dialogue," Oct. 8, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/08/joint-statement-u-s-mexico-high-level-security-dialogue/; White House, "Fact Sheet: U.S.-Mexico High-Level Economic Dialogue," Sept. 9, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/09/fact-sheet-u-s-mexico-high-leveleconomic-dialogue/.

help to broaden the United States' engagement with the GOM to address these critical efforts, which we expect will produce more effective and sustainable results than what we achieved through MPP. It will also provide more space and resources to address the many other bilateral issues that fall within DHS's diverse mission, such as countering transnational organized crime, cybersecurity, trade and travel facilitation, cargo and port security, emergency management, biosurveillance, and much more.

IV. The Biden-Harris Administration's Affirmative Efforts to Enhance Migration Management

In December 2018, when DHS announced the start of MPP, the Department stated that MPP was expected to provide numerous benefits for the immigration system, including reducing false asylum claims, more quickly adjudicating meritorious asylum claims, clearing the backlog of unadjudicated asylum applications, and, perhaps most importantly, stemming migration flows across the SWB. All of these goals remain top priorities for the Department and Administration. But the Secretary assesses that there are ways to advance these goals through means other than MPP—through policies and practices that will more effectively and more humanely achieve the stated goals than continuing to implement MPP as designed or in modified form.

Not only has MPP failed to deliver many of its promised benefits, but the burden and attention required to reimplement and maintain MPP will undermine the Department's efforts to address irregular migration and achieve lasting reform of the asylum system through other means. As noted earlier, the Secretary is under-

taking this review on the premise that MPP was responsible for a share of the significant decrease in SWB encounters that occurred during many months of MPP's operations. However, MPP is not the only, and certainly not the preferred, means of tackling irregular migration. To the contrary, the Department is currently pursuing a range of other measures that it anticipates will disincentivize irregular migration in ways that are more consistent with this Administration's values and enduring, including by addressing root causes and building regional solutions. In addition, the Department is committed to channeling migration through safe and orderly pathways and reforming our asylum adjudication system to achieve more timely, fair, and efficient results,

In July 2021, the Administration released a Blueprint describing its overarching strategy—as well as the concrete steps that will be taken—to ensure a secure, humane, and well-managed border, implement orderly and fair asylum processing, strengthen collaborative migration management with regional partners, and invest in the root causes of migration in Central America.[127] The Administration, with DHS playing a critical role, has made significant investments and taken substantial actions to move forward with its strategy.

A. Managing Flows

The current Administration is pursuing a comprehensive vision for managing migration and facilitating

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[127] White House, "Fact Sheet: The Biden Administration Blueprint for a Fair, Orderly and Humane Immigration System," July 27, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/27/fact-sheet-thebiden-administration-blueprint-for-a-fair-orderly-and-humane-immigration-system/.

safe, orderly, and legal pathways for individuals seeking protection or intending to migrate.[128] A key part of this vision involves disincentivizing unlawful entries by robustly enforcing our laws at the land border while also ensuring the humane and lawful treatment of those who do arrive in the United States. Doing so requires a concerted effort to address root causes of migration, provide alternative protection solutions in the region, enhance lawful pathways for migration to the United States, and streamline the fair adjudication of asylum claims at the border—efforts that the Department has determined will be more effective at reducing irregular migration than continuing to implement MPP.

To disincentivize irregular migration, the Administration is pursuing a multi-pronged approach. At our border, we are employing expedited removal to rapidly, but humanely, return certain individuals and families that are encountered unlawfully crossing between POEs. Those who do not express fear of persecution or torture, and who are nationals of countries that allow electronic nationality verification (ENV), are returned to their countries within a few days of being encountered. DHS is working closely with the Department of State to expand the use of these ENV agreements throughout the hemisphere to more expeditiously facilitate removals of individuals who do not claim a fear of persecution or torture. The Department additionally treats any noncitizen who unlawfully entered the United

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[128] EO 14010 directed the creation of a Root Causes Strategy and Collaborative Migration Management Strategy. Published in July 2021, the strategies articulate a bold and comprehensive vision for managing migration throughout the Western Hemisphere. *Id.*

States on or after November 1, 2020, as a presumed border security enforcement and removal priority under current guidance,[129] as well as in guidance that will become effective on November 29, 2021.[130]

Recognizing that the management of migration is a shared responsibility among sending, transiting, and receiving countries, the Administration is also working with our partner countries across the region to manage migratory flows. As part of these efforts, the United States is working bilaterally and multilaterally with countries across the Western Hemisphere, seeking to encourage humane border enforcement and enhance legal pathways throughout the region. DHS is also working closely with the Department of State to provide additional technical assistance, mentoring, and resources to border and immigration authorities in the region, with the goal of enhancing the capability and effectiveness of our partners' efforts to identify and interdict unlawful activity. As part of these efforts, the United States and Colombia co-hosted a regional conference on migration in Colombia on October 20, 2021 that brought together foreign ministries and immigration authorities from 17 partner nations across the hemisphere to directly address recent trends in irregular migration in the region. During this conference, countries commit-

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[129] Memorandum from Tae D. Johnson, Acting Director, ICE, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021).

[130] Memorandum from Alejandro Mayorkas, Sec'y of Homeland Security, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021).

ted to enhancing protection, combating human smuggling and trafficking, and expanding humane enforcement efforts.

The Department is also working bilaterally with countries across the region to build law enforcement capacity, tackle transborder crime, and slow migratory flows. Beginning in April 2021, for example, DHS deployed dozens of CBP personnel to Guatemala to train and support local law enforcement units and help enhance the security of Guatemalan border crossings, checkpoints, and ports.[131] And in October 2021, for example, the United States and Mexico agreed on joint actions to prevent transborder crime, with a particular focus on reducing arms trafficking, targeting illicit supply chains, and reducing human trafficking and smuggling.[132] Such efforts build on the successes of Operation Sentinel, in which DHS is working with other

U.S. government agencies and the GOM to identify and impose meaningful sanctions on those involved in human smuggling, including by freezing their assets, revoking their visas, and curtailing their trade activities. DHS seeks to expand these efforts across the hemisphere, with the GOM as a key partner. However, the senior U.S. and Mexican officials who would lead these efforts are the same officials that have spent much of the past three months negotiating the reimplementation of MPP—detracting from efforts to advance other key parts of the bilateral relationship.

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[131] CBP data on Guatemalan deployments provided on 10/29/2021.

[132] Joint Statement: U.S.-Mexico High-Level Security Dialogue, *supra* note 125.

The Administration is also expanding efforts to address root causes of migration and enhance legal pathways for individuals who intend to migrate, as well as building and improving asylum systems in other countries and scaling up protection efforts for at-risk groups. These efforts reduce incentives to come to the United States to seek protection and, for those who still choose to do so, reduce incentives to cross the border unlawfully. As part of these efforts, DHS is working with Department of State to expand efforts to build and improve asylum systems in other countries and scale up protection efforts for at-risk groups, thereby providing alternative opportunities for individuals to seek protection without making the often-dangerous journey to the SWB.

The Department of State and DHS, for example, are working to stand up Migrant Resource Centers (MRC) in key sending countries, including Guatemala, where individuals who intend to migrate can apply for a visa or seek other available protection.[133] The Department of State established the first MRC in Guatemala this year, and is working with international organizations to expand the MRCs to multiple locations and countries over the coming year. The Administration is also working to continue to expand the legal pathways that are available for individuals who apply at these facilities. We are also expanding refugee processing in Central America —including through in-country processing in Northern Triangle countries—and are helping international organizations and local non-governmental organizations identify and refer individuals with urgent protection

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[133] *Id.*

needs to the U.S. Refugee Admissions Program and resettlement agencies in other countries.

Additionally, on March 10, 2021, DHS, in close coordination with the Department of State, restarted the Central American Minors (CAM) program to reunite eligible children from El Salvador, Guatemala, and Honduras with parents who are lawfully present in the United States. On June 15, 2021, the Departments expanded CAM eligibility to include certain U.S.-based parents or legal guardians who have a pending asylum application or U visa petition filed before May 15, 2021, thereby allowing them to file petitions on behalf of children who are nationals of El Salvador, Guatemala, or Honduras for potential resettlement in the United States. This important program provides an avenue for children to come to the United States that would not otherwise be available, which in turn supports family unity and reduces the incentives for unlawful entry. By restarting and expanding this safe, orderly, and lawful pathway through which children may reunite with their parent or legal guardians in the United States, CAM reduces the incentive for such vulnerable and often unaccompanied children to make the dangerous journey to the United States border.[134]

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[134] *See* "Joint Statement by the U.S. Department of Homeland Security and U.S. Department of State on the Expansion of Access to the Central American Minors Program," June 15, 2021, https://www.dhs.gov/news/2021/06/15/joint-statement-us-department-homeland-security-and-us-department-stateexpansion. Under the expanded guidance, eligible minors may apply for refugee status if they are sponsored by a parent or legal guardian in the United States who is in one of the categories: lawful permanent residence; temporary protected status; parole; deferred action; deferred enforced departure; withholding of removal; or certain parents or legal guardians who

The Department also has expanded access to temporary work visas in the region, thereby providing a lawful pathway to work temporarily in the United States for individuals who might otherwise take the irregular and dangerous journey to the United States in search of economic opportunities and cross the border unlawfully. To that end, on May 21, 2021, DHS published a temporary final rule making available 6,000 H-2B supplemental visas for temporary nonagricultural workers from Honduras, Guatemala, and El Salvador in FY21.[135] The Administration is also working to enhance access to H-2A visas for temporary agricultural workers, for when there are insufficient qualified U.S. workers to fill these jobs. Departments and agencies are engaged with the Northern Triangle governments, international organizations, the private sector, civil society, labor unions, and worker rights organizations to promote this program.

These efforts, all of which have only recently been initiated, require diplomatic engagement and investment of resources. They will take some time to achieve substantial results. Once fully operational, they will provide legal and regular pathways for individuals seeking protection and opportunity to work in the United States, thus reducing the need for unlawful crossings and reducing the appeal of exploitative smugglers. By incen-

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have a pending asylum application or a pending U visa petition filed before May 15, 2021.

[135] Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers, 86 Fed. Reg. 28,198 (May 25, 2021).

tivizing migration through lawful channels, and disincentivizing the use of unlawful channels, these initiatives achieve several key goals of MPP, but in a more humane way that matches the Administration's values.

B. Managing Asylum Claims

The Department also is taking a number of different steps to better manage asylum claims that will allow the United States to more humanely, and fairly, achieve some of MPP's stated benefits: reducing false asylum claims, more quickly adjudicating meritorious asylum claims, and clearing the backlog of unadjudicated asylum applications.

1. *Dedicated Docket*

In May 2021, DHS and DOJ jointly announced a new Dedicated Docket, designed to expeditiously and fairly conduct removal proceedings for families who enter the United States between ports of entry at the SWB.[136] With a goal that immigration judges will generally complete cases on the Dedicated Docket within 300 days, the process is intended to significantly decrease the length of time for adjudication of such noncitizens' cases, while also providing fair hearings for families seeking asylum and other forms of relief or protection from removal. Dedicated Dockets have been established in 11 cities (Boston, Denver, Detroit, El Paso, Los Angeles, Miami, Newark, New York City, San Diego, San Francisco, and Seattle) chosen because they are common destination cities for migrants and have robust communities of legal

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[136] Press Release, DHS, "DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings," May 28, 2021, https://www.dhs.gov/news/2021/05/28/dhs-and-doj-announce-dedicated-docket-processmore-efficient-immigration-hearings.

service providers. Once fully up and running, it is expected to adjudicate approximately 80,000 cases each year.

The Dedicated Docket serves multiple goals: It provides a mechanism for the more efficient adjudication of claims. It ensures compliance with court proceedings through use of case management services provided through ICE's Alternatives to Detention (ATD) program.[137] It promotes efficiency and fairness in those proceedings through robust access to legal orientation for families on the docket (including group and individual legal orientations and friend-of-the-court services for unrepresented individuals). And, as MPP was designed to do, it discourages non-meritorious claims by dramatically reducing the amount of time that a noncitizen may remain in the United States while his or her claims for relief or protection are adjudicated.

Moreover, it is expected to achieve these goals in ways that avoid the pitfalls associated with MPP. Unlike MPP, which was plagued with high *in absentia* rates, the Dedicated Docket is designed, via the use of ATD and case management services, to ensure high appearance rates and contribute to the proper functioning of our immigration system. As of October 25, 2021, EOIR had conducted nearly 12,000 initial hearings for individuals in Dedicated Docket cases, just 4.5 percent of which had ended in issuance of an *in absentia* order of removal.[138] ICE data reflect a 98.9% attendance rate

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[137] ICE Enforcement and Removal Operations (ERO), "Alternatives to Detention Program," https://www.ice.gov/detain/detention-management.

[138] Data on the number of initial hearings for individuals on Dedicate Docket, provided by EOIR on Oct. 25, 2021.

at all hearings for individuals enrolled into ATD from the SWB from FY14 to FY21.[139]

Two immigration court locations currently hearing Dedicated Docket cases—El Paso and San Diego—are slated for use as part of the court-ordered reimplementation of MPP because of their proximity to ports of entry along the border. To staff MPP cases, EOIR will have to either divert judges from existing initiatives such as the Dedicated Docket—which will prolong those cases and undermine the effort—or reassign other immigration judges handling other non-detained cases, which will exacerbate the 1.4 million case backlog that already exists. It is the Department's reasoned decision —working in close partnership with EOIR—that the limited pool of asylum officers and immigration judges are best spent supporting the Dedicated Docket and other initiatives that achieve the goals of timely and fair adjudications.

2. *Asylum Officer Rule*

On August 20, 2021, DHS and DOJ promulgated a Notice of Proposed Rulemaking (NPRM) for the so-called "Asylum Officer Rule," which seeks to address systemic problems with the asylum system in an enduring way consistent with the Administration's values. Specifically, it amends the procedures for credible fear screenings and consideration of asylum, withholding of

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[139] Data from ICE ERO Custody Management Division FY14, 15, 16, 17, 18, 19, 20, and 21 through Aug. 31, 2021 FAMU BP Apprehensions-Subsequently Enrolled into ATD, ISAP IV EOIR Court Appearance Rates FY14 & FY15 & FY16 & FY17 & FY18 & FY19 & FY20 & FY21 through Aug. 31, 2021.

removal, and CAT, so as to streamline the asylum process and address the current backlogs in the system.[140] The comment period of this NPRM recently closed, and DHS and DOJ are currently reviewing the comments received and working on a final rule.

