No. 21-954

IN THE

Supreme Court of the United States

JOSEPH R. BIDEN, JR.,
PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

STATE OF TEXAS, *et al.*,

Respondents.

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

BRIEF OF ADMINISTRATIVE LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ADAM S. GERSHENSON
ADAM KATZ
HANNA EVENSEN
COOLEY LLP
500 Boylston Street
Boston, MA 02116

PETER BRODY
COOLEY LLP
1333 2nd Street
Suite 400
Santa Monica, CA 90401

KATHLEEN R. HARTNETT
Counsel of Record
JULIE VEROFF
CAROLINE A. LEBEL
COOLEY LLP
3 Embarcadero Center
20th Floor
San Francisco, CA 94111
(415) 693-2000
khartnett@cooley.com

Counsel for Amici Curiae

March 21, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are professors are professors of administrative law. *Amici* have an interest in the construction and application of the Administrative Procedure Act and in the role that federal courts and agencies play in advancing or hindering reasoned policymaking, democratic accountability, and good governance. *Amici* express no view about the wisdom of the Migrant Protection Protocols ("MPP"). They write to address why, as a matter of fundamental administrative law doctrine and principle, the Department of Homeland Security's second action terminating MPP should be accorded legal effect and the injunction requiring the Department to implement that program should be vacated. *Amici* share a concern that the Fifth Circuit's refusal to accord legal effect to that action has dangerous implications for the integrity of administrative law and the functioning of administrative agencies.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about the ability of the Executive Branch to improve upon, change, or rescind policies where there is a reasoned basis for doing so—a power vital to democracy and good government. Here, the Fifth Circuit refused to (1) acknowledge the legal effect of an agency action rescinding a policy that superseded a prior action rescinding the policy and (2) allow the District Court to review that superseding agency action.

---

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief's preparation and submission. All parties have provided blanket consent to *amicus* filings on the docket.

Instead, the Fifth Circuit insisted that the government was bound by its prior action so long as it appealed that action. The Fifth Circuit's decision disallowing the Executive Branch to change a policy if it fails to satisfy the APA on its first attempt is manifestly wrong and dangerous. It is at odds with fundamental principles of administrative law and multiple decisions of this Court. And it threatens the ability of agencies to advance change responsive to the democratic process and to evolving understandings of science, markets, and other on-the-ground realities.

This case specifically concerns the Migrant Protection Protocols ("MPP"), often called the "Remain in Mexico" policy, a policy commenced by the Department of Homeland Security ("DHS") in January 2019 forcing certain non-Mexican migrants—primarily asylum seekers—arriving at the southern border to remain in Mexico pending the resolution of their immigration proceedings. As authority for MPP, DHS invoked 8 U.S.C. § 1225(b)(2)(C), a provision that had never before been interpreted or used to allow widespread returns. Pet. App. 273a & n.12. MPP faced serious legal challenge and criticism that it subjected asylum seekers to dangerous conditions. *See* Brief for Respondents at 6-9, *Mayorkas v. Innovation Law Lab*, No. 19-1212, 2021 WL 2520313 (U.S. Jan. 15, 2021).

Then-candidate Biden had been critical of MPP and other immigration policies commenced by the Trump Administration, and shortly after his inauguration in January 2021, he ordered—among other things—a review by DHS of MPP and whether it should be continued, modified, or discontinued. *See* Executive Order No. 14,010, § 4(a)(ii)(B), 86 Fed. Reg. 8267, 8269 (Feb. 5, 2021). Such policy reviews are

commonplace upon a new presidential administration taking power.

In June 2021, DHS decided to terminate MPP pursuant to a 7-page memorandum issued by the DHS Secretary. Pet. App. 346a-360a. Respondent States challenged DHS's termination action as arbitrary and capricious and contrary to law under the Administrative Procedure Act ("APA"). The U.S. District Court for the Northern District of Texas agreed, holding that DHS's action was not adequately supported by the reasons offered in the termination memorandum. It also held that MPP was statutorily compelled. The District Court issued an injunction requiring DHS to implement MPP until it had been lawfully rescinded. The U.S. Court of Appeals for the Fifth Circuit and this Court denied DHS's stay requests. Pursuant to the injunction, DHS reimplemented MPP and is again returning noncitizens to Mexico.

DHS appealed the District Court decision to contest the holding that MPP is compelled by 8 U.S.C. § 1225. But rather than endeavor to better explain its June termination decision, DHS instead undertook a new and more robust decisionmaking process regarding "whether to maintain, terminate, or modify MPP." Pet. App. 286a. At the conclusion of that process, in October 2021, DHS announced that it had again decided to terminate MPP, this time issuing a 4-page Secretary's memorandum attaching a 39-page explanation. Pet. App. 257a-345a. "Effective immediately," the Secretary "supersede[d] and rescind[ed] the June 1 memorandum." *Id.* at 263a-264a.

The government moved the Fifth Circuit to vacate the injunction given that the October termination action had superseded the June 1 termination action, but the Fifth Circuit denied the motion and refused to

give legal effect to DHS's October termination action. Rather, it criticized the government for undertaking a new decisionmaking process while it appealed the District Court's rejection of the initial termination action. The Fifth Circuit then affirmed the District Court's ruling against the June termination action and the District Court's injunction forcing DHS to continue MPP. Pet. App. 1a-136a.

The Fifth Circuit's ruling contravenes of the APA, this Court's precedents, good government, and the democratic process. Agencies have never been—and should not be—stuck with their prior actions on a matter when they have a reasoned basis for taking a new action. This principle applies here both to DHS's approach to rescinding MPP in the first place—which it should have been able to do—but especially to its effort to undertake a new, better decisionmaking process and take a new action that the Fifth Circuit refused to acknowledge.

