

No. 21-954

IN THE
Supreme Court of the United States

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

v.

STATE OF TEXAS, STATE OF MISSOURI,
Respondents.

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

**BRIEF OF AMICI CURIAE 25 CITIES AND
COUNTIES IN SUPPORT OF PETITIONERS**

DANIEL R. SUVOR
Counsel of Record
JAMES A. BOWMAN
O'MELVENY & MYERS LLP
400 South Hope Street
18th Floor
Los Angeles, CA 90071
dsuvor@omm.com
jbowman@omm.com
(213) 430-6000

*Counsel for Amicus Curiae
County of Los Angeles, Calif.*

Additional Counsel for Amici Listed in Appendix

QUESTIONS PRESENTED

1. Whether 8 U.S.C. § 1225 requires DHS to continue implementing MPP.
2. Whether the court of appeals erred by concluding that the Secretary's new decision terminating MPP has no legal effect.

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INTERESTS OF AMICI CURIAE¹

Amici curiae² are 25 local governments representing every region of the country and every type of community, from some of the nation's most populous and diverse cities and counties to suburbs, small towns, and rural communities. Americans of every race, ethnicity, nationality, culture, creed, and political persuasion call amici home.

Amici share a common interest in building prosperous, healthy, and civically engaged communities. To advance that common interest, amici strive to protect and promote the well-being of their immigrant residents. Immigrants from around the world, including tens of thousands of asylees and refugees, play varied and vital roles in amici's communities. They have pursued higher education, developed careers, built businesses, volunteered, and started families. They have put down roots and invested in their dreams. And amici have prospered as a result.

The Migrant Protection Protocols (MPP) harm amici by preventing residents in amici's communities from reuniting with immigrant family members, traumatizing immigrant families and communities, and frustrating amici's efforts to ensure that asylum seekers have access to full, fair immigration proceedings.

¹ The parties have filed blanket consent to the filing of amicus briefs. *See* Sup. Ct. R. 37.3(a). No party's counsel authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

² A complete list of amici is provided in Appendix A.

MPP requires certain asylum seekers arriving by land at the U.S.-Mexico border to wait in Mexico for their asylum proceedings. MPP is designed to help reduce migratory flows across the southern border, but at an unjustifiable cost. MPP has created dangerous and intolerable conditions at the border, where tens of thousands of immigrants, including thousands of immigrant children, face the very real threat of violence, kidnapping, rape, and murder at the hands of criminal organizations. MPP has allowed these profiteers to exploit vulnerable individuals who already are fleeing violence and persecution in their home countries and who seek refuge in the United States.

MPP also exacts substantial costs from amici. MPP exacerbates family separation, which causes trauma and results in long-term harm to immigrants and their families living in amici's communities. Those harms lead to long-term costs for amici, whose collective success depends on the success of each resident. MPP also undermines investments many amici make in legal services programs to ensure that asylees can fully and fairly pursue their claims for immigration relief.

To grow and thrive, amici will need contributions from all of their residents—native born, immigrants, and asylees alike. But residents cannot make those contributions if they are scarred by the trauma of family separation, or if they are denied access to full, fair asylum proceedings. Amici therefore have a strong interest in ensuring that MPP is terminated.

SUMMARY OF THE ARGUMENT

Tens of millions of immigrants, including tens of thousands of asylees, live in the United States today. Free from the threat of persecution they faced in their home countries, they put down roots and pursue their dreams. They make amici's communities safer, more productive, and more prosperous. And they contribute to the civic life of amici's communities, to the benefit of all residents. They are woven into the fabric of amici's communities.

MPP tears that fabric apart. MPP has created mass crowding and inhumane conditions at the southern border, where MPP enrollees are subject to extortion by criminal organizations and are victims of physical violence, kidnapping, rape, and murder. These dangerous conditions separate immigrant families, often forcibly. Parents are abducted or murdered, leaving their children to cross the border alone having just suffered the trauma of losing a loved one. Other parents make the impossible decision to send their children across the border alone to shield them from the threat of violence and kidnapping in Mexico. Although some families eventually reunite in the United States, the trauma of separation persists, causing lifelong harm for immigrant children, parents, and the communities in which they live.