The proposed rule addresses the fact that the number of asylum and related protection claims at the SWB has increased dramatically over the years, that the system has not been able to keep pace, and that large immigration court backlogs and lengthy adjudicated delays are the result.[141] As stated in the NPRM, the proposed rule also evidences this Administration's recognition that "[a] system that takes years to reach a result is simply not a functional one. It delays justice and certainty for those who need protection, and it encourages abuse by those who will not qualify for protection and smugglers who exploit the delay for profit."[142] The Asylum Officer Rule thus responds to the very same concerns identified by the last Administration when it adopted MPP—and to a number of the concerns relied upon by the *Texas* court—but tackles them in a transformative and systemic way, while holding true to our laws and values.

To support the more expeditious and fair adjudication of claims, the proposed rule would transfer from immigration judges to USCIS asylum officers the initial responsibility for adjudicating asylum and related protection claims made by noncitizens who are encountered

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[140] Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46,906 (Aug. 20, 2021).

[141] *Id.* at 46,907.

[142] *Id.*

at or near the border and who are placed into expedited removal proceedings. Individuals who establish a credible fear of persecution or torture following an initial screening interview would have their applications referred to USCIS, rather than the immigration court, for further consideration of their claim. The initial credible fear interview would serve as the basis for the individual's asylum application, thereby introducing a key efficiency into the process.

Allowing cases with positive credible-fear findings to remain within USCIS for the full asylum merits adjudication, rather than being shifted to immigration judge-review, will capitalize on the investment of time and expertise developed during the screening interview and allow cases to be resolved more quickly. This will, in turn, employ limited asylum officer and immigration court resources more efficiently, reduce asylum backlogs, and protect against further expansions of the already large immigration court backlog. As currently drafted, the NPRM is also designed to include key procedural safeguards—including the ability to appeal, be represented by counsel, and present additional evidence as necessary to ensure due process, respect for human dignity, and equity. Once implemented, the Asylum Officer Rule is expected to represent a transformative and lasting shift in asylum claim processing that will ensure rapid and fair processing in a way that delivers appropriate outcomes and realistically keeps pace with the workflow.

Achieving the rule's objectives will require substantial investment in resources, training, and personnel; to fully implement this new process, USCIS will need to

quadruple the current asylum officer corps.[143] Importantly, these are the same asylum officers needed to conduct *nonrefoulement* interviews for MPP. Restarting MPP will likely undercut the ability to implement this new rule as designed.

It is the Department's reasoned view that these limited resources are better expended on implementing both the Dedicated Docket and the Asylum Officer Rule. Like MPP, both the Dedicated Docket and the Asylum Officer Rule are designed to render timely decisions and discourage non-meritorious claims. Unlike MPP, however, they do so without subjecting vulnerable individuals to increased risk in Mexico and without creating the inevitable barriers to accessing counsel that exist for those returned to Mexico.

V. Consideration of Alternatives to Terminating MPP

The Department has considered the following as alternatives to terminating MPP: First, implementing MPP in the same manner as the prior Administration. Second, implementing with modifications designed to address some of the access-to-counsel, safety, and other humanitarian considerations, consistent with demands from the GOM. (These modifications are currently being planned pursuant to the court's order to implement MPP in good faith.) Third, implementing a significantly modified programmatic use of the Section 235(b)(2)(C) authority, as described below.

Reimplementation of MPP in the same manner as the prior Administration is not currently an available option. As has been described in court filings, the United

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[143] *Id.* at 46,933.

States cannot unilaterally implement MPP without the independent agreement of the GOM to accept those who the United States seeks to return. In ongoing discussions with the GOM, the GOM has made clear it would agree to accept such returns only if certain changes were implemented, including (i) measures to ensure that cases are generally adjudicated within six months, thus limiting the amount of time individuals are waiting in Mexico; (ii) clear means of communicating to MPP enrollees accurate information about the time and date of their hearings; (iii) improved access to counsel; and (iv) better screenings to protect particularly vulnerable individuals from being returned to Mexico. Each of these changes would, as a result, need to be made in any reimplementation. Unless the GOM significantly changes its position, resuming the program as it existed previously is simply not possible in the foreseeable future as a matter of international diplomacy.

Moreover, the Secretary has his own independent and significant concerns about the prior implementation of MPP, including concerns about the safety and security of those returned to Mexico, deficiencies in the *non-refoulement* interview process, barriers to access to counsel, and the ways in which reimplementation of MPP would divert from other Administration goals and result in significant burdens for the Department that would limit DHS's opportunities to make other needed reforms consistent with this Administration's policy priorities. In light of these concerns, the Secretary has decided not to resume MPP in precisely the same form as it previously existed, even if were a viable option.

As an alternative, the Secretary considered a modified implementation and enforcement plan, in the manner that the Administration is planning to start doing in the coming weeks— pending an independent decision by the GOM to facilitate returns—in order to comply with the district court's order. As the Department moves to reimplement, it is making changes to account for GOM's concerns—changes which are designed to better protect individuals returned to Mexico and ensure, among other things, timely and accurate notice about court hearings. In addition, the Department is evaluating what changes could be made to address the issues raised in the Red Team Report, to include changes announced by the December 2020 supplementary guidance to better ensure family unity, access to counsel during *non-refoulement* interviews, and assessment of vulnerability. In addition, in the near term, the Department will need to put in place robust COVID-19 mitigation measures to safeguard DHS personnel, the public, and the migrants themselves from the spread of the pandemic.

The Secretary has carefully considered whether these changes would sufficiently address his concerns regarding MPP to such an extent that he would support reimplementation of a modified MPP in lieu of termination. But ultimately he has concluded that, while helpful, they fail to address the fundamental problems with MPP—which is that it puts an international barrier between migrants and their counsel and relevant immigration court where their proceedings are pending and it places their security and safety in the hands of a sovereign nation, over which the United States does not exercise control. Further, the reimplementation of MPP diverts resources from key priorities that designed to address the same policy goals more effectively and in a

more humane way, including this Administration's landmark efforts to transform our asylum system and address the root causes of migration.

A third alternative still would be to attempt to do even more to address the humanitarian and other concerns associated with MPP, thus designing a programmatic use of the Section 235(b)(2)(C) authority that aggressively tackles the humanitarian concern and is more fully aligned with the Administration's broader vision for migration management. It is doubtful that DHS *could* adequately address these problems, given Mexican territorial sovereignty. At best, any such effort would require the provision of significant U.S. foreign assistance to counterparts operating in Mexico to assist with housing, transportation to and from court hearings, and other protections to address safety and security concerns. Attempting to do so would divert enormous Department of State resources away from the Administration's signature policy goals—to address the root causes and develop regional solutions for enforcing against irregular migration while providing regional approaches to lawful pathways. Meanwhile, the fundamental flaws with MPP remain.

After careful consideration, and for all the reasons laid out in his termination memo and this explanatory document, the Secretary has concluded that there are inherent problems with the program that no amount of resources can sufficiently fix, and others that cannot be sufficiently addressed without detracting from key Administration priorities and more enduring solutions.

VI. Conclusion

In sum, continuation of MPP—even in a significantly modified format—is inconsistent with the current policy approach of this Administration. Rather than forcing individuals to return to Mexico to await court hearings, this Administration is pursuing a range of other policies and rulemaking efforts—including regional approaches to addressing the root causes of migration and a reform of the asylum system—to better achieve the key goals of securing the border, reducing migratory flows, timely and fairly adjudicating asylum claims, and reducing the asylum backlog. Many of these efforts are currently underway and will bear fruit over time; the resources needed to implement MPP will detract from these efforts.

It is squarely within the authority of the Secretary of Homeland Security to decide to pursue the immigration policies and practices that he believes are most effective, and to decide not to exercise the discretion granted him by Congress in Section 235(b)(2)(C) of the INA to continue MPP. The Secretary reserves the prerogative to exercise this discretionary authority if circumstances—and the factors that led to this conclusion—change. Until such time, the Secretary has determined that MPP is incompatible with his goals for managing migratory flows at the border, and doing so in a humane way, consistent with the Administration's values.

Appendix 1: Encounters by Detention, Fiscal Years 2013-2021

Fiscal Year	Total Encounters	Continuous detention		Booked out prior to final outcome		Never detained	
2013	287,535	114,673	40%	76,776	27%	96,086	33%
2014	338,650	113,005	33%	102,371	30%	123,274	36%
2015	296,856	105,425	36%	82,221	28%	109,210	37%
2016	373,506	105,295	28%	131,147	35%	137,064	37%
2017	292,102	73,809	25%	106,405	36%	111,888	38%
2018	360,574	93,449	26%	149,183	41%	117,942	33%
2019	762,912	100,700	13%	246,099	32%	416,113	55%
2020	312,794	61,751	20%	37,981	12%	213,062	68%
2021	665,158	27,402	4%	62,744	9%	575,012	86%
2013-2019	2,712,135	706,356	26%	894,202	33%	1,111,577	41%
2013-2021	3,690,087	795,509	22%	994,927	27%	1,899,651	51%
Non-MPP Cases	991,012	323,425	33%	251023	25%	416,564	42%

Note: Non-MPP cases are defined as single adults and family units encountered between Jan. 25, 2019, and Jan. 20, 2021, and not enrolled in MPP and not expelled under Title 42.

Source: Data derived from DHS Office of Immigration Statistics Enforcement Lifecycle, which is based on a comprehensive person-level analysis of DHS and EOIR enforcement and adjudication records. *See* Marc Rosenblum and Hongwei Zhang, *Fiscal Year 2020 Enforcement Lifecycle Report* (Dec. 2020).

APPENDIX I

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

June 1, 2021

MEMORANDUM FOR: Troy Miller
Acting Commissioner
U.S. Customs and Border Protection

Tae D. Johnson
Acting Director
U.S. Immigration and Customs Enforcement

Tracy L. Renaud
Acting Director
U.S. Citizenship and Immigration Services

FROM: Alejandro N. Mayorkas
Secretary
/s/ ALEJANDRO N. MAYORKAS

SUBJECT: Termination of the Migrant Protection Protocols Program

On January 25, 2019, Secretary of Homeland Security Kirstjen Nielsen issued a memorandum entitled "Policy Guidance for Implementation of the Migrant Protection

Protocols" Over the course of the Migrant Protection Protocols (MPP) program, the Department of Homeland Security and its components issued further policy guidance relating to its implementation. In total, approximately 68,000 individuals were returned to Mexico following their enrollment in MPP.[144]

On January 20, 2021, then-Acting Secretary David Pekoske issued a memorandum suspending new enrollments in MPP, effective the following day.[145] On February 2, 2021 President Biden issued Executive Order 14010, 86 Fed. Reg. 8267, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*. In this Executive Order, President Bident directed me, in coordination with the Secretary of State, the Attorney General, and the Director of the Centers for Disease Control and Prevention, to "promptly consider a phased strategy for these and orderly entry into the United States, consistent with public health and safety and capacity constraints, of those individuals who have been subjected to MPP for further processing of their asylum

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[144] *See* "Migrant Protection Protocols Metrics and Measures," Jan. 21, 2021, available at https://www.dhs.gov/publiction/metrics-and-measures.

[145] Memorandum from David Pekoske, Acting Sec'y of Homeland Sec., *Suspension of Enrollment in the Migrant Protection Protocols Program* (Jan. 20, 2021).

claims," and "to promptly review and determine whether to terminate or modify the program known as the Migrant Protection Protocols."[146]

On February 11, the Department announced that it would begin the first phase of a program to restore safe and orderly processing at the Southwest Border of certain individuals enrolled in MPP whose immigration proceedings remained pending before the Department of Justice's Executive Office for Immigration Review (EOIR).[147] According to Department of State data, between February 19 and May 25, 2021, through this program's first phase approximately 11,200 individuals were processed into the United States. The Department is continuing to work with interagency partners to carry out this phased effort and to consider expansion to additional populations enrolled in MPP.

Having now completed the further review undertaken pursuant to Executive Order 14010 to determine whether to terminate or modify MPP, and for the reasons outlined below, I am by this memorandum terminating the MPP program. I direct DHS personnel to take all appropriate actions to terminate MPP, including taking all

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[146] Executive Order 14010, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, 86 Fed. Reg. 8267 (Feb. 2, 2021), available at https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regionl-framework-to-address-the-causes-of-migration-to-manage-migration.

[147] U.S. Department of Homeland Security, *DHA Announces Process to Address Individuals in Mexico with Active MPP Cases,* Feb. 11, 2021, available at https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases.

steps necessary to rescind implementing guidance and other directives or policy guidance issued to implement the program.

Background

Section 235(b)(2)(C) of the Immigration and Nationality Act (INA), 8 U.S.C. & 1225(b)(2)(C), authorizes DHS to return to Mexico or Canada certain noncitizens who are arriving on land from those contiguous countries pending their removal proceedings before an immigration judge under Section 240 of the INA, 8 U.S.C. § 1229a. Historically, DHS and the legacy Immigration and Naturalization Service primarily used this authority on an ad-hoc basis to return certain Mexican and Canadian nationals who were arriving at land border ports of entry though the provision was occasionally used for third country nationals under certain circumstances provided they did not have a fear of persecution or torture related to return to Canada or Mexico.

On December 20, 2018, the Department announced the initiation of a novel program, the Migrant Protection Protocols, to implement the contiguous-territory-return authority under Section 235(b)(2)(C) on a wide-scale basis along the Southwest Border. On January 25, 2019, DHS issued policy guidance for implementing MPP, which was subsequently augmented a few days later by guidance from U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, and U.S. Citizenship and immigration Services. During the course of MPP, DHS and its components continued to update and supplement the policy, including through the "Supplemental Policy Guidance for Implementation of the Migrant Protection Protocols" issued on December

7, 2020 by the Senior Official Performing the Duties of the Under secretary for strategy, Policy, and Plans.

Under MPP, it was DHS policy that certain non-Mexican applicants for admission who arrived on land at the Southwest Border could be returned to Mexico to await their removal proceeding under INA Section 240. To attend removal proceedings, which were prioritized by EOIR on the non-detained docket, DHS facilitated program participants' entry into and exit from the United States. Due to public health measures necessitate by the ongoing COVID-19 pandemic, however, DHS and EOIR stopped being able to facilitate and conduct immigration court hearings for individuals enrolled in MPP beginning in March 2020.[148]

Following the Department's suspension of new enrollments in MPP, and in accordance with the President's direction in Executive Order 14010, DHS has worked with interagency partners and facilitating organizations to implement a phased process for the safe and orderly entry into the United States of certain individuals who had been enrolled in MPP.