The government here did precisely what it should have done after the District Court refused its first effort and enjoined it from discontinuing MPP: it appealed what it believed to be an erroneous ruling; it undertook a new, even more robust decisionmaking process; and it superseded its prior action with a new action. The operative administrative action is now DHS's second termination of MPP, embodied in the October 2021 memoranda. Neither the decision to pursue an appeal nor the fact that DHS's fresh analysis reached the same conclusion as its prior analysis is an appropriate basis for ignoring the new agency action. Accordingly, this Court should reverse the decision of the Fifth Circuit, vacate the injunction, and remand to the District Court for consideration of any new arbitrary

and capricious challenge to the second termination action brought by Respondents.[2]

ARGUMENT

I. The Fifth Circuit's Ruling Denying Legal Effect to DHS's Second Termination Action Contravenes Core Administrative Law Doctrine and Threatens Fundamental Principles of Democratic Accountability and Good Governance.

This Court has repeatedly affirmed the bedrock administrative law principle that agencies can rethink and revisit their policies and positions. *See, e.g.*, *Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907-08 (2020) (describing an agency's ability to revisit a decision and either offer a fuller explanation or take new agency action); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (considering "subsequent agency action undoing or revising [initial agency] action"); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 972 (2005) (explaining that agencies can respond to changes in market conditions and shifts in social context and "provid[e] a fresh analysis of the problem"); *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29. 41 (1983) (acknowledging an agency's ability to rescind or modify a policy; *see also* 5 U.S.C. § 551(5) (defining "rule making" to include "amending[] or repealing" an existing rule"). That foundational

---

[2] Regarding the first question presented, the Fifth Circuit's unprecedented construction of 8 U.S.C. § 1225 is wrong and should be reversed. That provision does not compel DHS to use MPP indefinitely. This brief, however, does not address that issue, and focuses only on the second question presented.

principle extends at least back to *SEC v. Chenery Corp.*, which held that where an agency's "first order was unsupportable for the reasons supplied by that agency," and the agency then "deal[s] with the problem afresh," the agency's subsequent decision may "be justified on the basis upon which it clearly rests." 332 U.S. 194, 200-04 (1947).

Here, contrary to these fundamental principles, the Fifth Circuit rejected the notion that an agency whose reasons for taking a particular agency action were found wanting could revisit the issue, consider the problem afresh, and take new agency action. The Fifth Circuit thus took the unprecedented view that a superseding agency action had no legal effect.

That conclusion was error as a matter of law, in several respects. It ignored clear precedent from this Court about the ability of agencies to issue new decisions on policy areas previously addressed, including decisions reaching the same result as the agencies' earlier decisions; misapplied this Court's rules regarding *post hoc* rationalizations; misconstrued the reopening doctrine, which concerns the APA's statute of limitations, not finality; and took an unduly cabined view of the litigation and policy options available to agencies when their actions are deemed infirm by a court.

The Fifth Circuit's decision is also at odds with one of the fundamental values advanced by administrative agencies—the ability to revisit and revise actions over time as circumstances evolve. That agencies have flexibility to remedy flawed actions and take account of evolving conditions, knowledge, and deliberation is a feature, not a bug. Such flexibility—so long as paired, as here, with the obligation to explain the reasoning for exercising that flexibility—is essential to good governance and democratic accountability.

A. Agencies Act Through "Agency Actions," Not Disembodied Decisions, and Those Actions Are Not Analogous to Judicial Decisions.

The Fifth Circuit's refusal to recognize the legal effect of DHS's October 2021 memoranda terminating MPP was based on a faulty premise: that the States' arbitrary-and-capricious challenge here is to DHS's *overall decision* to rescind MPP—as opposed to a particular agency action reflecting the agency's decision and providing the explanation for that decision. According to the Fifth Circuit, "[t]he June 1 Memorandum—just like the October 29 Memoranda and *any other subsequent* memos—simply explained DHS's [termination] decision. . . . And so the Termination Decision (not a memo) is the 'final agency action' reviewable in court." Pet App. 22a-23a (quoting 5 U.S.C. § 704).

One of the most fundamental principles of administrative law, however, is that agencies act through "agency action[s]," 5 U.S.C. § 704, not disembodied policy decisions. The APA defines "agency action" as the vehicle through which an agency conveys its substantive decision; such actions include an "agency rule, order, license, [or] sanction." *Id.* § 551(13). And the APA subjects "agency action"—not policy decisions—to "judicial review." *Id*. § 704. Administrative agencies are judged by courts on whether the particular agency action under review is supported by "reasoned decisionmaking." *Massachusetts v. EPA*, 576 U.S. 743, 750 (2015); *see also*, *e.g.*, Cristina M. Rodriguez, *Foreword: Regime Change*, 135 Harv. L. Rev. 1, 94 (2021) ("Perhaps the most basic of expectations is that actors within the administrative state provide reasons for their actions[.]"). Because a central

goal of judicial review under the APA is to determine whether a specific agency action rests on an adequate rationale, challenges to agency action under the APA do not—indeed, could not—separate out for review an agency's disembodied substantive "decision" from the vehicle through which the decision is conveyed and explained.