The violence and dangerous conditions at the border prevent many asylum seekers from being able to participate in their immigration proceedings. Though many amici have invested in pro bono legal services for immigrants and asylees, MPP enrollees forced to remain in Mexico during the pendency of their asylum proceedings do not have access to those services.

Recognizing MPP’s dire consequences, the Biden Administration suspended new enrollments in MPP on January 20, 2021. The Administration then terminated MPP on June 1, 2021 after reviewing the program’s policy considerations, rationales, and practical effects (June 1 Decision). After Respondents filed suit in the Northern District of Texas challenging the suspension and termination decisions, the district court issued a permanent injunction compelling the Department of Homeland Security (DHS) to implement MPP “until” two conditions are satisfied: (1) DHS “has sufficient detention capacity to detain all aliens subject to mandatory detention under [8 U.S.C. 1225]”; and (2) MPP “has been lawfully rescinded in compliance with the APA.” App. 212a. The reason for the second condition was the district court’s finding that DHS did not sufficiently explain the basis for the June 1 Decision.

After the injunction issued, and following this Court’s guidance in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), DHS elected to “‘deal with the problem afresh’ by taking *new* agency action.” *Id.* at 1908 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947)). Following a thorough agency evaluation process, DHS issued a new decision—the October 29 Decision—in which the Secretary “supersede[d] and rescind[ed] the June 1 memorandum” and in its place again “terminat[ed] MPP.” App. 263a.

While engaging in this new review and decision-making process, DHS also appealed the injunction to the Fifth Circuit. Once DHS issued the October 29 Decision, the agency brought that decision to the Fifth

Circuit’s attention, explaining that this new agency action mooted the appeal—at least as to the injunction’s second condition—because the October 29 Decision fulfilled the requirement that MPP be rescinded in accordance with the APA. App. 123a-126a.

But the Fifth Circuit, disregarding binding caselaw, repeatedly contended that the October 29 Decision was not a final agency action. That contention ignored this Court’s opinion in *Bennett v. Spear*, 520 U.S. 154, 178 (1997) and relied instead on inapplicable legal doctrines and inapposite analogies. Contrary to the Fifth Circuit’s conclusion, the October 29 Decision is indisputably a new and final agency action: It “mark[s] the consummation of [DHS’s] decisionmaking process” and constitutes an action “from which legal consequences will flow.” *Id.* at 178 (quotation omitted). The Fifth Circuit’s conclusion to the contrary was error.

ARGUMENT

I. MPP HARMS IMMIGRANTS IN AMICI’S COMMUNITIES AND THE HARM RADIATES OUTWARD TO AMICI.

Amici have long recognized the importance of immigrants to their communities. Immigrants bring economic prosperity and safety, contribute to the labor force, and benefit the civic and social life of amici’s communities. MPP harms amici because it harms immigrants—including immigrants residing in amici’s communities—by exacerbating family separation, which has devastating and long-lasting effects.

MPP tears families apart in several ways. Parents make the unimaginable decision to send their children alone into the United States to avoid the perilous border conditions caused by MPP. Children must cross the border alone after their parents are captured or killed by organized criminals preying on MPP enrollees. And amici's residents with family members enrolled in MPP experience the heartache and stress of knowing that loved ones are stranded at the border and living in dangerous conditions, with no clear path or timeline for entering the United States. When immigrants enrolled in MPP are finally reunited with their families in the United States, the trauma does not end. Even temporary family separation causes devastating long-term harm to children, adults, and ultimately amici's communities.

MPP also frustrates amici's efforts to ensure immigrants have access to fair immigration proceedings. Many amici have invested significant resources in local initiatives that provide pro bono legal services for immigrants. But because MPP enrollees are separated from amici's communities, they cannot access those services, and amici's investments go unrealized.