Determination

In conducting my review of MPP, I have carefully evaluated the program's implementation guidance and programmatic elements; prior DHS assessments of the program, including a top-down review conducted in 2019 by senior leaders across the Department, and the effectiveness of related efforts by DHS to address identified

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[148] *See* "Joint DHS/EOIR Statement on MPP Rescheduling," Mar. 23, 3030, available at https://www.dhs.gov/news/2020/03/23/joint-statement-mpp-rescheduling.

challenges; the personnel and resource investments required of DHS to implement the program; and MPP's performance against the anticipated benefits and goals articulated at the outset of the program and over the course of the program. I have additionally considered the Department's experience to date carrying out its phased strategy for the safe and orderly entry into the United States of certain individuals enrolled in MPP. In weighing whether to terminate or modify the program, I considered whether and to what extent MPP is consistent with the Administration's broader strategy and policy objectives for creating a comprehensive regional framework to address the root causes of migration, managing migration throughout North and Central America, providing alternative protection solutions in the region, enhancing lawful pathways for migration to the United States, and—importantly—processing asylum seekers at the United States border in a safe and orderly manner consistent with the Nation's highest values.

As an initial matter, my review confirmed that MPP had mixed effectiveness in achieving several of its central goals and that the program experienced significant challenges.

- I have determined that MPP Does not adequately or sustainably enhance border management in such a way as to justify the program's extensive operational burdens and other shortfalls. Over the course of the program, border encounters increased during certain periods and decreased during others. Moreover, in making my assessment, I share the believe that we can only manage migration in an effective responsible, and durable

manner if we approach the issue comprehensively, looking well beyond our own borders.

- Based on Department policy documents, DHS originally intended the program to more quickly adjudicate legitimate asylum claims and clear asylum backlogs. It is certainly true that some removal proceedings conducted pursuant to MPP were completed more expeditiously than is typical for non-detained cases, but this came with certain significant drawbacks that are cause for concern. The focus on speed was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their immigration proceedings. In particular, the high percentage of cases completed through the entry of *in absentia* removal orders (approximately 44 percent, based on DHA data) raises questions for me about the design and operation of the program, whether the process provided enrollees an adequate opportunity to appear for proceeding to present their claims for relief, and whether conditions faced by some MPP enrollees in Mexico, including the lack of stable access to housing income, and safety, resulted in the abandonment of potentially meritorious protection claims. I am also mindful of the fact that, rather than helping to clear asylum backlogs, over the course of the program backlogs increased before both the USCIS Asylum Offices and EOIR.
- MPP was also intended to reduce burdens on order security personnel and resources, but over time the program imposed additional responsibil-

> ities that detracted from the Department's critically important mission sets. The Department devoted resources and personnel to building, managing, staffing, and securing specialized immigration hearing facilities to support EOIR; facilitating the parole of individuals not and out of the United Sates multiple times in order to attend immigration court hearings; and providing transportation to and from ports of entry in certain locations related to such hearings. Additionally, as more than one-quarter of individuals enrolled in MPP were subsequently reencountered attempting to enter the United States between ports of entry, substantial border security resources were still devoted to these encounters.

A number of the challenges faced by MPP have been compounded b the COVID-19 pandemic. As immigration courts designated to hear MPP cases were closed for public health reason between March 2020 and April 2021, DHS spent millions of dollars each month to maintain facilities incapable of serving their intended purpose. Throughout this time, of course, tens of thousands of MPP enrollees were living with uncertainty in Mexico as court hearings were postponed indefinitely. As a result, any benefits the program any have offered are now far outweighed by the challenges, risks, and costs that it presents.

In deciding whether to maintain, modify, or terminate MPP, I have reflected on my own deeply held belief, which is shared throughout this administration, that the United States is both a nation of laws and a nation of immigrants, committed to increasing access to justice and offering protection to people fleeing persecution

and torture through an asylum system that reaches decisions in a fair and timely manner. To that end, the Department is currently considering ways to implement long needed reforms to our asylum system that are designed to shorten the amount of time it takes for migrant's including those seeking asylum, to have their cases adjudicated, while still ensuring adequate procedural safeguards and increasing access to counsel. One such initiative that DHS recently announced together with the Department of Justice is the creation of a Dedicated Docket to process the cases of certain families arriving between ports of entry a the Southwest Border.[149] This process, which will take place in ten cites that have well-established communities of legal service providers will aim to complete removal proceedings within 300 days—a marked improvement over the current case completion rate for non-detained cases. To ensure that fairness is not compromised, noncitizens placed on the Dedicated Docket will receive access to legal orientation and other supports, including potential referrals for pro bono legal services. By enrolling individuals placed on the Dedicated Docket in Alternative to Detention programs, this initiative is designed to promote compliance and increase appearances throughout proceedings. I believe these reforms will improve border management and reduce migration surges more effectively and more sustainably than MPP, while better ensuring procedural safeguards and enhancing migrant's access to counsel. We will closely monitor the

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[149] *See* U.S. Department of Homeland Security, "DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings," May 28, 2011, available at https://www.dhs.gov/news/2021/ 05/28/dhs-and-doj-announce-deicated-docket-process-more-efficient- immigration-hearings.

outcomes of these reforms, and make adjustments, as needed, to ensure they deliver justice as intended: fairy and expeditiously.

In arriving at my decision to now terminate MPP, I also considered various alternatives, including maintaining the status quo or resuming new enrollments in the program. For the reasons articulated in this memorandum, however preserving MPP in this manner would not be consistent with this Administration's vision and values and would be a poor use of the Department's resources. I also considered whether the program could be modified in some fashion, but I believe that addressing the deficiencies identified in my review would require a total redesign that would involve significant additional investments in personnel and resources. Perhaps more importantly, that approach would come at tremendous opportunity cost, detracting from the work taking place to advance the vision for migration management and humanitarian protection articulated in Executive Order 14010.

Moreover, I carefully considered and weighed the possible impacts of my decisions to terminate MPP as well as steps that are underway to mitigate any potential negative consequences.

- In considering the impact such a decision could have on border management and border communities, among other potential stakeholders, I considered the Department's experience designing and operating a phased process, together with interagency and nongovernmental partners, to facilitate the safe and orderly entry into the United States of certain individuals who had been placed

in MPP. Throughout this effort, the Department has innovated and achieved greater efficiencies that will enhance port processing operations in other contexts. The Department has also worked in close partnership with nongovernmental organizations and local officials in border communities to connect migrant with short-term supports that have facilitated their onward movement to final destinations away from the border. The Department's partnership with the Government of Mexico has been an integral part of the phased process's success. To maintain the integrity of this safe and orderly entry process for individuals enrolled in MPP and to encourage its use, the Department has communicated the terms of the process clearly to all stakeholders and has continued to use, on occasion and where appropriate, the return-to-contiguous-territory authority in INA Section 235(b)(2)(C) for MPP enrollees who nevertheless attempt to enter between ports of entry instead of through the government's process.

- In the absence of MPP, I have additionally considered other tools the Department may utilize to address future migration flows in a manner that is consistent with the Administration's values and goals. I have further considered the potential impact to DHS operations in the event that current entry restrictions imposed pursuant to the Centers for Disease Control and Prevention's Title 42 Order are no longer required as a public health measure. At the outset, the Administration has been—and will continue to be—unambiguous that the immigration laws of the United

States will Be enforced. The Department has at its disposal various options that can be tailored to the needs of individuals and circumstances, including detention, alternatives to detention, and case management programs that provide sophisticated wraparound stabilization services. Many of these detention alternatives have been shown to be successful in promoting compliance with immigration requirements. This Administration's broader strategy for managing border processing and adjudicating claims for immigration relief—which includes the Dedicated Docket and additional anticipated regulatory and policy changes —will further address multifaceted border dynamics by facilitating both timely and fair final determinations.

- I additionally considered the Administration's important bilateral relationship with the Government of Mexico, our neighbor to the south and a key foreign policy partner. Over the past two-and-a-half years, MPP played an outsized role in the Department's engagement with the Government of Mexico. Given the mixed results produced by the program, it is my belief that MPP cannot deliver adequate return for the significant attention that it draws away from other elements that necessarily must be more central to the bilateral relationship. During my tenure, for instance, a significant amount of DHS and U.S. diplomatic engagement with the Government of Mexico has focused on port processing programs and plans, including MPP. The Government of Mexico was a critically important partner in the first phase of our efforts to permit certain MPP participants to

> enter the United States in a safe and orderly fashion and will be an important partner in any future conversations regarding such efforts. But the Department is eager to expand the focus of the relationship with the Government of Mexico to address broader issues related to migration to and through Mexico. This would include collaboratively addressing the root causes of migration from Central America; improving regional migration management; enhancing protection and asylum systems throughout North and Central America; and expanding cooperative efforts to combat smuggling and trafficking networks, and more. Terminating MPP will, over time, help to broaden our engagement with the Government of Mexico, which we expect will improve collaborative efforts that produce more effective and sustainable results than what we achieved through MPP.

Given the analysis set forth in this memorandum, and having reviewed all relevant evidence and weighed the costs and benefits of either continuing MPP, modifying it in certain respects, or terminating it altogether, I have determined that, on balance, any benefits of maintain or now modifying MPP are far outweighed by the benefits of terminating the program. Furthermore, termination is most consistent with the Administration's broader policy objectives and the Department's operational needs. Alternative options would not sufficiently address either consideration.

Therefore, in accordance with the strategy and direction in Executive Order 14010, following my review, and informed by the current phased strategy for the safe and

orderly entry into the United States of certain individuals enrolled in MPP, I have concluded that, on balance, MPP is no longer a necessary or viable tool for the Department. Because my decision is informed by my assessment that MPP is not the best strategy for implementing the goals and objectives of the Biden-Harris Administration, I have no intention to resume MPP in any manner similar to the program as outlined in the January 25, 2019 Memorandum and supplemental guidance.

Accordingly, for the reasons outlined above, I hereby rescind, effective immediately, the Memorandum issued by Secretary Nielsen dated January 25, 2019 entitled "Policy Guidance for Implementation of the Migrant Protection Protocols," and the Memorandum issued by Acting Secretary Pekoske dated January 20, 2021 entitled "Suspension of Enrollment in the Migrant Protection Protocols Program." I further direct DHS personnel, effective immediately, to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives issued to carry out MPP. Furthermore, DHS personnel should continue to participate in the ongoing phased strategy for the safe and orderly entry into the United States of individuals enrolled in MPP.

The termination of MPP does not impact the status of individuals who were enrolled in MPP at any stage of their proceedings before EOIR or the phased entry process describe above.

* * * * *

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

CC: Kelli Ann Burriesci
Acting Under Secretary
Office of Strategy, Policy, and Plans

APPENDIX J

Secretary

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

Jan. 20, 2021

MEMORANDUM FOR: Troy Miller
Senior Official Performing the Duties of the Commissioner
U.S. Customs and Border Protection

Tae Johnson
Acting Director
U.S. Immigration and Customs Enforcement

FROM: David Pekoske
Acting Secretary
/s/ DAVID P. PEKOSKE

SUBJECT: **Suspension of Enrollment in the Migrant Protection Protocols Program**

Effective January 21, 2021, the Department will suspend new enrollments in the Migrant Protection Protocols (MPP), pending further review of the program. Aliens who are not already enrolled in MPP should be processed under other existing legal authorities.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-10806

STATE OF TEXAS; STATE OF MISSOURI,
PLAINTIFFS-APPELLEES

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA; UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, ACTING COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION; UNITED STATES CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; UR M. JADDOU, DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, DEFENDANTS-APPELLANTS

[Filed: Dec. 13, 2021]

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:21-CV-67

JUDGMENT

Before: BARKSDALE, ENGELHARDT, and OLDHAM, *Circuit Judges*.

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that each party bar its own costs on appeal.

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

2:21-CV-067-Z

THE STATE OF TEXAS, THE STATE OF MISSOURI,
PLAINTIFFS

v.

JOSEPH R. BIDEN, JR., ET AL., DEFENDANTS

Filed: Aug. 13, 2021

JUDGMENT

On an equal date herewith, the Court entered findings of facts and conclusions of law in accordance with Fed. R. Civ. P. 52. The Court found Plaintiffs' APA and statutory claims meritorious while declining to rule on Plaintiffs' other claims. Accordingly, the Court **VACATED** and **REMANDED** the June 1 Memorandum and entered a **PERMANENT INJUNCTION** against Defendants.

Judgment is entered accordingly.

Aug. 13, 2021.

/s/ MATTHEW J. KACSMARYK
MATTHEW J. KACSMARYK
United States District Judge

APPENDIX M

1. 8 U.S.C. 1103(a) provides in pertinent part:

Powers and duties of the Secretary, the Under Secretary, and the Attorney General

(a) Secretary of Homeland Security

(1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided*, *however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

* * * * *

(3) He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.

* * * * *

2. 8 U.S.C. 1182(d)(5) provides:

Inadmissible aliens

(d) Temporary admission of nonimmigrants

(5)(A) The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served 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.

(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.

3. 8 U.S.C. 1225 provides:

Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing

(a) Inspection

(1) Aliens treated as applicants for admission

An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.

(2) Stowaways

An arriving alien who is a stowaway is not eligible to apply for admission or to be admitted and shall be ordered removed upon inspection by an immigration officer. Upon such inspection if the alien indicates an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview under subsection (b)(1)(B). A stowaway may apply for asylum only if the stowaway is found to have a credible fear of persecution under subsection (b)(1)(B). In no case may a stowaway be considered an applicant for admission or eligible for a hearing under section 1229a of this title.

(3) Inspection

All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.

(4) Withdrawal of application for admission

An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States.

(5) Statements

An applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the United States, including the applicant's intended length of stay and whether the applicant intends to remain permanently or become a United States citizen, and whether the applicant is inadmissible.

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

(iii) Application to certain other aliens

(I) In general

The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.

(II) Aliens described

An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.

(B) Asylum interviews

(i) Conduct by asylum officers

An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

(ii) Referral of certain aliens

If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.

(iii) Removal without further review if no credible fear of persecution

(I) In general

Subject to subclause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.