In fact, just the opposite is true: APA review necessarily focuses jointly on the vehicle in which an agency decision is delivered and the reasoning expressed in that vehicle. Particularly for arbitrary-and-capricious review, the soundness of the reasons the government gives for its action is what counts. As the Fifth Circuit itself has previously recognized, "the central focus of the arbitrary and capricious standard is on the *rationality* of the agency's 'decisionmaking,' rather than its *actual decision*." *United States v. Garner*, 767 F.2d 104, 116 (5th Cir. 1985) (emphases added). Other courts have echoed this basic point. *See*, *e.g.*, *Cook County, Ill. v. Wolf*, 962 F.3d 208, 222 (7th Cir. 2020) (in assessing "the agency's policymaking to ensure that it is not 'arbitrary and capricious,'" courts are to "focus[] not on the facial validity" of the agency's conclusion, "but rather on the soundness of the process by which it reached" that conclusion); *Colo. Wild, Heartwood v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006) ("[T]he arbitrary and capricious standard focuses on the rationality of an agency's decision making process rather than on the rationality of the actual decision."); *CHW West Bay v. Thompson*, 246 F.3d 1218, 1223 (9th Cir. 2001) (similar); *see also Regents*, 140 S. Ct. at 1933 (Kavanaugh, J., concurring in part) ("The question under the APA's deferential arbitrary-and-capricious standard is not

whether we agree with the Department's decision to rescind DACA. The question is whether the Nielsen Memorandum reasonably explained the decision to rescind DACA.").

The nature of APA review—which centers on agency "actions" and the rationale provided for such actions—helps illustrate why the Fifth Circuit's strained attempt to analogize an agency decision to a court judgment and an agency memorandum to a court's opinion is misplaced. Pet. App. 22a ("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."). The review of district court judgments and the review of agency action are entirely different exercises with different purposes. Review of a district court's judgment principally aims to ensure the district court reached the correct *result*, whereas the overriding aim of the "APA's arbitrary-and-capricious standard" is to ensure that the agency has "reasonably *explained* the decision." *F.C.C. v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021) (emphasis added); *see also* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 Yale L.J. 952, 955-56 (2007) (contrasting "appellate review of lower court judgments" and judicial review of "agency action").

This differing focus has meaningful consequences. For example, because APA review focuses on an agency's action and its rationale, agency action—unlike a district court's judgment—can be sustained *only* on the grounds articulated in the relevant rule, order, or memorandum. *See*, *e.g.*, *NLRB v. Indianapolis Mack*, 802 F.2d at 280, 285 (7th Cir.1986) ("An administrative agency's decisions, unlike those of a district court, cannot be sustained on a ground

appearing in the record to which the agency made no reference; to the contrary, the Board's decision stands or falls on its express findings and reasoning."); *Fox*, 556 U.S. at 563 ("We must consider the lawfulness of an agency's decision on the basis of the reasons the agency gave, not on the basis of those it *might have* given.").

In addition to being out of step with well-established administrative law principles, the Fifth Circuit's approach also contradicted the States' own framing of their challenge and the District Court's treatment of that challenge. Both the States and the District Court properly focused on DHS's June 1 memorandum terminating MPP and the reasons provided therein for that termination—*i.e.*, the "agency action"—not the "decision" to terminate MPP in a vacuum.

For example, the States' Fifth Circuit briefing clearly targeted the June 1 Memorandum: "The *June 1 Memorandum* both failed to consider important aspects of the problem and reached arbitrary conclusions." Brief for Appellees at 29, *Texas v. Biden*, No. 21-10806 (5th Cir. Oct. 12, 2021). The Fifth Circuit's remarkable response to the States' clear statement of the nature of their challenge is that the States "misunderstand[]" the nature of their own suit, and in fact "are challenging DHS's *Termination Decision*—not any particular memo that DHS might have written in the past or might write in the future." Pet. App. 21a-22a.

Like the States, the District Court properly understood DHS's June 1 memorandum—not "termination of MPP" in a vacuum—to be the subject of the States' challenge. It held that Plaintiffs were "entitled to vacatur and remand because the *June 1 Memorandum* violates the APA and is in substantive violation of Section 1225." Pet. App. 209a (emphasis added).

The district judge based this conclusion on perceived shortcomings in the memorandum, not an underlying "decision" to rescind MPP. Namely, the District Court pointed to what it concluded to be the June 1 memorandum's (1) failure to "consider several critical factors," such as whether MPP helped address "false claims of asylum," Pet. App. 192a; (2) reliance upon "arbitrary" reasoning, such as stating that certain data "raise[d] questions" without articulating an "answer [to] such questions," Pet. App. 195a-196a; and (3) "fail[ure] to consider the effect terminating MPP would have on DHS's ability to detain aliens subject to mandatory detention," Pet. App. 199a. Those are classic bases for finding agency reasoning "arbitrary and capricious," which may be remedied by further agency consideration and explanation.[3] Indeed, that is just what the District Court ordered the agency to do: "The June 1 Memorandum is vacated . . . and remanded to DHS for *further consideration*." Pet. App. 212a.

In short, in sending the June 1 Memorandum back to DHS for "further consideration" of its reasoning, *id.*, the District Court "held no more and no less than the [agency's] first [memorandum] was unsupportable for the reasons supplied by that agency." *Chenery*, 332 U.S. at 200. That ruling left "unsettled . . . the answer the [agency] might give were it to bring to bear on

---

[3] *See, e.g.*, William S. Jordan, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 N.W. U. L. Rev. 398, 418 (2000) (finding, based on a survey of remands of legislative rules by the D.C. Circuit between 1985 and 1995, that agencies were able to "recover" and accomplish their regulatory goals following remand the vast majority of the time).

the facts the proper . . . considerations, a function which belongs exclusively to the [agency] in the first instance." *Id*.