A. Immigrants, Including Asylees, Are Productive And Important Members Of Amici's Communities.

Immigrants represent some of the best of amici's communities. They make their communities safer, work hard, and start businesses, creating jobs for all residents and driving economic growth and prosperity that benefits communities on the whole. Indeed, immigrants yield significant economic power, contributing hundreds of billions of dollars to the economy.

Immigrants also actively engage in civic affairs and contribute to the social life of amici's communities.

1. *Immigrants Make Amici's Communities Safer.*

Immigrants contribute to the safety of amici's communities. Immigrants, both authorized and unauthorized, commit fewer crimes than U.S.-born citizens.³ Undocumented immigrants have been found to have lower conviction and arrest rates than U.S. citizens.⁴ Studies also show that communities with more foreign-born residents are safer than communities with fewer.⁵ For example, one study found a reduction of almost five violent crimes per 100,000 residents for every 1% increase in foreign-born residents.⁶ A study in Chicago found that residents born outside of the United States were 45% less likely to commit

³ Chiraag Bains, *How Immigrants Make Communities Safer*, The Marshall Project (Feb. 28, 2017), <https://www.themarshallproject.org/2017/02/28/how-immigrants-make-communities-safer>.

⁴ Alex Nowrasteh, *Criminal Immigrants in Texas: Illegal Immigrant Conviction and Arrest Rates for Homicide, Sex Crimes, Larceny, and Other Crimes*, CATO Inst. (Feb. 26, 2018), <https://www.cato.org/publications/immigration-research-policy-brief/criminal-immigrants-texas-illegal-immigrant#arrests>.

⁵ See, e.g., Bains, *supra* n.3; Robert Adelman et al., *Urban crime rates and the changing face of immigration: Evidence across four decades*, 15 *Journal of Ethnicity in Crim. Just.* 52-77 (2017), <https://www.tandfonline.com/doi/full/10.1080/15377938.2016.1261057>.

⁶ Bains, *supra* n.3; Adelman, *supra* n.5.

violence than third-generation Americans.⁷ Studies in other cities have similarly found that violent-crime rates are lower in areas with more immigrants.⁸

2. *Immigrants Strengthen Amici's Economies.*

Immigrants, including asylees, are key contributors to the labor force and make amici's communities more productive for all residents. Immigrants are more likely to work than native residents. In 2020, 65.6% of foreign-born U.S. residents age 25 and older participated in the labor force compared to 62.5% of native-born residents in the same age range.⁹ Asylees in particular have strong labor participation rates. One study found that while resettled refugee women in the United States start with lower labor force participation rates than other groups, they outpace other immigrant and native-born women over time.¹⁰

⁷ Robert J. Sampson, *rethinking crime and immigration*, 7 *Contexts* 28-33 (2008), https://contexts.org/articles/files/2008/01/contexts_winter08_sampson.pdf.

⁸ Bains, *supra* n.3.

⁹ Here's what we know about foreign-born workers in the U.S. – and how their demographics compare to the native-born population, Peter G. Peterson Found. (July 19, 2021), <https://www.pgpf.org/blog/2021/07/the-foreign-born-labor-force-of-the-united-states>.

¹⁰ Ramya Vijaya, *Comparing Labor Market Trajectories of Refugee Women to Other Immigrant and native-Born Women in the United States*, 26 *Feminist Econs.* 149-177 (2020), <https://www.tandfonline.com/doi/abs/10.1080/13545701.2020.1759815?journalCode=rfec20>.