(II) Record of determination

The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution. A

copy of the officer's interview notes shall be attached to the written summary.

(III) Review of determination

The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

(IV) Mandatory detention

Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.

(iv) Information about interviews

The Attorney General shall provide information concerning the asylum interview described in this subparagraph to aliens who may be eligible. An alien who is eligible for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations

prescribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process.

(v) "Credible fear of persecution" defined

For purposes of this subparagraph, the term "credible fear of persecution" means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.

(C) Limitation on administrative review

Except as provided in subparagraph (B)(iii)(III), a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath, or as permitted under penalty of perjury under section 1746 of title 28, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section 1157 of this title, or to have been granted asylum under section 1158 of this title.

(D) Limit on collateral attacks

In any action brought against an alien under section 1325(a) of this title or section 1326 of this title, the court shall not have jurisdiction to hear

any claim attacking the validity of an order of removal entered under subparagraph (A)(i) or (B)(iii).

(E) "Asylum officer" defined

As used in this paragraph, the term "asylum officer" means an immigration officer who—

(i) has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under section 1158 of this title, and

(ii) is supervised by an officer who meets the condition described in clause (i) and has had substantial experience adjudicating asylum applications.

(F) Exception

Subparagraph (A) shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry.

(G) Commonwealth of the Northern Mariana Islands

Nothing in this subsection shall be construed to authorize or require any person described in section 1158(e) of this title to be permitted to apply for asylum under section 1158 of this title at any time before January 1, 2014.

(2) Inspection of other aliens

(A) In general

Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

(B) Exception

Subparagraph (A) shall not apply to an alien—

(i) who is a crewman,

(ii) to whom paragraph (1) applies, or

(iii) who is a stowaway.

(C) Treatment of aliens arriving from contiguous territory

In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

(3) Challenge of decision

The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien

whose privilege to be admitted is so challenged, before an immigration judge for a proceeding under section 1229a of this title.

(c) Removal of aliens inadmissible on security and related grounds

(1) Removal without further hearing

If an immigration officer or an immigration judge suspects that an arriving alien may be inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 1182(a)(3) of this title, the officer or judge shall—

(A) order the alien removed, subject to review under paragraph (2);

(B) report the order of removal to the Attorney General; and

(C) not conduct any further inquiry or hearing until ordered by the Attorney General.

(2) Review of order

(A) The Attorney General shall review orders issued under paragraph (1).

(B) If the Attorney General—

(i) is satisfied on the basis of confidential information that the alien is inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 1182(a)(3) of this title, and

(ii) after consulting with appropriate security agencies of the United States Government, concludes that disclosure of the information would be

prejudicial to the public interest, safety, or security,

the Attorney General may order the alien removed without further inquiry or hearing by an immigration judge.

(C) If the Attorney General does not order the removal of the alien under subparagraph (B), the Attorney General shall specify the further inquiry or hearing that shall be conducted in the case.

(3) Submission of statement and information

The alien or the alien's representative may submit a written statement and additional information for consideration by the Attorney General.

(d) Authority relating to inspections

(1) Authority to search conveyances

Immigration officers are authorized to board and search any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought into the United States.

(2) Authority to order detention and delivery of arriving aliens

Immigration officers are authorized to order an owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel or aircraft bringing an alien (except an alien crewmember) to the United States—

(A) to detain the alien on the vessel or at the airport of arrival, and

(B) to deliver the alien to an immigration officer for inspection or to a medical officer for examination.

(3) Administration of oath and consideration of evidence

The Attorney General and any immigration officer shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service.

(4) Subpoena authority

(A) The Attorney General and any immigration officer shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and to that end may invoke the aid of any court of the United States.

(B) Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer may, in the event of neglect or refusal to respond to a subpoena issued under this paragraph or refusal to testify before an immigration officer, issue an order requiring such persons to appear before an immigration officer, produce books, papers, and documents if

demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

4. 8 U.S.C. 1226 provides:

Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[1] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person

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[1] So in original. Probably should be "sentenced".

cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system—

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available—

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

5. 8 U.S.C. 1252(a)(2)(B) provides:

Judicial review of orders of removal

(a) Applicable provisions

(2) Matters not subject to judicial review

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and ex-

cept as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

6. 8 C.F.R. 212.5(a)-(d) provides:

Parole of aliens into the United States.

(a) The authority of the Secretary to continue an alien in custody or grant parole under section 212(d)(5)(A) of the Act shall be exercised by the Assistant Commissioner, Office of Field Operations; Director, Detention and Removal; directors of field operations; port directors; special agents in charge; deputy special agents in charge; associate special agents in charge; assistant special agents in charge; resident agents in charge; field office directors; deputy field office directors; chief patrol agents; district directors for services; and those other officials as may be designated in writing, subject to the parole and detention authority of the Secretary or his designees. The Secretary or his designees may invoke, in the exercise of discretion, the authority under section 212(d)(5)(A) of the Act.

(b) The parole of aliens within the following groups who have been or are detained in accordance with § 235.3(c) of this chapter would generally be justified only on a case-by-case basis for "urgent humanitarian reasons or "significant public benefit," provided the aliens present neither a security risk nor a risk of absconding:

(1) Aliens who have serious medical conditions in which continued detention would not be appropriate;

(2) Women who have been medically certified as pregnant;

(3) Aliens who are defined as minors in § 236.3(b) of this chapter and are in DHS custody. The Executive Assistant Director, Enforcement and Removal Operations; directors of field operations; field office directors, deputy field office directors; or chief patrol agents shall follow the guidelines set forth in § 236.3(j) of this chapter and paragraphs (b)(3)(i) through (ii) of this section in determining under what conditions a minor should be paroled from detention:

(i) Minors may be released to a parent, legal guardian, or adult relative (brother, sister, aunt, uncle, or grandparent) not in detention.

(ii) Minors may be released with an accompanying parent or legal guardian who is in detention.

(iii) If the Service cannot locate a relative in or out of detention to sponsor the minor, but the minor has identified a non-relative in detention who accompanied him or her on arrival, the question of releasing the minor and the accompanying non-relative adult shall be addressed on a case-by-case basis;

(4) Aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; or

(5) Aliens whose continued detention is not in the public interest as determined by those officials identified in paragraph (a) of this section.

(c) In the case of all other arriving aliens, except those detained under § 235.3(b) or (c) of this chapter and paragraph (b) of this section, those officials listed in paragraph (a) of this section may, after review of the individual case, parole into the United States temporarily in accordance with section 212(d)(5)(A) of the Act, any alien applicant for admission, under such terms and conditions, including those set forth in paragraph (d) of this section, as he or she may deem appropriate. An alien who arrives at a port-of-entry and applies for parole into the United States for the sole purpose of seeking adjustment of status under section 245A of the Act, without benefit of advance authorization as described in paragraph (f) of this section shall be denied parole and detained for removal in accordance with the provisions of § 235.3(b) or (c) of this chapter. An alien seeking to enter the United States for the sole purpose of applying for adjustment of status under section 210 of the Act shall be denied parole and detained for removal under § 235.3(b) or (c) of this chapter, unless the alien has been recommended for approval of such application for adjustment by a consular officer at an Overseas Processing Office.

(d) *Conditions.* In any case where an alien is paroled under paragraph (b) or (c) of this section, those officials listed in paragraph (a) of this section may require reasonable assurances that the alien will appear at

all hearings and/or depart the United States when required to do so. Not all factors listed need be present for parole to be exercised. Those officials should apply reasonable discretion. The consideration of all relevant factors includes:

(1) The giving of an undertaking by the applicant, counsel, or a sponsor to ensure appearances or departure, and a bond may be required on Form I-352 in such amount as may be deemed appropriate;

(2) Community ties such as close relatives with known addresses; and

(3) Agreement to reasonable conditions (such as periodic reporting of whereabouts).

7. 8 C.F.R. 235.3(d) provides:

Inadmissible aliens and expedited removal.

(d) *Service custody.* The Service will assume custody of any alien subject to detention under paragraph (b) or (c) of this section. In its discretion, the Service may require any alien who appears inadmissible and who arrives at a land border port-of-entry from Canada or Mexico, to remain in that country while awaiting a removal hearing. Such alien shall be considered detained for a proceeding within the meaning of section 235(b) of the Act and may be ordered removed in absentia by an immigration judge if the alien fails to appear for the hearing.

APPENDIX N

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Civil Action No. 2:21-cv-00067-Z

STATE OF TEXAS, STATE OF MISSOURI,
PLAINTIFFS

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY
AS PRESIDENT OF THE UNITED STATES, ET AL.,
DEFENDANTS

DECLARATION OF DAVID SHAHOULIAN

I, David Shahoulian, pursuant to 28 U.S.C. § 1746 and based upon my personal knowledge, and documents and information made known or available to me from official records and reasonably relied upon in the course of my employment, hereby declare as follows: *Introduction*

1. I am the Assistant Secretary for Border Security and Immigration at the Department of Homeland Security (DHS or Department) and have been in this role since January 20, 2021. I previously served at DHS as Deputy General Counsel from June 29, 2014 to January 19, 2017. I am familiar with the Court order in the above-captioned case.

2. Managing migration in a safe, effective, and durable manner that comports with a country's laws

and values is a profoundly complicated enterprise, particularly because the forces driving migration are constantly shifting. As with all law enforcement matters, the government must make choices within the boundaries of the law and in light of the fiscal limits imposed by Congress that require federal agencies to prioritize resources. Migration management also implicates important matters of foreign relations entrusted to the federal government.

3. On January 20, 2021, DHS suspended new enrollments into the Migrant Protection Protocols (MPP) program. Due to the ongoing COVID-19 pandemic, MPP hearings had been suspended since April 2020, and even by January 2021 it was unclear when such hearings could resume. While new enrollments into the program were suspended, DHS began to pursue alternative strategies domestically and throughout the region, working with U.S. and international partners, to manage migration. On June 1, 2021, after a review of the MPP program required by presidential directive,[2] DHS announced the termination of the pro-

[2] Executive Order 14,010, *Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, 86 Fed. Reg. 8267 (Feb. 2, 2021), *available at* https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration (last visited August 16, 2021).

gram as it existed, for the multiple reasons specified in a memorandum issued by Secretary Alejandro N. Mayorkas on that date.[3]

4. The permanent injunction issued by the federal court in this matter would undo that termination decision. It requires the government to restart MPP in seven days, and to administer the program until the government has sufficient detention capacity to "detain all aliens subject to mandatory detention under Section [1225 of Title 8 of the U.S. Code] without releasing any aliens *because of* lack of detention resources."

5. There are three key problems with the injunction. First, the Department simply does not now have—and, to my knowledge, has never had under any prior administration—sufficient detention capacity to maintain in custody every single person described in 8 U.S.C. § 1225. Additionally, the Court's conclusion that the discretionary use of the contiguous territory return authority is mandatory so long as the Department does not have adequate resources to detain everyone described in Section 1225 is inconsistent with the practices of every previous administration to administer the statute. Second, it would be near-impossible for the U.S. Government to comply with the Court's injunction in the time period provided. And third, to the extent that the Administration

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[3] *See* Secretary Alejandro N. Mayorkas, "Termination of The Migrant Protection Protocols Program," June 1, 2021, available at https://www.dhs.gov/publication/dhs-terminates-mpp-and-continues-process-individuals-mpp-united-states-complete-their (last visited Aug. 14, 2021).

were capable of implementing any portion of the MPP program as directed by the order, it could not possibly operate in a safe, orderly, and humane manner in the time given by the order.

The District Court Order Disregards Longstanding Practices and Creates an Impossible Standard for Terminating MPP

6. To my knowledge, no administration has ever detained all inadmissible applicants for admission or even the subset of those individuals who could be eligible for expedited removal, nor has Congress appropriated the Department (or the former Immigration and Naturalization Service) the amount of resources that would be needed to accomplish this. Moreover, even if the Department had sufficient detention capacity, there are other limitations on the ability to detain, including significant medical and humanitarian concerns, particularly in the midst of a global pandemic.

7. In July 2021, CBP encountered a total of approximately 199,777 individuals seeking to cross along the southwest border. *See* https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics (last visited Aug. 16, 2021). Even with approximately 93,781 expelled pursuant to the Center for Disease Control and Prevention's (CDC) Title 42 authorities, approximately 105,996 were processed under Title 8 authorities. Pursuant to the Court's order, the Administration would be bound to implement MPP unless *all* of those individuals processed under Title 8 could be detained without the possibility

of release based upon the lack of detention capacity.

8. The current and historic appropriations by Congress for detention is multiple times smaller than the size of the population that DHS would be mandated to either hold in custody or return to Mexico under the Court's order. ERO is currently appropriated sufficient funding for approximately 34,000 detention beds nationwide, including approximately 31,000 single adult beds and 3,000 family unit beds, to support its mission to enforce immigration law across the entire country.

9. Importantly, due to the COVID-19 pandemic, bed space is even more limited than usual. Pursuant to guidance from the CDC, ICE now requires detention facilities that house ICE detainees to undertake efforts to reduce maintain population levels to approximately 75% of rated capacity.[4] In addition, the U.S. District Court for the Central District of California has also issued a preliminary injunction with nationwide application recognizing the 75% capacity limit, and ordering ICE to maintain strict standards to reduce the risk of COVID-19 infection. *See Fraihat v. ICE*, 445 F. Supp. 3d 709 (C.D. Cal. Apr. 20, 2020). The currently detained population of approximately 25,671 noncitizens as of August 16, 2021

[4] ICE's Enforcement and Removal Operations COVID-19 Pandemic Response Requirements, Version 6.0 (Mar. 16, 2021), at p. 35, https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf (last visited Aug. 14, 2021).

constitutes approximately 75% of the 34,000 funded capacity.

10. In addition to *Fraihat*, the Department is also bound by the *Flores* Settlement Agreement (FSA) and subsequent court orders interpreting the FSA. *See Flores v. Garland*, No. CV 85-4544 (C.D. Cal). Pursuant to those court orders, the Department generally cannot detain accompanied minors for more than approximately twenty days in ICE family unit facilities.

11. This Court further suggests that, except for those returned to Mexico pursuant to MPP, DHS must detain all inadmissible applicants for admission, including the subset of those individuals eligible for expedited removal proceedings. To my knowledge, no administration, including the former administration that initiated MPP, has ever implemented the law in this way. No administration has ever been funded for or had the detention capacity to detain all individuals who potentially could be placed into expedited removal proceedings under Section 1225(b)(1).