B. Under the APA, Agencies Are Not Precluded from Deciding Anew and Reaching the Same Result, Rather Than Re-Explaining an Initial Decision.

The Fifth Circuit based its ruling on the premise is that an agency whose action was deemed wanting is limited to returning to that decision and offering a better explanation or changing course. Pet. App. 41a, 44a-45a. That is wrong.

1. Agencies Can Remedy a Flawed Action by Re-Explaining the Initial Decision or Deciding Anew.

As this Court recently explained in *Regents*, when a court holds that an agency's action was arbitrary and capricious because the agency ignored critical factors or the grounds it invoked to justify the action were otherwise inadequate, an agency has two options: It can—(1) "offer a fuller explanation of the agency's reasoning *at the time of the agency action*," or (2) deal with the problem afresh by taking *new* agency action." *Regents*, 140 S. Ct. at 1907-08 (quotation marks omitted). If the agency chooses the first route, it "may elaborate" on the reasons already given "but may not provide new ones." *Id.* at 1908. If it takes the second route, the agency "is not limited to its prior reasons but must comply with the procedural requirements for new agency action." *Id.* at 1908.

Regents involved DHS's choice to take "the first path"—providing a renewed, fuller explanation for a decision already taken. *Id.* A description of the path

taken and not taken in *Regents* illuminates the validity of the path DHS chose here.

Regents considered an APA challenge to the rescission of the Deferred Action for Childhood Arrivals ("DACA") program. That program was revoked by DHS Secretary Elaine Duke via a September 2017 "decision memorandum" (the "Duke Memorandum"). *Id.* at 1903. Multiple challenges followed, claiming in relevant part that the Duke Memorandum was arbitrary and capricious. *Id.* In one of those challenges, the district court granted summary judgment against DHS on the APA arbitrary-and-capricious claim, holding that Secretary Duke's "conclusory" memorandum offered an "insufficient" explanation for the agency's decision to rescind DACA. *Id.* at 1904 (citing *NAACP v. Trump*, 298 F. Supp. 3d 209, 243 (D.D.C. 2018)). The district court stayed its judgment to preserve the status quo while the administration decided whether to "rest on the Duke Memorandum while elaborating on its prior reasoning, or issue a new rescission bolstered by new reasons absent from the Duke Memorandum." *Regents*, 140 S. Ct. at 1908 (citing *NAACP*, 298 F. Supp. at 245).

"Two months later, Duke's successor, Secretary Kirstjen Nielsen," issued a memorandum offering further support for the reasons for rescission offered in the Duke memorandum, as well as other alternative policy reasons for rescission that were not in the Duke memorandum. *Id* at 1904. Importantly, Secretary Nielsen was clear that she had not taken any new agency action to rescind DACA. "Rather than making a new decision, she declined to disturb the Duke memorandum's rescission and instead provided further explanation for that action." *Id* at 1908. (cleaned up). Accordingly, the government informed

the district court that Nielsen's memorandum offered "additional explanation for [Duke's] decision" and asked the district court to "leave in place [Duke's] September 5, 2017 decision to rescind the DACA policy." *Id.* (cleaned up). This Court rejected that explanation as arbitrary and capricious. *Id.* at 1910-15.

In this case, after the District Court rejected the June memorandum as arbitrary and capricious, DHS faced the same choice as it had in *Regents*: provide a "fuller explanation" of the agency's initial action *or* take "new agency action." 140 S. Ct. at 1907-08. DHS chose the path expressly provided for but not taken in *Regents*: returning to the drawing board to deliberate and come to a new decision. *See* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 Yale L.J. 1748, 1766 (2021) (noting that "[a] new, superseding agency action" can "reset the litigation"). Thus, instead of offering further explanation of its June 1 termination decision, it made a new decision—on October 29, DHS decided afresh to terminate MPP.

Despite the long line of precedent from *Chenery* to *Regents* making plain that an agency can undertake a "new agency action" after an adverse APA ruling, the Fifth Circuit repeatedly expressed skepticism about the legitimacy of DHS's choice to issue a new action to terminate MPP, as opposed to seeking to further justify its initial action. *See, e.g.*, Pet. App. 3a (stating that the October 29 memoranda "purported to 're-terminate' MPP"). This skepticism was unwarranted.

Specifically, the Fifth Circuit faulted the government for failing to offer any analysis of whether the reasons given in the October 29 memoranda "are *post hoc* rationalizations under the demanding standard in announced by the Supreme Court [in *Regents*]." Pet. App.

44a. But as this Court explained in *Regents*, the prohibition on *post hoc* rationalization is relevant only where an agency chooses the first path: "to elaborate on the reasons for the initial [action] rather than take new administrative action." *Regents*, 140 S. Ct. at 1908 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971)). In contrast, *Regents* expressly noted that when an agency issues "a new decision," it can "consider[] new reasons." *Id.* at 1909. Because the October 29 termination decision was a new decision, not an effort to shore up the June 1 termination decision, the Fifth Circuit erred in inquiring whether the October 29 termination decision rested on *post hoc* rationalizations.

In sum, DHS's "new agency action" in October 2021, *id.* at 1908—precisely of the type contemplated by *Regents* and the prior APA precedent cited in *Regents*—superseded the first termination action and warrants legal effect.