Immigrants are also entrepreneurs, founding businesses at far higher rates than the U.S. population overall. In 2019, there were over 3.2 million immigrant entrepreneurs, generating business income of \$88.5 billion and creating millions of jobs.¹¹ Asylees are no exception, and many businesses have sought to invest in asylees' entrepreneurial spirit and success.¹²

The many immigrants who pursue higher education further contribute to amici's communities. In 2018, immigrants made up 13.7% of the U.S. population but 17% of U.S. adults with a bachelor's degree or higher.¹³ College attainment rates for immigrants increased 38% between 2010 and 2018; during the same period, the attainment rate for U.S.-born residents increased by only 24%.¹⁴ Refugees in particular have high college attainment rates, with one study finding that refugees who arrived here before age 14 displayed the same college graduation rates as the

¹¹ New Am. Econ., Locations, <https://www.newamericaneconomy.org/locations/national/> (last visited Mar. 21, 2022).

¹² Capital Area Asset Builders, *Empowering Refugee and Asylee Entrepreneurs in Montgomery County with Individual Development Accounts*, <https://www.caab.org/en/empowering-refugee-and-asylee-entrepreneurs-with-individual-development-accounts> (last visited Mar. 21, 2022).

¹³ *Immigrant Students in Higher Education*, PNPI (Aug. 9, 2021), <https://pnpi.org/immigrant-students-in-higher-education/>.

¹⁴ *Id.*

U.S.-born population.¹⁵ These educational achievements will drive the continued success of amici's communities, as more college graduates in a community correlates with faster economic growth, a higher median household income, and a deficit decrease over the long term.¹⁶

Immigrants invigorate the economy in other ways, too. In 2019, immigrants paid \$492.4 billion in taxes, with \$161.7 billion going to state and local governments.¹⁷ That same year, immigrants held \$1.3 trillion in spending power.¹⁸ Asylees' tax contributions also outpace their reliance on public benefits. One study found that over their first 20 years in the United States, refugees who arrived as adults aged 18–45 contributed more in taxes than they received in public assistance.¹⁹

3. *Immigrants Are Important Civic Contributors.*

Immigrants are active contributors to the civic life of amici's communities. Naturalized immigrants who

¹⁵ Pedro Nicolaci da Costa, *Welcoming refugees brings unexpected economic benefits*, Bus. Insider (Aug. 21, 2017), <https://www.businessinsider.com/refugees-pay-more-in-taxes-than-they-collect-in-benefits-2017-8>.

¹⁶ Sophia Koropeckyj et al., *The Economic Impact of Increasing College Completion*, Am. Acad. Of Arts & Scis. (2017), https://amacad.org/sites/default/files/publication/downloads/CFUE_Economic-Impact.pdf.

¹⁷ New Am. Econ., *supra* n.11.

¹⁸ *Id.*

¹⁹ Costa, *supra* n.15.

are registered to vote turn out to vote at about the same rate as U.S.-born residents.²⁰ Even immigrants who cannot vote make important civic contributions. One study found that, despite being unable to cast ballots, undocumented immigrants in Los Angeles frequently attended campaign rallies and participated in get-out-the-vote initiatives.²¹ Another study in New York found that undocumented immigrants successfully mobilized to demand fair wages and safe working conditions, ultimately winning a 30% pay raise for day laborers and a domestic workers' bill of rights.²² And studies have shown that once immigrants are engaged in volunteer work, they volunteer more than U.S.-born residents.²³

B. MPP Causes Family Separation And Significant Long-Term Trauma That Harms Amici's Communities.

The abysmal conditions at the border are well-documented. Immigrant men, women, and children face

²⁰ Rob Paral et al., *Benchmarks of Immigrant Civic Engagement* at 4 (July 2010), <https://www.hplct.org/assets/uploads/files/Library%20Services/Immigration/RPA%20Report%20to%20the%20Carnegie%20Corporation.pdf>.

²¹ Kevin Beck & Karina Shklyan, *Civic Engagement, Legal Status, and the Context of Reception: Participation in Voluntary Associations among Undocumented Immigrants in California*, Sage J. (Apr. 5, 2021), <https://journals.sagepub.com/doi/10.1177/23780231211005214>.