12. Nor has any administration, to my knowledge, had sufficient personnel to process all such individuals through expedited removal proceedings. Individuals processed under expedited removal who indicate an intent to apply for asylum or express a fear of persecution are entitled to a credible fear screening by an asylum officer, and, if requested, review of a denial by an immigration judge. There has never been a sufficient number of asylum officers to do such screenings for all individuals who may be encountered at the

border. And there are not now. Between Fiscal Year 1999 and 2021, for example, only 11 percent of the total number of individuals eligible for expedited removal were processed under that authority. And in no fiscal year have the majority of such individuals been processed pursuant to expedited removal.

13. For these and other reasons, since expedited removal was first created in 1996, the Department has never detained all inadmissible applicants for admission, nor the subset of those who are subject to expedited removal, and it has never been funded by Congress to do so. Nor could the Department reasonably detain the hundreds of thousands, and potentially millions, of individuals encountered at the border and subject to expedited removal in a given year. Indeed, the Department has long understood that it retains discretion to place noncitizens who may be amenable to processing under Section 1225 directly into removal proceedings under Section 1229a, *see Matter of E-R-M- & L-R-M-*, and that limitations on available detention resources require the Department to prioritize those resources consistent with its enforcement priorities and may warrant release in certain circumstances. By mandating that the government implement MPP until DHS has sufficient detention capacity to hold all noncitizens subject to mandatory detention under Section 1225, the order effectively requires the Department to implement MPP—a program that did not exist prior to January 2019 and that relies

on statutory authority that entrusts the Secretary with *discretion* to effectuate contiguous territory returns[5]—in perpetuity.

14. In short, the Department has nowhere near the capacity or personnel—nor the billions needed in appropriated funds—to detain all noncitizens described in 8 U.S.C. § 1225. Although the Department has the ability to reprogram a modest amount of funds from other accounts to support increased detention capacity, doing so would both diminish the Department's ability to accomplish other priorities of critical importance to protecting the safety of the nation, and would do little to meet the impossible standard set by the district court.

Re-Establishing MPP Within Seven Days Is Nearly Impossible

15. Implementation of MPP cannot be done without significant coordination with, and cooperation from, the Government of Mexico. When the Department first put MPP in place, the Government of Mexico took a number of key steps critical to the functioning of the program.[6] This included

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[5] 8 U.S.C. § 1225(b)(2)(C) ("In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the [Secretary] *may* return the alien to that territory pending a proceeding under section 240.") (emphasis added).

[6] P*osition of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act*, Dec. 20, 2018 *available at* https://www.gob.mx/sre/en/articulos/position-of-mexico-on-the-decision-of-the-u-s-government-to-invoke-

arranging for personnel and infrastructure to receive individuals returned to Mexico under MPP; allowing MPP enrollees returned to Mexico to remain in Mexico pending resolution of their immigration proceedings; providing a mechanism for enrollees to request work authorization; and ensuring that enrollees were considered eligible for select social services. Putting these minimal pieces back in place, even without adopting additional measures to address the concerns identified following the Department's recent review of the program—including, but not limited to, the lack of access to stable housing, income, and safety that some MPP enrollees experienced—would require negotiations with the Government of Mexico and, eventually, its support and cooperation. The Department simply cannot implement the MPP program unilaterally.

16. Re-implementing the MPP program would additionally require that the United States reestablish the entire infrastructure upon which the program was built. The program, for example, utilized specialized immigration court hearing facilities that had been erected in key locations along the southwest border. These facilities were scaled down and repurposed to address other inadmissible populations; reconstituting these facilities and staffing them for the purpose of holding immigration hearings cannot possibly be accomplished in seven days. Re-implementing the MPP program would also require DHS to find

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section-235-b-2-c-of-its-immigration-and-nationality-act-185795?idiom=en (last visited August 15, 2021).

and relocate personnel to operationalize MPP, including to provide necessary protection screenings prior to return to Mexico; create systems and protocols for facilitating each enrollee's entry into and out of the United States for multiple immigration court hearings; and arrange for transportation to and from ports of entry to attend such hearings. All of this work would require significant time, resources, and personnel—particularly given the current COVID-19 environment—including resources and personnel that cannot be reallocated without affecting other departmental missions. None of this is possible to do within seven days.

17. The fact that specialized immigration court hearing facilities for use by MPP enrollees do not now exist and would require time to be reconstituted highlights both logistical and foreign-relations concerns with the Court order. Between the time the last Administration suspended court hearings for MPP enrollees in April 2020 through the time the current Administration began to reprocess noncitizens who had previously been returned to Mexico under MPP, tens of thousands of individuals remained in Mexico for long periods with no movement in their immigration cases. In addition to placing a strain on community resources along Mexico's northern border, this contributed to instability and insecurity in some communities, which complicated U.S.-Mexico bilateral relations. Moreover, the lack of court hearings violated the premise under which the Government of Mexico allowed MPP enrollees returned to Mexico to remain in Mexico pending resolution of their immigration proceedings:

namely, that the United States would have a functioning, rapid immigration court process in which MPP enrollees could participate. Mexican officials made clear at the time that allowing MPP enrollees to remain in Mexico temporarily (and relatedly, the ability to access select social services in Mexico) was to be provided only to those "involved in immigration proceedings."[7] Given current COVID-19 protocols and the amount of time it will take to rebuild infrastructure and processes to resume court proceedings in the United States for MPP enrollees, restarting MPP precipitously, without sufficient time for the needed consultation, risks replicating the challenges that existed previously and may complicate foreign relations with Mexico now and in the future.

Re-Establishing MPP within Seven Days Could Not be Done in a Safe, Orderly, or Humane Manner

18. In order for a implementation of the Secretary's return authority to operate in a safe, orderly, and humane manner—and to achieve its statutory goal of facilitating the ability of people returned to a contiguous country to participate in removal proceedings under 8 U.S.C. § 1229a—much more has to take place beyond simply effectuating returns.

19. As the 2021 review of MPP and the October 25, 2019 Red Team Report documented, there were

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[7] *See* Press Conference with Legal Counsel Alejandro Alday on the Bilateral Relationship with the United States, Dec. 20, 2018, available at https://www.gob.mx/sre/prensa/press-conference-with-legal-counsel-alejandro-alday-on-the-bilateral-relationship-with-the-united-states (last visited Aug. 16, 2021).

several problems with the program as put in place that need to be addressed. For some MPP enrollees, inadequate access to stable food and housing and a range of safety concerns undercut the effectiveness of the program. To re-establish a program using the Secretary's return authority responsibly, the Department would need to address these concerns.

20. A responsible program implementing section 1225(b)(2)(C) would also require the Department to create electronic or other systems to better track and communicate with individuals enrolled in that program. The Department also would need to dedicate resources, build infrastructure, and establish protocols to better ensure access to counsel and legal orientation. As mentioned above, reestablishing MPP would require a combination of diplomatic engagement and financial investment to ameliorate problems identified previously, including the lack of adequate or available housing, food, and safety for some MPP enrollees in Mexico. A forced restart in just seven days would exacerbate the problems that had been identified.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief. Executed on this 16th day of Aug., 2021

/s/ DAVID SHAHOULIAN
DAVID SHAHOULIAN
Assistant Secretary for Border and Immigration Policy
Department of Homeland Security

APPENDIX O

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Civil Action No. 2:21-cv-00067-Z

STATE OF TEXAS, STATE OF MISSOURI,
PLAINTIFFS

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY
AS PRESIDENT OF THE UNITED STATES, ET AL.,
DEFENDANTS

DECLARATION OF PRINCIPAL DEPUTY CHIEF IMMIGRATION JUDGE DANIEL H. WEISS

I, **DANIEL H. WEISS**, do hereby declare under penalty of perjury that the following statements are true and correct to the best of my knowledge, information, and belief:

1. I am the Principal Deputy Chief Immigration Judge ("PDCIJ") for the Executive Office for Immigration Review ("EOIR") for all immigration courts nationwide. I work for EOIR's Office of the Chief Immigration Judge ("OCIJ") which provides overall program direction and articulates policies and procedures for the immigration courts nationwide. As PDCIJ, my responsibilities include supervising and managing the dockets and daily activity in the immigration courts.

2. I was appointed as PDCIJ in January 2021. Prior to my appointment as PDCIJ, I served as an Assistant Chief Immigration Judge from September 2017-January 2021, Acting Chief of Staff, from April 2019-July 2019, and as an immigration judge at the Dallas Immigration Court from January 2016-September 2017.

3. As PDCIJ, I have knowledge of the policies and practices relating to immigration court operations, including operations of all detained and non-detained immigration courts and immigration adjudication centers[1] nationwide. I am familiar with the lawsuit that the States of Texas and Missouri have filed in the United States District Court in the Northern District of Texas, and the court's Memorandum Opinion and Order granting the Plaintiffs' request for a preliminary injunction and vacating the Defendant Department of Homeland Security's ("DHS") June 1 Memorandum terminating the Migrant Protection Protocols (MPP) program, *Texas, et al., v. Biden, et al.*, No. 2:21-cv-00067-Z (N.D. Texas Aug. 13, 2021) ("Court's Order").

4. I am aware that when the Court's Order becomes effective, it requires that Defendant's DHS enforce and implement MPP in good faith until such a time as it has been lawfully rescinded in compliance with the Administrative Procedures Act ("APA") and until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section 1225 of the Immigration and Nationality Act ("INA") without releasing any non-citizen because of a lack of detention resources. A consequence

[1] An immigration adjudication center is a facility where immigration judges preside over immigration proceedings via video teleconference.

of the Court's Order would be to resume enrollment of new individuals in MPP, who are placed in removal proceedings. Those cases would then require processing, in addition to the 26,000 individuals in Mexico with active cases.[2]

5. I have prepared this declaration to explain the burden this Court's Order places on EOIR's immigration courts. From my role as PDCIJ, I have personal knowledge of the facts stated in this declaration.

A. Overview of the Immigration Courts' Dockets

6. There are currently 66 Immigration Courts nationwide, and three Immigration Adjudication Centers. When MPP was in operation, EOIR heard cases for MPP enrollees at four Immigration Courts: El Paso, Harlingen, San Antonio and San Diego. Hearings for MPP enrollees were conducted in-person before an immigration judge within the United States in El Paso and San Diego, with DHS transporting individuals to their hearings by bus, and virtually from Immigration Hearing Facilities (IHFs), temporary structures constructed and operated by DHS at the southern border in Brownsville and Laredo, Texas, with immigration judges appearing by video from San Antonio and San Diego. Cases involving MPP enrollees were given priority scheduling—similar to the treatment of cases for persons who are detained—and were scheduled to avoid disrupting existing dockets.

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[2] Dkt. 64, Declaration of David Shahoulian, APP 6 (indicating that restarting MPP would require providing information about updated hearing times and locations to up to 26,000 individuals in Mexico with active cases.").

7. In March 2020, EOIR paused hearing cases, including MPP matters, at the non-detained immigration courts due to the COVID-19 pandemic. Beginning in June of 2020, the non-detained courts resumed hearing cases and by July 6, 2021, all non-detained immigration courts have resumed hearing cases, although the operational levels vary at each court due to the ongoing pandemic. As of August 13, 2021, only four immigration courts nationwide are operating at 100 percent staffing capacity.[3] The remaining courts and IACs continue to operate at a reduced capacity, with twenty-six (26) locations operating at less than sixty percent (60%) capacity —that is more than 36% of locations operating with significant staffing shortages.

8. The court closures on account of the COVID-19 pandemic have significantly impacted EOIR's adjudicatory functions. As a result of the long-term closures, hundreds of thousands of cases have been postponed and most have still have not had a hearing since the non-detained dockets have resumed. As of August 6, 2021, only 17 locations have docket availability in 2021 for merits hearings. Twelve have availability in 2022, but 35 locations do not have availability until 2023, two of which do not have availability until 2025. As such, most new cases will not receive a hearing on the merits and subsequent decision for several years. As of August 13, 2021, the Office of the Chief Immigration Judge had 1,348,787 pending matters.

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[3] The four locations are the detained court at Batavia, NY; the hybrid courts (that maintain both a non-detained and detained dockets) at Tucson, AZ and Saipan; and the newly opened Immigration Adjudication Center in Richmond, VA.

9. In cases where an individual remains in Department of Homeland Security ("DHS") custody during the pendency of immigration proceedings, EOIR seeks to minimize detention (and the costs associated with detention) by prioritizing detained cases over non-detained cases. In 20 of those courts, Immigration Judges preside over detained cases only; in 38 of those courts, Immigration Judges preside over both detained and non-detained cases; and in 10 of those courts, Immigration Judges preside over non-detained cases only. The three IAC locations hear both detained and non-detained cases. Therefore, the majority of EOIR's immigration courts and the Immigration Judges assigned to them have dockets that conduct hearings for detained cases only or at least some detained cases. As such, EOIR is limited in the resources it can divert to non-detained cases, including MPP cases.

10. Assuming DHS resumes the use of Immigration Hearing Facilities (IHFs), along the southwest border, there are only a limited number of such facilities where Immigration Judges can conduct hearings. In-person cases are also limited to those locations that are nearest to the border where DHS can transport individuals for their proceedings. DHS is responsible for physically bringing an MPP enrollee to their immigration court hearings, or facilitating their appearance from the IHF by video-teleconference ("VTC"). It is my understanding that DHS also has a finite number of VTC units and secure space for use for immigration court hearings. While the VTC units are able to connect to any immigration courtroom across the country, consideration must be given to allow counsel for the parties, any witnesses, and often an interpreter to be able to also appear before

the immigration court for a given hearing when selecting a hearing location.

11. Due to space and resource constraints, EOIR could not immediately dedicate additional Immigration Judges to MPP dockets without great disruption to existing dockets and the expenditure of already reduced resources. Even if the government could construct and bring online additional IHFs and VTC units to facilitate the docketing of additional MPP cases, to do so would likely require the realignment of dockets at courts across the country for the 1,348,787 pending matters (excluding the detained cases), to make room for new MPP cases, further pushing out pending cases to 2025 and beyond.[4] As such, implementing these changes on a nationwide or widespread basis is not immediately possible. EOIR also has a policy in place to ensure that all courtrooms across the country are used at all times and because of this policy, there are generally no courtrooms sitting vacant that could be utilized for these hearings. *See* Executive Office for Immigration Review, Office of the Director, Policy Memorandum 19-11, "No Dark Courtrooms," (May 1, 2019), *available at* https://www.justice.gov/eoir/office-of-policy. Even when a courtroom is not in use because the adjudicator and the parties are able to appear remotely, the immigration court has to flex that space to use it for social distancing on account of the pandemic where a hearing is taking place in-person, resulting in fewer courtrooms available for other hearings.