2. Agencies That Choose to Decide Anew Can Reach the Same Result.

The apparent basis for the Fifth Circuit's skepticism toward DHS's approach and its ultimate refusal to give the new October termination action its legal effect is that DHS's "new agency action" was to, again, rescind MPP. *See, e.g.*, Pet. App. 3a ("Never mind that the new memoranda simply reaffirmed the Termination Decision that the States had been challenging all along."); Pet. App. 11a ("The October 29 Memoranda did not purport to alter the Termination Decision in any way; they merely offered additional reasons for it."); Pet. App. 41a ("DHS cannot moot this case by reaffirming and perpetuating the very same injury that brought the States into court.").

The Fifth Circuit's suggestion that an agency can issue a new action only by adopting a different conclusion about a policy is wrong, and would predetermine any subsequent agency decisionmaking process. This Court has long been clear that when an agency takes new, superseding agency action, it may well reach the same conclusion as it did the first time, and the fact that it does has no bearing on whether the superseding action warrants legal effect. *See Chenery*, 332 U.S. at 196 (providing that, on remand, an agency may "reexamine[] the problem, recast its rationale, and reach[] the same result"); *Regents*, 140 S. Ct. at 1908 (explaining that on remand following the district court's arbitrary-and-capricious ruling, DHS could have "issue[d] a new rescission bolstered by new reasons"), *id.* at 1934 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) (noting that "[c]ourts often consider an agency's additional explanations" made "on remand from a court, even if the agency's bottom-line decision itself d[id] not change"). In other words, and contrary to the Fifth Circuit's premise, if an agency chooses the second path set out in *Regents* and reaches the same conclusion after a new decisionmaking process, that new action is no less final agency action than the first action.

C. Courts Routinely Evaluate Subsequent Agency Actions, and the Fifth Circuit Should Have Allowed the District Court to Do So Here.

Consistent with *Regents*, the Fifth Circuit was obligated to accord legal effect to DHS's second termination action and remand to the District Court to review the legality of that new action in the first instance. That is what courts routinely and properly do when an initial agency action is found lacking

and agencies take a new action to remedy that shortcoming—evaluate the reasoning contained in the *later-in-time* action, whether or not the agency reached a different bottom-line result. *See, e.g.*, *Fox*, 556 U.S. at 514-15 (holding that "initial agency action" and "subsequent agency action" are subject to the same standard of review); *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1060, 1067–75 (9th Cir. 2018) (documenting five successive agency publications explaining the agency's decision not to list a species of fish as endangered and assessing the district court's arbitrary-and-capricious review of the latest-in-time explanation); *Crutchfield v. Cnty. of Hanover, Va.*, 325 F.3d 211, 218 (4th Cir. 2003) (holding that a later-in-time agency action that "reached virtually the same decision after judicial remand" was neither arbitrary nor capricious); *City of Los Angeles v. U.S. Dep't of Transp.*, 165 F.3d 972, 975–78 (D.C. Cir. 1999) (reviewing and affirming later-in-time agency decision to set aside landing fees at an airport after having remanded the agency's initial decision—which reached the same result—for failing to adequately consider various factual matters); *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 45 F.3d 481, 482–86 (D.C. Cir. 1995) (reviewing and affirming agency decision regarding fuel economy standard for passenger cars after having previously remanded for consideration of additional factors the agency's decision reaching the same standard); *Sierra Club v. Glickman*, 67 F.3d 90, 94–96 (5th Cir. 1995) (cataloguing an APA case where the district court considered three sequential versions of a "timber management plan" and properly "focused on [the] new plan"); *WAIT Radio v. F.C.C.*, 459 F.2d 1203, 1204 (D.C. Cir. 1972) (after remanding a waiver denial for deficient reasoning, holding that FCC's

subsequent action denying a waiver with greater explanation survived "hard look" review).

By contrast, here, the Fifth Circuit held that DHS's later-in-time agency action had no "legal effect," Pet. App. 22a, viewed the October 2021 memorandum as "simply *explain[ing]*" DHS's initial action, *id.*, and thus refused to assess DHS's new action on its own terms or remand to the District Court to do so, *id.* 35a. The Fifth Circuit's decision is an aberration, contrary to *Regents*, and incompatible with the APA's pursuit of reasoned decisionmaking. In effect, the Fifth Circuit cut off DHS's ability to remedy perceived gaps in its reasoning by treating DHS's effort to remedy its reasoning as irrelevant. Were that the law, it would eviscerate agencies' ability to remedy arbitrary-and-capricious violations. But decades of case law make clear that when a court concludes that an agency overlooked important facts or failed to satisfactorily explain its action, the proper course is to give the agency an opportunity to try again and then to assess the agency's new action when the matter returns to court. *See*, *e.g.*, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 664, 657 (2007) (explaining that if an agency's "action was arbitrary and capricious, . . . the proper course [is] to remand to the Agency for clarification of its reasons); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."); *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) (reversing the lower court for violating

the "guiding principle" that the "function of the reviewing court ends" when an agency's error is "laid bare," because at "that point the matter once more goes to the [agency] for reconsideration"); *Regents*, 140 S. Ct. at 1908-09 (an agency must proffer "a new decision" before a reviewing court will "consider[] new reasons").

When the District Court held that DHS failed to adequately explain its rescission of MPP in the first instance, DHS was entitled to consider the problem afresh and issue a new agency action with a new explanation. And when DHS did so, it was further entitled to have that later-in-time decision reviewed. That result follows directly from *Regents*. The Fifth Circuit's contrary holding was error.

D. The Reopening Doctrine Is Inapposite to Assessing Whether Final Agency Action Exists.

The Fifth Circuit sought to buttress its determination that DHS's second termination action was not final agency action with legal effect by *sua sponte* invoking the reopening doctrine and concluding that DHS had not "reopened" the first termination action. Pet. App. 23a-30a. But no party had addressed or briefed the reopening doctrine, and for good reason—the reopening doctrine is inapposite to the question whether the second termination action was new, final agency action. The Fifth Circuit's reliance on the doctrine was error.