²² *Id.*

²³ *National Volunteer Week: How Much Do Immigrants Volunteer?*, New Am. Econ. (Apr. 11, 2016), <https://www.newamerican-economy.org/feature/national-volunteer-week-how-much-do-immigrants-volunteer/>.

the constant threat of brutal violence, kidnapping, assault, extortion, stalking, rape, and murder. MPP exacerbates the trauma of this violence by forcing immigrant families apart. Parents and children are harmed by family separation, and amici's communities suffer the long-term consequences.

1. *MPP Rips Families Apart and Prevents Asylum Seekers from Uniting with Family in Amici's Communities.*

Immigrants enrolled in MPP face terrifying conditions in Mexico while they await their immigration proceedings. As of February 2021, there were more than 1,500 publicly reported cases of murder, rape, torture, kidnapping, and violent assault at the border.²⁴ The United Nations High Commissioner for Refugees found that 81% of families returned to Mexico under MPP did not feel safe there and that 48% had been victims or witnesses of violence in Mexico. App. 290a. Nearly half the targets of physical violence and victims of kidnapping are children. App. 290a-291a. Other organizations have reported similarly dire statistics. Doctors Without Borders noted that 75% of its patients who were in Nuevo Laredo in October 2019 because of MPP reported having been kidnapped.²⁵ And one study of 95 MPP enrollees

²⁴ *U.S. Government Sending Asylum Seekers & Migrants to Danger*, Human Rights First (Feb. 19, 2021), <https://www.human-rightsfirst.org/campaign/remain-mexico>.

²⁵ *The devastating toll of 'Remain in Mexico' asylum policy one year later*, Médecins Sans Frontières (Jan. 29, 2020), <https://www.msf.org/one-year-inhumane-remain-mexico-asylum-seeker-policy>.

found that 32 had been threatened with violence, 24 had been targeted for theft or extortion, 18 had experienced physical violence, 16 had been kidnapped, 15 had witnessed violence, and four had experienced sexual violence.²⁶

Stories of suffering among immigrants enrolled in MPP are all too common. A Salvadoran father was brutally murdered in Tijuana, suffering cuts and stab wounds consistent with torture, after being returned to Mexico under MPP. Before his death, his family had repeatedly told immigration officers, an immigration judge, and asylum officers that they were in danger and feared being returned to Mexico.²⁷

A Honduran woman leaving the U.S. immigration office to go back into Mexico after being enrolled in MPP was kidnapped, raped, and forced into sexual slavery for three months. She escaped only when one of her captors assisted her in exchange for sex. After her escape, she remained in hiding at a church shelter, but even there she was not safe: The parish priest told her that an unknown man had come looking for her.²⁸

A 3-year-old Honduran boy and his parents were kidnapped after being returned to Mexico under MPP.

²⁶ Kathryn Hampton MSt et al., *Forced into Danger: Human Rights Violations Resulting from the U.S. Migrant Protection Protocols*, Physicians for Human Rights (Jan. 19, 2021), <https://phr.org/our-work/resources/forced-into-danger/>.

²⁷ *U.S. Government Sending Asylum Seekers & Migrants to Danger*, *supra* n.24.

²⁸ *Id.*

The mother heard the kidnappers beat and electrocute her husband. The mother and boy were released, but the father remains missing and his family does not know whether he is alive.²⁹

Conditions at the border have not improved. One organization tracked more than 8,700 reports of kidnappings and other violent attacks against migrants and asylum seekers at the border since President Biden took office.³⁰ Further, reports of problematic practices have persisted since MPP was reinstated pursuant to the district court's injunction.³¹ MPP enrollees have been denied access to counsel, and U.S. officials have failed to give COVID-19 vaccinations to asylum seekers, despite the United States' agreement with Mexico to do so.³² There also have been reports of U.S. official instructions to report for immigration hearings in the middle of the night—a practice that

²⁹ *Id.*

³⁰ *A Shameful Record: Biden Administration's Use of Trump Policies Endangers People Seeking Asylum*, Human Rights First (Jan. 13, 2022), <https://www.humanrightsfirst.org/resource/shameful-record-biden-administration-s-use-trump-policies-endangers-people-seeking-asylum>.