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[4] Currently, nineteen courts have dockets out to 2024 and two courts have dockets out to 2025.

12. Beyond the space and judicial resource limitations, EOIR lacks sufficient administrative support staff to promptly create, docket, assign and schedule new MPP cases to be heard nationwide within a very short time frame.[5] The immigration courts are experiencing significant staffing shortages in most courts across the county, and as such the agency does not have additional resources at other locations to immediately reassign to these tasks so as to be able to immediately re-implement MPP nationwide. Because the MPP program was discontinued, EOIR decreased the number of contract administrative staff employed to manage MPP cases. As a result, new staff would need to be recruited and trained to resume hearing MPP dockets. Immigration Judges are generally supported by court staff and a court administrator. As indicated above, only four locations are currently at full administrative staffing levels for the number of Immigration Judges presiding over cases, and many are without a permanent Court Administrator. For example, as of August 13, 2021, Harlingen was at 50% of its operational capacity; San Antonio was at 60%; San Diego was at 52%; and El Paso was at 90%, but without the contract administrative staff previously dedicated to MPP.

B. Impact of the Court's Order

13. The COVID-19 pandemic creates unique burdens on the immigration court to implement MPP. Prior to the pandemic, MPP enrollees could be transported in substantial numbers to the San Diego and El Paso courts

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[5] Administrative staff are responsible for creating an alien's electronic and paper record of proceedings, scheduling initial master calendar and bond hearings, and ensuring that there is sufficient docket space for required hearings.

by van and awaited their hearings in crowded waiting areas or courtrooms. Because of the pandemic, current social distancing protocols prohibit such close contact and enforcing those necessary measures would necessarily require fewer individuals to appear in person at the court, limiting the efficiency of hearing time and ultimately resulting in delays in scheduling MPP cases, and further delays in scheduling preexisting non-MPP matters. Re-implementing MPP cases at this time during the pandemic would require court administrative staff to schedule and generate thousands of hearing notices for individuals, some of whom DHS would be unable to transport to their hearings because they exhibit COVID symptoms. This would require re-scheduling and reissuance of new hearing notices, which places an additional administrative burden on the immigration courts. As indicated above, the significant judicial and administrative resource shortages would make it severely difficult for the government to immediately re-implement MPP nationwide on an orderly basis. Social distancing protocols would also limit the number of MPP enrollees who can appear at the courts and IHFs. Overall, the reduced numbers of MPP matters that can be heard due to social distancing protocols may result in significantly delayed hearings for MPP enrollees and, as a consequence, cause further delays of displaced non-MPP cases.

14. Given the large number of cases already on the Immigration Court's dockets and the limited space and resources available, it will be difficult and disruptive to resume dedicated dockets for MPP cases. As noted, there is restricted space to hold VTC hearings along the southwest border and more than half of the courts have

calendars set into 2023. Requiring additional Immigration Judges to assist is not feasible due to space restrictions and would result in continuances and further delays of cases on the judges' dockets, who would be required to assist with these hearings. More importantly, cases currently docketed during this time would need to be rescheduled to accommodate these cases. As stated above in paragraph 11, EOIR has instituted a policy that requires that all courtrooms be utilized for immigration hearings at all times. Therefore, in order to hold space open for these cases, EOIR would necessarily need to reschedule already-scheduled hearings.

15. Rescheduling cases will have an adverse impact on all cases because other hearings would be deferred to later dates, resulting in the further delay of those individuals who have been waiting for several years for their day in court. Many noncitizens would therefore face longer overall removal proceedings due to delays in order to make room to conduct hearings for MPP enrollees.

16. Further, rescheduling currently docketed cases will create a ripple effect on the dockets. Rescheduling requires re-serving notices of hearings to the parties and their attorneys and the rescheduled dates, in turn, may result in new scheduling conflicts that would require still further rescheduling. The resulting delays would likely contribute to the number of cases pending at the courts. Such delays would also substantially interfere with EOIR's goal of expediting other priority dockets, including the detained docket, if there are less resources available to assist overall with fluctuating detention numbers and surges in new arrivals who are not eligible for MPP enrollment.

17. Beginning in May 2021, EOIR and DHS implemented "Dedicated Dockets" in 11 cities, including El Paso and San Diego. The dedicated docket process is intended to allow the agency to more expeditiously and fairly make decisions in immigration cases of families who arrive between ports of entry at the Southwest Border.[6] This new process is intended to significantly decrease the amount of time it takes for migrants to have their cases adjudicated while still providing fair hearings for families seeking asylum at the border. Under the Dedicated Docket, IJ's are expected to generally issue a decision within 300 days of the initial master calendar hearing. To facilitate such timeliness while providing due process, these cases are only scheduled before immigration judges who generally have docket time available to manage a case on that timeline, recognizing that unique circumstances of each case may impact the ability to issue a decision within that period.[7] These dockets are anticipated to grow to 80,000 individuals and are priority matters for adjudication. Given the limited judicial resources, the resumption of MPP matters as an additional priority, particularly in cities that are designated for the Dedicated Docket, will likely result in delays of existing cases and any new non-priority cases.

18. It is difficult to estimate how much time the Immigration Courts would need to docket and schedule

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[6] *See* DHS and DOJ Annoounce Dedicated Docket Process for More Efficient Immigration Hearings, May 28, 2021 available at https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings

[7] *See* EOIR Policy Memorandum, PM 21-23, Dedicated Docket, available at https://www.justice.gov/eoir/book/file/1399361/download

new hearings for MPP cases because the size is relatively unknown and constantly changing. DHS opines that as of June 2021, there were 26,000 individuals in Mexico with active cases, and the Court's Order provides that for "May and June 2021, for example, CBP recorded over 180,000 and 188,000 encounters, respectively, at the southwest border." Court's Order at footnote 7. In my opinion, if the government were required by court order to re-implement MPP immediately as it existed prior to January 20, 2021, and to utilize MPP for all applicants for admission who are not detained, the requirement to manage an influx of 100,000 new MPP cases or more each month would likely push out all non-priority dockets for at least another calendar year or more, and continue to push the cases out as needed based on the number of new receipts. Alternatively, if MPP cases are not prioritized, individuals could wait years for their merit hearings to take place.

I affirm, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief. Executed in Dallas, Texas.

Dated: Aug. 16, 2021

/s/ DANIEL H. WEISS
DANIEL H. WEISS
Principal Deputy Chief Immigration Judge
Executive Office for Immigration Review

APPENDIX P

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Civil Action No. 2:21-cv-00067-Z

STATE OF TEXAS, STATE OF MISSOURI,
PLAINTIFFS

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY
AS PRESIDENT OF THE UNITED STATES, ET AL.,
DEFENDANTS

DECLARATION OF RICARDO ZÚNIGA

I, Ricardo Zúniga, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge and information made known to me in the course of my employment, hereby make the following declaration with respect to the above-captioned matter:

1. I am currently the Senior Bureau Official in the Bureau of Western Hemisphere Affairs at the U.S. Department of State and have held this position since August 3, 2021. Prior to this appointment, I was appointed Special Envoy for the Northern Triangle in the Bureau of Western Hemisphere Affairs on March 22, 2021 and retained that role in addition to my new duties. In my capacity as Special Envoy, I serve as the senior Department of State official responsible

for our relationship with the northern Central American Countries, particularly regarding irregular migration from those countries to the southern border of the United States. In that capacity I have also engaged on the effects of irregular migration through and from Mexico. I travelled with senior White House and State Department officials to Mexico on August 10, 2021, to discuss the challenge of irregular migration with senior Mexican officials, and joined Vice President Harris during her June 6-8 visit to Central America for meetings regarding the administration's Root Causes Strategy and Collaborative Migration Management Strategy. I am a Senior Foreign Service officer with the rank of Minister Counselor with 28 years of experience most of that related to the U.S. relationship with Latin America. I have served in multiple assignments in Washington and throughout the Western Hemisphere. As the Senior Bureau Official in the Bureau of Western Hemisphere Affairs, I oversee the Department's work on Western Hemisphere Affairs, including bilateral engagement with the Government of Mexico. I engage regularly with interlocutors throughout the Department and interagency to advance the U.S. government's regional migration policy.

2. I am familiar with the lawsuit that the States of Texas and Missouri filed in the United States District Court in the Northern District of Texas seeking to enjoin the U.S. government from enforcing or implementing the discontinuance of the Migrant Protection Protocols (MPP) either

through the Acting Secretary of Homeland Security's January 20, 2021 Memorandum suspending enrollment in the MPP, or the Secretary of Homeland Security's June 1, 2021 Memorandum formally terminating MPP, and the District Court decision granting the injunction. If this injunction remains in place, it could have a significant adverse impact on U.S. foreign policy, including our relationship with the governments of El Salvador, Guatemala and Honduras (the "northern Central American countries") and Mexico.

3. Addressing regional irregular migration and its root causes is a top U.S. foreign policy priority. To sustainably reduce irregular migration in, from, and through North and Central America, the United States must establish long-term strategic partnerships with the governments in the region to catalyze structural change to root out corruption and impunity, improve security and the rule of law, and increase economic opportunity. These efforts must be coordinated in a comprehensive policy framework to address regional migration that includes adequate protection, expanded legal pathways and regional solutions.

4. President Biden introduced such a framework on February 2, 2021, through Executive Order 14010, 86 Fed. Reg. 8267, *Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the*

United States Border. Among other things, Executive Order 14010 outlines a new and comprehensive, multi-pronged policy approach toward collaboratively managing migration throughout North and Central America. The two main prongs are the Root Causes Strategy and the Collaborative Migration Management Strategy.

5. The Root Causes Strategy focuses on the three main challenges that drive irregular migration: governance and anticorruption, economic opportunity, and security. Through this strategy, the United States seeks to partner with Mexico and the northern Central American countries to rebuild hope in the region, promote accountability, and advance a safe, democratic and prosperous region where people can advance economically, live in safety, and create futures for themselves and their families instead of embarking on dangerous and often futile journeys to the United States.

6. The Collaborative Migration Management Strategy is devoted to fostering the international cooperation and partnership with Mexico and Central American countries necessary to focus resources and energy on collective action that will mobilize humanitarian assistance, enhance access to international protection and other protection options for those forcibly displaced from their homes, strengthen legal pathways for those who choose to or must migrate, and reduce irregular migration. As Secretary of State Blinken stated on February 2, 2021, "The United States remains committed to working with governments in the

region to address irregular migration and ensure safe, orderly, and humane migration. We are working to establish and expand a cooperative, mutually respectful approach to managing migration across the region that aligns with our national values and respects the rights and dignity of every person."

7. Mexico is an essential partner for the United States in the implementation of both the Root Causes Strategy and the Collaborative Migration Management Strategy. On March 1, 2021, Presidents Biden and Lopez Obrador issued the U.S.-Mexico Joint Declaration, in which they committed to immigration policies that recognize the dignity of migrants and the imperative of orderly, safe and regular migration. They further committed to collaborate on a joint effort to address the root causes of regional migration, improve migration management, and develop legal pathways for migration. They also directed the Department of State and the Secretariat of Foreign Relations, respectively, to engage with the governments of the northern Central American countries, as well as with civil society and private sectors, through policies that promote equitable and sustainable economic development, combat corruption, and improve law enforcement cooperation against transnational criminal smuggling networks.

8. As then-Acting Assistant Secretary of State Chung stated in her remarks before the U.S. House Foreign Affairs Subcommittee on Western

Hemisphere, Civilian Security, Migration and International Economic Policy on April 28, 2021, Mexico has already begun taking actions to advance these commitments. It has reinforced its efforts to reduce irregular northbound movements through its territory, launching a major enforcement action in southern Mexico in March with over 10,000 personnel. It has further committed to increasing its enforcement personnel strength to 12,000. The Mexican government continues to look for ways to invest in and develop its own communities, contribute to stronger Central American economies, and engage with regional and international partners to share the burden. In addition, Mexico continues to be a leader in the region in offering international protection for those fleeing persecution.

9. On June 8, 2021, Vice President Harris met with President Lopez Obrador during her first foreign trip as Vice President, reflecting the priority the Administration is placing on addressing irregular migration. Together they announced a new partnership to work jointly in Central America to address the root causes of irregular migration to Mexico and the United States, as well as efforts to disable human trafficking and human smuggling organizations. During this visit, the U.S. and Mexican governments signed a memorandum of understanding to establish a strategic partnership to address the lack of economic opportunities in the northern Central American countries, which will include fostering agricultural development and youth empowerment programs and co-creat-

ing and managing a partnership program enabling them to better deliver, measure, and communicate about assistance to the region.

10. The United States has likewise worked to secure key commitments from the governments of the northern Central American countries to advance both the Root Causes Strategy and the Collaborative Migration Management Strategy. Both Secretary Blinken and Vice President Harris have been engaged on these issues throughout the region during my tenure as Special Envoy for the Northern Triangle.

11. For example, on June 1, 2021, Secretary Blinken met with foreign ministers from Costa Rica, Guatemala, Honduras, El Salvador, Nicaragua, Panama and Mexico in San Jose, Costa Rica at a meeting of the Central America Integration System (SICA)—the economic and political organization of the region's states. The leaders discussed the U.S. strategy to address the root causes of migration, including generating economic opportunities for Central Americans, advancing the essential work of reducing violence and addressing the COVID-19 pandemic and climate change. Secretary Blinken emphasized that Central America can be a stronger region if the people and countries cooperate to jointly tackle these challenges.

12. Vice President Harris has had several conversations with President Giammattei of Guatemala about migration issues, and met with him on June 7, 2021, in Guatemala City. Both leaders ac-

knowledged the need to work as partners to address irregular migration from Central America. A high-level delegation led by the National Security Council's (NSC) then-Senior Advisor to the President, Amy Pope, were in Costa Rica from June 9-11, 2021, to attend the Comprehensive Regional Protection and Solutions Framework Solidarity Event (Spanish acronym "MIRPS"), which focused on how the international community can support solutions for forced displacement in Mexico and Central America. The delegation also held a series of bilateral meetings to underscore the United States' commitment to finding solutions to the challenges of irregular migration and forced displacement in the region, including with officials from northern Central America. Additionally, Uzra Zeya, the State Department's Undersecretary for Civilian Security, Democracy, and Human Rights, participated in the High Level Dialogue on Irregular Migration hosted by the Government of Panama on August 11, 2021, and attended by foreign ministers from the region, including the foreign minister of Mexico. The group agreed on the need for a shared regional approach to address irregular migration in the Western Hemisphere and is moving forward to establish and implement joint solutions and actions.