The reopening doctrine is a D.C. Circuit-created "exception to statutory limits on the time for seeking review of an agency decision." *Nat'l Ass'n of Reversionary Property Owners v. Surface Transp. Bd.*, 158 F.3d 135, 141 (D.C. Cir. 1998) (cleaned up). The

doctrine provides that, "where an agency conducts a rulemaking or adopts a policy on an issue at one time," then "reconsider[s] the rule" and "in a later rulemaking restates the policy or otherwise addresses the issue again without altering the original decision," the statute of limitations runs from the later action. *Id*. The doctrine's framework for assessing "whether an agency reconsidered a previously decided matter" only has bearing on when the statute of limitations begins to run. *Id.* It has nothing to do with the distinct question whether agency action is "final" for purposes of judicial review. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (holding that "for agency action to be final," it "must mark the consummation of the agency's decisionmaking process" and determine "rights or obligations" or trigger "legal consequences" (cleaned up)).[4]

The reopening doctrine also does not apply outside the context of notice-and-comment rulemaking, which is not the context at issue here.. Each reopening case the Fifth Circuit cited involved agency rulemakings, *see* Pet. App. 23a-30a,[5] and *amici* are not aware of any

---

[4] *P & V Enterprises v. U.S. Army Corps of Engineers*, 516 F.3d 1021 (D.C. Cir. 2008), upon which the Fifth Circuit relied, *see* Pet. App. 28a, does not support the Fifth Circuit's approach. Although the D.C. Circuit framed its inquiry in that case as whether the press release and advance notice of proposed rulemaking at issue "demonstrate final agency action under the reopening doctrine," the court's analysis shows that it treated the questions of finality and reopening separately. It first assessed the advance notice of proposed rulemaking under the reopening doctrine framework, *see* 516 F.3d at 1023-24, and then second, and separately, concluded that the press release could not "constitute a final agency action," *id.* at 1025; *see also id.* at 1026.

[5] *See Reversionary Property Owners*, 158 F.3d at 139-41 (rulemakings in 1986 and 1996); *NRDC v. EPA*, 571 F.3d 1245, 1265

case applying the reopening doctrine outside the context of rulemakings. The reopening framework articulated by the D.C. Circuit in *Reversionary Property Owners* further makes this clear: "when deciding if a reopening has taken place," a court must consider "[t]he language of the [notice of proposed rulemaking] itself," "an agency's response to comments filed by parties during a rulemaking," and "the entire context of the rulemaking." 158 F.3d at 141-42 (quotation marks omitted).

The Fifth Circuit strained to apply these factors here, and upon finding no hallmarks of notice-and-comment rulemaking, concluded that there was no reopening. *See* Pet. App. 28a ("[W]e look for 'ambiguity' in the closest thing this case has to an NPRM."); Pet. App. 29a ("[I]f we could, we would consider the October 29 Memoranda's response to comments."). But MPP was neither created nor terminated through notice-and-comment rulemaking, and no party has argued that notice-and-comment rulemaking was required for DHS's termination actions. Accordingly, the reopening doctrine has no bearing on whether the October termination was final agency action.

(D.C. Cir. 2009) (1989 Rule and Phase 2 Rule); *Wash. All. of Tech Workers v. DHS*, 892 F.3d 332, 342-43 (D.C. Cir. 2018) (1992 Rule and 2016 Rule); *Growth Energy*, 5 F.4th at 21-22 (2007 rulemaking and 2018 rulemaking); *CTIA-Wireless Ass'n v. F.C.C.*, 466 F.3d 105, 108-10 (D.C. Cir. 2006) (1990 NHPA and 2005 NPA); *Am. Road. & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109, 1110, 1115 (D.C. Cir. 2009) (regulations adopted in 1994 and readopted in 1997; rulemaking petition rejected 2008); *P & V*, 516 F.3d at 1023-27 (1986 rule, 2003 advance notice of proposed rulemaking).

E. An Agency May Appeal an Unfavorable Order on an Initial Administrative Action While Undertaking a New Action.

Yet another aspect of the Fifth Circuit's analysis was fundamentally flawed—its view that DHS acted improperly by reconsidering its first decision while also pursuing an appeal. *See* Pet. App. 125a-126a & n.19. Were that the rule, it would profoundly hinder agency functioning.

No case or principle of administrative law requires an agency, when its policy is enjoined by a district court, to choose between (1) appealing the injunction and waiting for the ultimate resolution of the policy's validity or (2) endeavoring to better explain its reasoning or revisit its decision afresh to satisfy the district court. Agencies may pursue both strategies simultaneously, as DHS did here, and for good reason: agencies often want to defend the legality of their positions without sacrificing progress on important policy changes. *See, e.g.*, *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 540 n.15 (1978) (noting that the Nuclear Regulatory Commission began a new rulemaking proceeding to replace a rule that had been rejected by the D.C. Circuit as arbitrary and capricious while petitions for certiorari on the D.C. Circuit's decision were pending).

An agency should not be forced to forsake all appeals in order to reevaluate the issue and possibly arrive at an improved action. That is especially so here, where forsaking any appeal would have required the government to forfeit its challenge to the District Court's holding on 8 U.S.C. § 1225.

F. The Ability of Agencies to Revisit Past Actions Is Necessary to Advance Democratic Accountability and Good Governance.