³¹ *Migrant Protection Protocols (MPP)*, Am. Immigration Lawyers Ass'n (Mar. 7, 2022), <https://www.aila.org/advo-media/issues/all/port-courts>; Julia Neusner (@JuliaNeusner), Twitter (Dec. 14, 2021 11:16 AM), <https://twitter.com/JuliaNeusner/status/1470789732032516109>; Kate Morrissey, *U.S. failure to follow Remain in Mexico rules show program hasn't changed as promised*, The San Diego Tribune (Jan. 8, 2022), <https://www.sandiegouniontribune.com/news/immigration/story/2022-01-08/remain-in-mexico-returns-to-tijuana>.

³² Morrissey, *supra* n.31.

exposes MPP enrollees to the added danger of nighttime travel, making them easy targets for kidnapers.³³ And operators of emergency shelters in Mexico say they likely will not be able to safely house all MPP enrollees, leaving enrollees exposed to violence and extortion by criminal organizations.³⁴

Because of these conditions, parents often make the difficult choice to send their children across the border alone. At least 700 children have crossed into the United States unaccompanied after their families were enrolled in MPP.³⁵ One immigration attorney on the ground in Mexico saw a 14-year-old, a 4-year-old, and their infant brother cross into the United States alone; the parent watched from the bank of the Rio Grande as the children crossed.³⁶

Families who choose to stay together in Mexico are not safe from separation, either. Parents are frequently abducted or go missing, and their children—

³³ Kennji Kizuka (@KennjiKizuka), Twitter (Dec. 8, 2021 9:09 PM), <https://twitter.com/KennjiKizuka/status/1468764744828006400>.

³⁴ Lizbeth Diaz, *Already stretched, Mexican shelters fret over migrant influx under MPP reboot*, Reuters (Dec. 2, 2021), <https://www.reuters.com/world/americas/already-stretched-mexican-shelters-fret-over-migrant-influx-under-mpp-reboot-2021-12-03/>.

³⁵ *The “Migrant Protection Protocols”*, Am. Immigration Council (Jan. 7, 2022), <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols>.

³⁶ Angelia Chapin, *Parents Stuck In Mexico Are Sending Kids As Young As 4 Across The U.S. Border Alone*, The Huffington Post (Dec. 10, 2019), https://www.huffpost.com/entry/remain-in-mexico-policy-immigrant-kids_n_5deeb143e4b00563b8560c69.

stranded and suffering the trauma of losing a parent—escape to the border alone. Two Honduran brothers, ages 4 and 10, appeared at a port of entry after having been enrolled in MPP. A friend at the camp where the boys were staying took them to the border after the mother had been missing for a few days. They reported last seeing their mother after she had gone to find a chicken for dinner.³⁷

A Central American mother and daughter were abducted after being enrolled in MPP. They were reunited temporarily, but the mother was abducted a second time and the daughter escaped kidnapping by hiding herself in the stove. Alone after the second abduction, the daughter crossed the border as an unaccompanied minor. She remains separated from her mother.³⁸

Children living with grandparents, aunts, and uncles also may be separated from their families. When a child arrives at the border with a family member other than a parent or legal guardian, U.S. officials treat the child as an unaccompanied minor, apprehend the child, and send the family member back to Mexico.³⁹ One grandmother was separated from her

³⁷ Priscilla Alvarez, *At least 350 children of migrant families forced to remain in Mexico have crossed over alone to US*, CNN (Jan. 24, 2020), <https://www.cnn.com/2020/01/24/politics/migrant-children-remain-in-mexico/index.html>.

³⁸ Hampton, *supra* n.26.

³⁹ *Forced Apart: How the “Remain in Mexico” Policy Places Children in Danger and Separates Families*, Kids in Need of Def. (Feb. 24, 2020), <https://supportkind.org/wp-content/uploads/2020/02/MPP-KIND-2.24updated-003.pdf>.