13. As a result of these and other U.S. diplomatic efforts, the northern Central American countries have engaged in migration management, and the governments make decisions about humane enforcement in ways that are appropriate for each country. We have seen the results in increased

access to protection, apprehensions of irregular migrants, and greater numbers of checkpoints.

14. For example, the United States and Guatemala are collaborating to deepen bilateral law enforcement cooperation to combat migrant smugglers, human traffickers, and narcotics traffickers including through the reconstitution of a Mobile Tactical Interdiction Unit focused on dismantling transnational criminal activities in Guatemala, by providing U.S. law enforcement personnel to train and advise Guatemalan border security and law enforcement, and by the Guatemalan government identifying and seizing the illicit assets of those criminal organizations. The Guatemalan government has also committed to collaborate with the United States to establish Migration Resource Centers in Guatemala that will provide protection screening and referrals to services for people in need of protection and others seeking lawful pathways to migrate, as well as for returning migrants in need of reintegration support in Guatemala. The first Migration Resource Center became operational on June 10, 2021, and has provided protection screenings for hundreds of returning migrants. The U.S. government, in collaboration with international organization partners and the Guatemalan government, is in the process of establishing several other Migration Resource Centers in Guatemala.

15. For its part, in addition to the joint efforts described above, the United States has already taken several other actions to advance the admin-

istration's efforts to enact a comprehensive approach to regional migration. One of the first such actions was to commence a process for safe and orderly re-processing of persons who had previously been returned to Mexico under MPP. While MPP was operational, tens of thousands of migrants, primarily individuals from Central America who were returned to Mexico under MPP, lived in very poor conditions along the U.S.-Mexico border, including in an informal camp that had formed in Matamoros, Tamaulipas, for extended periods while many awaited the commencement or completion of their U.S. immigration proceedings. The governments of the northern Central American countries expressed concern for the safety of their nationals residing in the camp as well as elsewhere along the U.S.-Mexico Border. The Government of Mexico shared these concerns.

16. The U.S. government announced the plan for safe and orderly re-processing of noncitizens in MPP on February 11, 2021. Since the announcement of the MPP re-processing, the Mexican and U.S. governments have worked together to implement this process, including determining the prioritization of the intake. Through the MPP re-processing the informal migrant camp in Matamoros was closed in early March 2021.

17. Mandatory and immediate implementation of-MPP until the federal government has sufficient detention capacity to detain all noncitizens subject to Section 1225 would undermine current U.S. foreign policy. An immediate imposition on

Mexico to care for and protect irregular migrants would be extremely problematic for Mexico. The Mexican government's partnership was essential for implementing MPP when it was operational, and Mexico has been an essential partner in the re-processing since February. An MPP process without the support and material collaboration of Mexico is impossible. Implementation of contiguous-territory-return authority depends on the issuance by Mexico of immigration documents, coordination for individuals being returned and then re-entering the United States for court dates, supplemental shelter provided by Mexico in some locations, and additional law-enforcement measures to meaningfully curb activities and presence of gangs, cartels, and other criminals seeking to prey on returned migrants. Attempting to hastily and unilaterally re-implement MPP without explicit Mexican support along with appropriate humanitarian safeguards would nullify more than six months of diplomatic and programmatic engagement with the Government of Mexico to restore safe and orderly processing at the U.S. southern border. It would also require the U.S. government to divert attention and limited resources away from its current U.S. foreign policy goals mentioned above towards negotiating with the Government of Mexico issues related to the re-implementation of MPP. Further, it would divert humanitarian resources from ongoing strategic efforts elsewhere in Mexico to reinforce capacity in northern Mexico, including in locations where security conditions severely limit humanitarian actors' ability

to operate, or otherwise would necessitate drawing from already-limited resources for other humanitarian emergencies globally.

18. In addition, rapidly re-implementing MPP without appropriate humanitarian safeguards at this stage, and without active collaboration with the Government of Mexico, would be harmful to our bilateral relationships with the northern Central American countries, with our international organization partners, and with other refugee host countries and donor countries throughout the Western Hemisphere and beyond. As a result, regional partners and international organizations could be less inclined to cooperate with the United States in implementing its broader, long-term foreign policy goals, including the Root Causes Strategy and the Collaborative Migration Management Strategy, and this, in turn, could adversely impact the U.S. government's efforts to stem the flow of irregular migration in the region. It would also undermine U.S. credibility and global leadership on humanitarian issues.

19. Additionally, the Mexican government and international organizations lack sufficient funding and capacity to respond to an order directing the United States government to immediately re-implement MPP nationwide. In recent days, the U.S. government has been interdicting approximately 7,500 individuals a day at the U.S. southwestern border. If the U.S. government were to attempt to return that number to Mexico absent appropriate procedural arrangements with Mexico and sufficient Mexican absorption capacity,

the result would create a humanitarian and diplomatic emergency.

20. Mandatory and immediate re-implementation of MPP on a wide-scale basis would undermine the U.S. government's flexibility and discretion, negatively impact U.S.-Mexico bilateral relations, and subject already-vulnerable individuals to increased risks. When operational, MPP frequently stressed Mexican social services beyond capacity and created challenges to meeting the needs of such large numbers of vulnerable individuals on the Mexican side of the U.S. border. Moreover, the diplomatic tensions caused by this humanitarian crisis became an ongoing obstacle to achieving our broader security, economic, and trade goals with Mexico.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on this 16th day of Aug., 2021

/s/ RICARDO ZÚNIGA
RICARDO ZÚNIGA
Senior Bureau Official
Bureau of Western Hemisphere Affairs
U.S. Department of State

APPENDIX Q

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Civil Action No. 2:21-cv-00067-Z

STATE OF TEXAS, STATE OF MISSOURI, PLAINTIFFS

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, ET AL., DEFENDANTS

DECLARATION OF EMILY MENDRALA

I, Emily Mendrala, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge and information made known to me in the course of my employment, hereby make the following declaration with respect to the above-captioned matter:

1. I am currently the Deputy Assistant Secretary in the Bureau of Western Hemisphere Affairs at the U.S. Department of State and have held this position since January 20, 2021. Prior to this appointment, I was a member of President-Elect Biden's transition, serving on the Agency Review Team for the Department of State with a focus on the Bureau of Western Hemisphere Affairs. From 2017 to 2021, I was Executive Director of the Center for Democracy in Americas, promoting U.S. policies of engagement toward the Americas.

During my tenure with the Center, I became very familiar with the issues we are confronting at the U.S. southern border and led educational travel delegations to the border for policy leaders and other stakeholders. In addition, I have served as Director for Legislative Affairs in the National Security Council and as a Special Adviser to the Coordinator for Cuban Affairs and in the Office of Central American Affairs in the State Department. I was also a Professional Staff Member in the Senate Foreign Relations Committee, where I worked on Western Hemisphere policy matters for the Committee.

2. As Deputy Assistant Secretary, I oversee the Department's work on regional migration and Cuban Affairs. I engage regularly with interlocutors throughout the Department and interagency to advance the U.S. government's regional migration policy.

3. I am familiar with the lawsuit that the States of Texas and Missouri have filed in the United States District Court in the Northern District of Texas seeking to enjoin the U.S. government from enforcing or implementing the discontinuance of the Migrant Protection Protocols (MPP) either through the Acting Secretary of Homeland Security's January 20, 2021 memorandum suspending enrollment in the MPP,[1] or the Secretary of Homeland Security's June 1, 2021 memorandum formally

[1] Memorandum from David Pekoske, Acting Sec'y of Homeland Sec., *Suspension of Enrollment in the Migrant Protection Protocols Program* (Jan. 20, 2021)

terminating MPP.[2] Granting this this injunction will have a significant adverse impact on U.S. foreign policy, including our relationship with the governments of El Salvador, Guatemala and Honduras (the "northern Central American countries") and Mexico.

4. Addressing regional irregular migration in, from, and through North and Central America, the United States must establish long-term strategic partnerships with the government in the region to catalyze structural change to root out corruption and impunity, improve security and the rule of law, and increase economic opportunity. These efforts must be coordinated in a comprehensive foreign policy framework to address regional migration that includes adequate protection, expanded legal pathways and regional solutions.

5. President Biden introduced such a framework on February 2, 2021 through Executive Order 14010, 86 Fed. Reg. 8267, *Creating a Comprehensive Framework to Address the Cause of Migration to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*. Among other things, Executive Order 14010 outlines a new comprehensive, multi-pronged foreign policy approach toward collaboratively managing migration throughout North and Central America. The two main prongs are the

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[2] Memorandum from Alejandro Mayorkas, Sec'y of Homeland Sec., *Termination of the Migrant Protection Protocols Program* (June 1, 2021)

Root Causes Strategy and the Collaborative Migration Management Strategy.

6. The Root Causes Strategy focuses on the three main challenges that drive irregular migration: governance and anticorruption, economic opportunity, and security, to rebuild hope in the region. Through this strategy, the United States seeks to partner with Mexico and the northern Central American countries to promote accountability and advance a safe, democratic and prosperous region, where people can advance economically, live in safety, and create futures for themselves and their families instead of embarking on dangerous and often futile journeys to the United States.

7. The Collaborative Migration Management Strategy is devoted to fostering the international cooperation and partnership with Mexico and Central American countries necessary to focus resources and energy on collective action that will enhance safety and economic opportunity, strengthen legal pathways for those who choose to migrate or are forcibly displaced from their homes, and reduce irregular migration. As Secretary of State Blinken stated on February 2, 2021, "The United States remains committed to working with governments in the region to address irregular migration and ensure safe, orderly, and humane migration. We are working to establish and expand a cooperative, mutually respectful approach to managing migration across the region that aligns with our national values and respects the rights and dignity of every person."

8. Mexico is an essential partner for the United States in the implementation of both the Root Causes Strategy and the Collaborative Migration Management Strategy. On March 1, 2021, President Biden and López Obrador issues the U.S.-Mexico Joint Declaration, in which they committed to immigration policies that recognize the dignity of migrants and the imperative of orderly, safe and regular migration. They also directed the Secretariat of Foreign Relations and the Department of State, respectively, to engage with the governments of the northern Central American countries, as well as with civil society and private sector, through policies that promote equitable and sustainable economic development, combat corruption, and improve law enforcement cooperation against transnational criminal smuggling networks.

9. As Acting Assistant Secretary of State Chung stated in her remarks before the U.S. House Foreign Affairs Subcommittee on Western Hemisphere, Civilian Security, Migration and International Economic Policy on April 28, 2021. Mexico has already begun taking actions to advance these commitments. It has reinforced its efforts to reduce irregular northbound movements through its territory—launching a major enforcement action in southern Mexico in March with over 10,000 personnel. It has further committed to increasing its enforcement personnel strength to 12,000. The Mexican government continues to look for ways to invest in and develop its own communities as well as contribute to stronger Central Ameri-

can economies and engage with regional and international partners to share the burden. In addition, Mexico continues to be a leader in the region on offering international protection for those fleeing persecution.

10. On June 8, Vice President Harris met with President López Obrador during her first foreign trip as Vice President, reflecting the priority the Administration is placing on addressing irregular migration. Together they announced a new partnership to work jointly in Central America to address the root causes of irregular migration. Together they announce a new partnership to work jointly in Central America to address the root causes of irregular migration to Mexico and the United States, as well as efforts to disable human trafficking and human smuggling organizations. During the visit, the U.S. and Mexican governments signed a memorandum of understanding to establish a strategic partnership between the two countries to address the lack of economic opportunities in the northern Central American countries, which will include fostering agricultural development and youth empowerment programs, and co-creating and managing a partnership program enabling them to better deliver, measure and communicate about assistance to the region.

11. The United States has likewise worked to secure key commitments from the governments of the northern Central American countries to advance both the Root Causes Strategy and the Collaborative Migration Management Strategy. Both Secretary Blinken and Vice President Harris have

been engaged on these issues throughout the region, as has Special Envoy for the Northern Triangle Zúñiga.

12. For example, on June 1, 2021, Secretary Blinken met with foreign ministers from Costa Rica, Guatemala, Honduras, El Salvador, Nicaragua, Panama and Mexico in San José, Costa Rica at a meeting of the Central America Integration System (SICA)—the economic and political organization of the region's states. The leaders discussed the U.S. strategy to address the root causes of migration, including generating economic opportunities for Central Americans and advancing the essential work of reducing violence and addressing the COVID-19 pandemic and climate change. Secretary Blinken emphasized that Central America can be a stronger region if the people and countries cooperate to jointly tackle these challenges. Vice President Harris has had several conversations with the president of Guatemala about migration issues, and on June 7, 2021, she met with president Giammattei of Guatemala City. Both leaders acknowledged the need to work as partner to address irregular migration from Central America.

13. As a result of these and other U.S. diplomatic efforts, the northern Central American countries have engaged in migration management, and the governments make decisions about human enforcement in ways that are appropriate for each country. We have seen the result in increased access to protection, apprehensions of irregular migrants, and greater numbers of checkpoints.

14. For example, The United States and Guatemala are collaborating to deepen bilateral law enforcement cooperation to combat migrant smugglers, human traffickers, and narcotics traffickers including through the reconstitution of a Mobile Tactical Interdiction Unite focused on dismantling transnational criminal activities in Guatemala, by providing U.S. law enforcement personnel to train and advise Guatemalan border security and law enforcement, and by the Guatemalan government identifying and seizing the illicit assets of those criminal organizations. The Guatemalan government has also committed to collaborate with the United States to establish Migration Resource Centers in Guatemala that will provide protection screening and referrals for people in need of protection, others seeking lawful pathways to migrate, as well as returning migrants in need of reintegration support in Guatemala. The first Migration Resource Center has already become operational.