The Fifth Circuit's novel and erroneous approach not only conflicts with the fundamental mechanics of APA review, but also overlooks the central good governance goal of APA review: "ensuring robust political accountability" and "ensuring the substantive soundness or political neutrality of agency decisions." Eidelson at 1752 ("[C]ourts can and should use arbitrariness review to force an administration into explaining itself in ways that facilitate, rather than frustrate, the natural political repercussions of its choices."). As a "practical matter, the explanation that an agency offers" to meet the APA's demand for satisfactory explanation, "will be importantly linked to the public's understanding of an action's reasons." *Id*. at 1760. In reviewing only DHS's "Termination Decision" while giving no effect to DHS's "memo" explaining that decision, Pet. App. 22a, the Fifth Circuit muzzled DHS from updating the public on its justification for rescinding MPP. The APA was designed to promote fulsome, reasoned, accountable, and transparent decisionmaking, not to stifle it.

Moreover, just as agencies must be able to revisit their actions to remedy legal defects that surface through litigation, they also must be able—and should be encouraged—to dynamically assess, buttress, or revise their policy decisions in response to changing circumstances. *See, e.g.*, *Massachusetts*, 549 U.S. at 524 ("Agencies . . . refin[e] their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed."); *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring

in part and dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."). Doing so is essential for agencies to remain democratically accountable and govern responsibly.[6]

Since the advent of the modern administrative state, one of the foundational purposes of agencies has been to "identify social problems and devise remedial strategies that adjust and are refined over time." Buzbee at 1361-362; *see also id.* at 1366 ("[R]oom for policy change and reliance on agencies go hand in hand. Policy change is expected."). For that reason, "most statutes are drafted to leave room for agency policy change due to changed empirical assessments or policy rationales." *Id.* at 1361. In particular, those changes can be prompted by "trying better means to achieve constant ends, making policy adjustments in light of changing underlying scientific

[6] These values are likewise advanced when agencies revisit their decisions because of litigation and judicial command. *See, e.g.*, Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 Colum. L. Rev. 1722, 1725 (2011) ("[S]erial litigation can be deeply dialogic. Courts and agencies engage in fruitful discussions that lead to better understanding of the issues and, ultimately, their resolution."); William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L.R. 1357, 1406 (2018) ("This process of contestation and cogent response results in a dialectical, iterative sort of tightening of explanations due to close engagement with contested claims and arguments. Much as reply briefs often provide the most incisive analysis, fiercely challenged regulations result in ever more cogent agency explanations.").

or social phenomena, or expert agency reassessment of the workability or fairness of past approaches." *Id.*

This Court has repeatedly recognized that changing circumstances necessitate the ability for flexible policymaking. *See, e.g.*, *Brand X*, 545 U.S. at 981 ("[T]he agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations." (quotation marks omitted)); *State Farm*, 463 U.S. at 42 (acknowledging that agencies need "ample latitude to adapt their rules and policies to the demands of changing circumstances" (quotation marks omitted)); *Am. Trucking Ass'ns v. Atchison, T. & S. F. Ry. Co.*, 387 U.S. 397, 416 (1967) ("[F]lexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday."); *Chenery*, 332 U.S. at 202 ("Some principles . . . must be adjusted to meet particular, unforeseeable situations."). Indeed, several canonical administrative law decisions center on agencies revisiting their decisions as their thinking about a particular problem evolves. *See, e.g.*, *Brand X*, 545 U.S. at 1001-02 (discussing the Federal Communications Commission's evolving classification of cable modem service); *State Farm*, 463 U.S. at 34-39 (considering an agency's evolved policy on passive

restraints in vehicles as the agency's understanding of costs and risks changed over time).[7]

The healthy functioning of an administrative state requires that agencies not be frozen at a particular point in their policymaking process. No legal or practical values are served by stymying agencies from rethinking their policy decisions following an adverse court ruling and reaching the same conclusion after due consideration and for improved reasons. Were the Fifth Circuit's "one and done" approach the rule, the government would be stuck with a policy not required by any law simply because an agency's first articulation of its reasoning for rescinding that policy failed to satisfy judicial review. Frustrating policy change in this way does not advance the rule of law, political legitimacy, institutional experience, or any other conceivable legal goal.

II. In Addition to Reversing the Fifth Circuit's Decision, This Court Should Vacate the District Court's Injunction and Remand to the District Court for Review of Any New Challenge to the Second Termination Action.

If this Court reverses the decision below and holds, as it should, that 8 U.S.C. § 1225 does not require DHS to continue implementing MPP and that the Secretary's second action terminating MPP has legal effect, it also should vacate the District Court's man-

[7] Of course, acknowledging that an agency can reexamine policy does not obviate the requirement that the agency "confront fully its earlier actions, its past explanations, and especially facts or circumstances relevant to the old and possible new policy." Buzbee at 1396; *see Fox*, 556 U.S. at 514.

datory injunction forcing DHS to implement MPP. Pet. App. 212(a).

Upon holding that the States had "proven their APA and statutory claims by the preponderance of the evidence," the District Court vacated the June 1 Memorandum and remanded to DHS for further consideration, and then separately ordered the government "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 [noncitizens] subject to mandatory detention under Section [1255] without releasing any [noncitizens] *because of* a lack of detention resources." Pet. App. 212a (emphasis in original).[8]

That injunction was and is unwarranted. This Court has made clear that granting an injunction in an APA suit—which, unlike set aside relief, would allow for contempt proceedings—generally requires a higher showing than is needed for set aside relief. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010) ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. If a less drastic remedy (such as partial or complete vacatur . . .) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted."). That heightened burden for injunctive relief is especially appropriate when a court is considering a mandatory injunction commanding a party to undo what they have already done or otherwise

[8] The District Court also ordered the government to file monthly reports regarding multiple metrics related to immigration and the southwest border. Pet. App. 213a.

take affirmative action. *See, e.g., RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1209 (10th Cir. 2009) ("[A] mandatory injunction is an unusual form of relief and one that must not be granted without heightened consideration."); *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) ("[M]andatory injunctions are not granted unless extreme or very serious damage will result.") (quotation marks omitted).