15. For its part, the United States has already taken several actions to advance the administration's efforts to enact a comprehensive approach to regional migration. One of the first was to commence the wind-down of the MPP policy. From a foreign policy perspective, the MPP wind-down was a crucial initial step in implementing the new policy. As a result of the U.S. "Remain in Mexico" policy, an informal camp had formed in Matamoros, Tamaulipas along the U.S.-Mexico border consisting of thousands of migrants primarily from Central America living in squalid conditions for extended periods while, for some, they were awaiting the

commencement or completion od their U.S. immigration proceedings. This camp was located in a dangerous area where the migrants faced the risk of murder, sexual and gender-based violence, kidnapping or extortion on a daily basis. The governments of the northern Centra American countries expressed concern for the safety of their nationals residing in the camp as well as elsewhere along the U.S.-Mexico border where migrants faced similar conditions while awaiting their immigration proceedings. The Government of Mexico shared these concerns.

16. After the U.S. government announced the wind-down of the MPP policy on February 11, 2021, President López Obrador applauded this move and welcomed the United States' commitment to "regularize the situation of migrants." Since the announcement of the MPP wind-down process, the Mexican and U.S. governments have worked together to implement this process, including determining the prioritization of the intake. Through the MPP wind-down process, the informal migrant camp in Matamoros was closed in early March 2021, and Mexican officials welcomed its closure. On May 7, 2021, during a telephone conversation with Vice President Harris President López Obrador stated, "We agree with the migration policies you are developing and we are going to help, you can count on us." International Organization partners, such as the United Nations High Commissioner for Refugees (UNHCR), International Organization for Migration (IOM), and others, responded positively to the decision to wind down

and terminate MPP, and some acted as partners in the wind-down effort.

17. Reversing the MPP wind-down and termination process would undercut current U.S. foreign policy. The Mexican government and our international organizations partners have been essential partners in the wind-down process since February. Re-implementing MPP would nullify more than four months of diplomatic and programmatic engagement with them to restore safe and orderly processing at the U.S. southern border. It would also require the U.S. government to divert attention and limited resources away from its current U.S. foreign policy goals mentioned above towards negotiating with Mexico the re-implementation of MPP.

18. In addition, reversing the wind-down and termination of MPP at this stage would be harmful to our bilateral relationships with Mexico and the northern Central American countries, as well as with our partner international organizations, as it would diminish their trust that the United States follows through on its commitments. As a result, these countries and international organizations will be less inclined to cooperate with the United States in implementing its broader, long-term foreign policy goals, including the Root Causes Strategy and the Collaborative Migration Management Strategy, and this in turn would adversely impact the U.S. government's efforts to stem the flow of irregular migration in the region.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on this 25th day of June, 2021.

/s/ EMILY MENDRALA
EMILY MENDRALA
Deputy Assistant Secretary
Bureau of Western Hemisphere Affairs
U.S. Department of State

APPENDIX R

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Civil Action No. 2:21-cv-00067-Z

STATE OF TEXAS, STATE OF MISSOURI,
PLAINTIFFS

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY
AS PRESIDENT OF THE UNITED STATES, ET AL.,
DEFENDANTS

DECLARATION OF DAVID SHAHOULIAN

I, David Shahoulian, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge, and documents and information made known or available to me from official records and reasonably relied upon in the course of my employment, hereby declare as follows:

Introduction

1. I am the Assistant Secretary for Border Security and Immigration at the Department of Homeland Security (DHS) and have been in this role since January 20, 2021. I previously served at DHS as Deputy General Counsel from June 29, 2014 to January 19, 2017.

2. In Mexico, as in the United States, migration is a politically and emotionally charged issue, in part

because of the profound impact that migration-related policies and operations have on individuals and communities. As a result, discussions between the U.S. and Mexican governments regarding migration management in the region and at our shared border are fluid, sensitive, and iterative. The United States and Mexico have maintained a close, delicate, and dynamic conversation on this issue for many years.

3. Critical to these conversations is the ability of each country to (1) alter policies or operations as circumstances is the ability of each country to (1) alter policies or operations as circumstances change, and (2) trust that the other country will follow through with its commitments. Over the course of the past five months, in response to changing circumstances and given the change in administration, the U.S. Government has undertaken a review of various migration-related policies as it pursues a series of new strategies, both unilaterally and in partnership with foreign partners and international organizations. The decisions to first suspend new enrollments into the Migrant Protection Protocols (MPP) program, and then to terminate MPP following close review of the program, are part of the Department's new strategies in response to changing circumstances.

4. As discussed further below, an injunction interfering with the U.S. Government's ability to proceed with the termination of MPP would undermine the Administration's overall strategy for managing migration in the region, complicate the U.S. Government's bilateral relationship with Mexico, divert

limited government resources and detract from important DHS missions, and hinder the Department's ongoing efforts to build its capacity to process individuals at ports of entry and adjudicate asylum claims in a safe, orderly, and humane manner consistent with our laws.

Governments need the ability to change policies and operations in response to changing circumstances

5. As regional migration trends evolve, governments need the ability to react and adjust their policy and operational responses as necessary, consistent with their overall strategic visions for migration management and humanitarian protection. In December 2018, DHS announced plans to utilize its authority under Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) to create a new program—the Migration Protection Protocols (MPP)—aimed at returning certain non-Mexican applicants for admission to Mexico for the duration of their U.S. removal proceedings.[3] Because MPP required such individuals to temporarily reside in Mexico, implementation of MPP required close collaboration and negotiation with the Government of Mexico. Shortly after the DHS announcement, Mexico reaffirmed its sovereign right to manage migration in its territory—including whether to admit or deny to foreign nationals—and committed to a number of steps that were important to the func-

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[3] *See Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration*, Dec. 20, 2018 *available at* https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront=illegal-immigration (last visited June 23, 2021).

tioning of MPP. Such steps included utilizing federal resources (personnel and infrastructure) to receive individuals returned to Mexico under MPP; granting temporary, humanitarian status to persons enrolled in MPP; ensuring that such individuals received equal treatment and protection from discrimination, as well as the right to request work authorization; and providing MPP enrollees with the ability to access selected social services.[4]

6. After MPP was initiated, the United States and Mexico coordinated closely in response to changing conditions, including substantial operational challenges that surfaced during the program's implementation. One such challenge—the onset of the COVID-19 pandemic—required significant coordination and flexibility to protect public health and address other changes in the border environment. In March 2020, for example, the Department of Justice suspended removal hearings for MPP enrollees due to the pandemic. This suspension fundamentally altered the situation at the border given the one of MPP's principal objectives was to promptly process the claims of MPP enrollees returned to Mexico. Without court hearings, the MPP program was unable to deliver on this objective, leaving MPP enrollees with no way to have their claims considered. And as the months passed, more and

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[4] *Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act*, Dec. 20, 2018 *available at* https://www.gov.mx/sre/en/articulos/position-of-mexico-on-the-decision-of-the-u-s-government-to-invoke-seciton-235-b-2-c-of-its-immigration-and-nationality-act-185795?idiom=en (last visited June 23, 2021)

more MPP enrollees found themselves in challenging circumstances in Mexico for a prolonged—and frankly indefinite—length of time with no avenue for relief.

7. Moreover, the fact that tens of thousands of individuals remained in Mexico for long periods with no movement in their immigration cases placed a strain on community resources along Mexico's northern border. This contributed to instability and insecurity in some communities, which complicated US-Mexico bilateral relations and undermined the ability of some MPP enrollees to wait for adjudications to resume.

8. Additionally, and just as important, the lack of court hearings violated the premise under which the Government of Mexico agreed to provide temporary status in Mexico to MPP enrollees in the first place: namely, that the United States would have a functioning rapid immigration court process in which MPP enrollees could participate. Mexican officials made clear that providing temporary status (and relatedly, the ability to access select social services in Mexico) was to be provided only to those "involved in immigration proceedings."[5] But with the closure of non-detained immigration in courts due to COVID-19, there were no such proceedings. Even now, after more than a year, it is still unclear where many of those enrolled in MPP would have had their

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[5] *See Press Conference with Legal Counsel Alejandro Alday on the Bilateral Relationship with the United States,* Dec. 20, 2018 *available at* https://www.gob.mx/sre/prensa/press-conference-with-legal-counsel-alejandro-alday-on-the-bilateral-relationship-with-the-united-states (last visited June 23, 2012).

cases heard. This challenge required a new solution and a change in policy and operations.

9. On February 2, 2021, President Biden issue Executive Order (EO) 14010, 86 Fed. Reg. 8267, *Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*.[6] In this EO, President Biden directed the Secretary of Homeland Security to review and determine whether to modify or terminate MPP. Furthermore, the President directed the Secretary to consider a phased strategy for the safe and orderly entry into the United States of thos individuals who were placed in MPP.

10. Upon the completion of the required review, the Secretary announced his decision to terminate MPP.[7] Among the reasons provided, the Secretary noted that MPP required a significant amount of diplomatic engagement with the Government of

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[6] *See* Executive Order 14010, *Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the Unites States Border,* 86 Fed. Reg. 8267 (Feb. 2, 2021), *available at* https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration (last visited Jne 23, 2021).

[7] *See* Secretary Alejandro N. Mayorkas, "Termination of The Migrant Protection Protocols Program," June 1, 2021 *available at* https://www.dhs.gov/publication/dhs-terminates-mpp-and-continues-process-individuals-mpp-united-states-complete-their (last visited June 23, 2021).

Mexico that the Department would like to now devote to other strategic initiatives that will allow for better and more consistent border management. From DHS's perspective, it is simply not a wise use of taxpayer resources to continue to focus bilateral energy on a program that cannot operate as intended in the current border environment, and that, even if continued, would involve significant and complicated burdens on border security personnel and resources that would detract from important DHS mission sets. As the internal review of MPP would have been required to restart the program and to ensure that participants can remain in Mexico pending their immigration proceedings.

11. For instance, restarting the MPP program would have required the United States, in partnership with Mexico, to provide information about updated hearing times and locations to up to 26,000 individuals in Mexico with active cases. Before the pandemic, MPP relied on in-person document service during initial encounter, or follow-up in-person interactions, with MPP enrollees. However, now that all previously scheduled hearings have lapsed due to court closures, the United States would need to devise a new way to contact the 26,000 MPP enrollees with active cases. The United States would likely need to process each of these individuals at a port of entry, reschedule each of their hearings, service required court documents, and then return them to Mexico once again. The United States would also need to reestablish the process for bringing these individuals into and out of the United States to attend their future hearings.

12. Additionally, even before COVID-19 forced the suspension of immigration courts have been shuttered —some program participants experienced inadequate and unstable access to housing, income, and safety, which made it challenging for some to remain in Mexico for the time required to complete their proceedings. In order to address these matters, including security-related concerns along the border, the United States would need to devote significant foreign assistance to counterparts operating in Mexico. The level of financial and diplomatic engagement that would be required to address these concerns would detract from this Administration's broader goal of establishing a comprehensive regional strategy for managing migration.

13. Rather than devote efforts to reestablishing and overhauling the MPP program, DHS seeks to refocus efforts to address the root causes of migration from Central America, improve regional migration management, enhance protection and asylum systems throughout North and Central America, expand cooperative efforts to combat smuggling and trafficking networks, and pursue other initiatives. The efforts are part of a broader strategy to address irregular migration in a more sustainable and effective way. Many of those efforts will require engagement with Mexico and, as is the President's prerogative, DHS can choose to focus on these efforts with Mexico rather than negotiations over MPP. This kind of evolution in response to new dynamics at the border should not be impeded.

Governments need the ability to trust that each country will uphold the actions to which it commits

14. Policy and operational decisions on migration are often the subject of intense scrutiny and criticism. In the case of U.S.-Mexico negotiations on these matters, both governments have been willing to endure domestic criticism for policies or operational decisions taken jointly, because each has believed these actions were ultimately in their country's best interest. However, if either party is prevented from upholding commitments made in the course of negotiations, the foundation of trust upon which these negotiations are premised erodes. In fact, as note above, it is partly because of the necessary closure of immigration courts, which impeded the U.S. commitment to provide MPP enrollees with meaningful access to immigration court proceedings, that DHS has been required to develop *new* policy and operational options. To maintain a trusted relationship with Mexico, DHS must have the ability to negotiate a new approach to address migration-related issues, including when that means moving away from MPP.

15. Just as DHS worked closely with and made a series of commitments to the Government of Mexico on the recent steps the Department has taken, including the ongoing phased approach to processing certain MPP enrollees into the United States and the decision to terminate MPP. The U.S. and Mexican governments continue to work together to look for more robust regional solutions to manage migration. If Mexico cannot trust the United States to

keep its faith or make hard decisions. This is especially important when it comes to issues of migration management, which are inherently multinational in nature.

16. An order interfering with DHS's termination of MPP, or otherwise requiring DHS to reinstitute the program, would wreak havoc on the Administration's approach to managing migration in the region, including by undermining the Government's ability to engage in the delicate bilateral (and multilateral) discussions and negotiations required to achieve a comprehensive solution. Such an order would require new and costly investments from both governments to re-establish the infrastructure that sat dormant for more than a year due to COVID-19.

17. An order to delay termination of MPP or to restart the program would also draw resources from other efforts aimed at more effectively and sustainably addressing irregular migration in the region, such as the creation of a dedicated court docket to hear case in a more timely fashion, other efforts to streamline the adjudication of asylum cases coming from the border, the expansion of alternative lawful migration pathways in the region, and regional efforts to address the underlying causes of migration.[8] Instead of focusing on these efforts, the Department would be forced to implement a discretionary program that the Department's recent review concluded would require a total redesign involving sig-

[8] *Id.*

nificant additional investments in personnel and resources. This redesign would come at tremendous opportunity cost and would detract from the work talking place to advance the vision for migration management and humanitarian protection articulated in Executive Order 14010.[9] In sum, such an order would undermine the Executive's ability to operationalize its considered policy vision with respect to an issue that is central to both domestic and foreign policy interests.

18. To be successful, migration management requires collective and coordinated policy and operational actions among regional governments. Undermining the ability of the Federal Government to make commitments will create doubt about the reliability of the United States as a negotiating partner. This doubt will hamstring the Federal Government's ability to conduct the foreign policy discussions that are part and parcel of migration-related negotiations. Without the ability to secure regional action, in part by making and keeping our own commitments, the United States will be forced to go-it-alone, which will have significant resource implications and be damaging to our national and economic security.

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[9] *Id.*

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief. Executed on this 24 day of June, 2021.

/s/ DAVID SHAHOULIAN
DAVID SHAHOULIAN
Assistant Secretary for
Border Security and Immigration
Department of Homeland Security