Accordingly, courts have ordered injunctive relief beyond vacatur only in the highly unusual situation where there is serious reason to conclude that an agency will use bad faith tactics to circumvent set aside relief and therefore the plaintiff requires an injunction—and the implied threat of contempt proceedings—to ensure the defendant's compliance. *See New York v. U.S. Dep't of Com.*, 351 F. Supp. 3d 502, 676 (S.D.N.Y.), *aff'd in part, rev'd in part*, 139 S. Ct. 2551 (2019) (granting an injunction against adding a citizenship question to the 2020 census questionnaire because the court concluded the Commerce Department might engage in bad faith tactics to circumvent vacatur and reasoned that an injunction would empower plaintiffs "to seek immediate recourse from this Court" should "Defendants seek to do anything inconsistent with this Opinion"); *see also O.A. v. Trump*, 404 F. Supp. 3d 109, 154 (D.D.C. 2019) (declining to issue an injunction where "Defendants have represented that they will abide by the Court's order").

This is not a case where such extreme relief is necessary or appropriate. The States have not demonstrated any bad faith or intent to circumvent vacatur on the part of the government, which has abided the District Court's order vacating the June 1 memoran-

dum and its injunction requiring the reimplementation of MPP.

Moreover, concerns about the equities of issuing and enforcing mandatory injunctions absent a showing of bad faith are especially present here, where the operative October agency action has not yet been assessed by any court to determine its compliance with the APA. A permanent injunction is properly issued only where a plaintiff achieves "actual success" on the merits. *See Winter v. NRDC*, 555 U.S. 7, 32 (2008). There has been no such determination here; the District Court's mandatory, nationwide, permanent injunction was based on the now-superseded June termination action. Furthermore, the injunction forces DHS to implement a costly program with serious foreign policy and humanitarian implications that it has twice determined is not in the nation's interests, and to which there are serious legal challenges.

Leaving in place a mandatory injunction requiring an agency to enforce and implement a policy prior to judicial review of the operative agency action terminating that policy absent any showing of bad faith is a drastic intrusion on the Executive Branch that risks debilitating new administrations. Under the Fifth Circuit's approach, administrations seeking a change in policy could be hamstrung by abusive litigation tactics and overly zealous courts. Faced with what it deems an undesirable policy change, a court effectively could force an administration to continue a policy indefinitely after determining that the initial effort at policy change was flawed. Such a power would subject agencies to the constant threat of policymaking purgatory. Letting the injunction here stand could have massive, long-lasting repercus-

sions stretching far beyond the immigration context, and beyond the current presidential administration.

Thus, upon vacating the injunction, this Court should remand to the District Court for consideration in the first instance of any new arbitrary and capricious challenge to the October termination action that Respondents choose to bring. Any such proceedings on remand should accord with this Court's holdings confirming that the presumptive proper remedy on summary judgment in an APA action is set aside relief, not an injunction.

CONCLUSION

The Court should reverse the decision of the Court of Appeals, vacate the injunction issued by the District Court, and remand to the District Court for any further proceedings.

Respectfully submitted,

ADAM S. GERSHENSON
ADAM KATZ
HANNA EVENSEN
COOLEY LLP
500 Boylston Street
Boston, MA 02116

PETER BRODY
COOLEY LLP
1333 2nd Street
Suite 400
Santa Monica, CA 90401

KATHLEEN R. HARTNETT
Counsel of Record
JULIE VEROFF
CAROLINE A. LEBEL
COOLEY LLP
3 Embarcadero Center
20th Floor
San Francisco, CA 94111
(415) 693-2000
khartnett@cooley.com

Counsel for Amici Curiae

March 21, 2022

APPENDIX

APPENDIX

List of *Amici Curiae* Law Professors[1]

William W. Buzbee
Edward and Carole Walter Professor
Professor of Law
Faculty Director, Environmental Law & Policy Program
Georgetown University Law Center

Ronald M. Levin
William R. Orthwein Distinguished Professor of Law
Washington University School of Law

Jeffrey S. Lubbers
Professor of Practice in Administrative Law
American University Washington College of Law

Jerry L. Mashaw
Sterling Professor of Law Emeritus and Professorial Lecturer
Yale Law School

Nina Mendelson
Joseph L. Sax Collegiate Professor of Law
University of Michigan Law School

Jon Michaels
Professor of Law
UCLA School of Law

Bijal Shah
Associate Professor of Law
Arizona State University
Sandra Day O'Connor College of Law

---

[1] Affiliations of *amici* are provided for purposes of identification only.

Peter Shane
Jacob E. Davis and Jacob E. Davis II Chair in Law
The Ohio State University Moritz College of Law

Kevin M. Stack
Lee S. and Charles A. Speir Chair in Law
Director of Graduate Studies
Vanderbilt Law School

Glen Staszewski
Professor of Law & The A.J. Thomas Faculty Scholar
Michigan State University College of Law

Peter L. Strauss
Betts Professor Emeritus of Law
Columbia Law School

Adam Zimmerman
Professor of Law, Gerald Rosen Fellow
Loyola Law School