6- and 9-year-old grandchildren at the border. The children now reside in the United States, but the grandmother was sent to Mexico under MPP. She worries that her grandchildren will be so traumatized by the separation that they will never be the same.⁴⁰

The data show just how many families are separated because of MPP. In the late fall of 2019, the percentage of Central American migrant children arriving at the border without parents was 25%. After MPP began, the number increased substantially, reaching a height of 69% in March 2020 before Title 42 expulsions began.⁴¹

MPP not only tears families apart; it also keeps families separated because it prevents asylum seekers from uniting with family members already living in amici's communities. One study found that, among 95 MPP enrollees, 30 had family in the United States.⁴² Many MPP enrollees who seek entry into the United States do so with the intention of reuniting with their family. For example, Rosa and her husband, Venezuelan asylum seekers who fled their country after being tear-gassed and kidnapped for political opposition work, were enrolled in MPP and waited in Tijuana during their asylum proceedings. In Tijuana, they were robbed at gunpoint and faced

⁴⁰ Hampton, *supra* n.26.

⁴¹ David J. Bier, *DHS Expels Families to Mexico & Kids Come Back Alone: La Separación*, CATO Inst. (Mar. 11, 2021), <https://www.cato.org/blog/dhs-expels-families-mexico-kids-come-back-alone-la-separacion>.

⁴² Hampton, *supra* n.26.

other acts of violence. They are now reunited with Rosa's cousin and brother living in Wisconsin.⁴³

Honduran migrant Delmy and her 13-year-old son were enrolled in MPP and spent nearly a year and a half waiting in a tent encampment in Matamoros. They are now reunited safely with family members living in Virginia.⁴⁴

And one 6-year-old boy who was kidnapped with his father after being sent back to Mexico under MPP was so traumatized by the experience that he lost half his body weight. The father sent the boy to the border alone so that he could be reunited with his mother in the United States while the father awaits his asylum proceedings.⁴⁵

2. *Family Separation Causes Long-Lasting Harm To Individuals, Families, and Amici's Communities.*

Amici's communities are home to families separated by MPP. Even after families are reunited, the trauma of family separation leaves deep scars, both on immigrants themselves and on their communities.

⁴³ Anika Ades & Rebecca Gendelman, "We feel safe": As Biden administration ends the Migrant Protection Protocols, asylum seekers included in the wind down experience security, stability, and joy in new lives in the United States, Human Rights First (June 17, 2021), <https://www.humanrightsfirst.org/blog/we-feel-safe-biden-administration-ends-migrant-protection-protocols-asylum-seekers-included>.

⁴⁴ *Id.*

⁴⁵ Hampton, *supra* n.26.

“Vast scientific evidence suggests separation from parents is among the most impactful traumatic experiences that a child can have.”⁴⁶ Parental separation puts children at greater risk for an array of health and psychological impairments, including anxiety, depression, PTSD, lower IQ, obesity, impaired immune system function, stunted physical growth, cancer, heart and lung disease, and stroke.⁴⁷ Children who have been separated from their families experience difficulty with emotional attachment, suffer self-esteem issues, and have impaired physical and psychological health.⁴⁸ They also are more likely to engage in harmful or antisocial behaviors, including increased risk-taking, aggressive behavior, and violence.⁴⁹ Some children experience speech and developmental difficulties,⁵⁰ which inhibit these children

⁴⁶ Cristina Muñiz de la Peña et al., *Working with Parents and Children Separated at the Border: Examining the Impact of the Zero Tolerance Policy and beyond*, 12 J. of Child & Adolescent Trauma 153-64 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7163859/>.

⁴⁷ Johayra Bouza et al., *The Science is Clear: Separating Families has Long-term Damaging Psychological & Health Consequences for Children, Families, and Communities*, Soc’y For Research in Child Dev. (June 20, 2018), <https://www.srkd.org/briefs-fact-sheets/the-science-is-clear>.

⁴⁸ *Id.*

⁴⁹ *Adversity in childhood is linked to mental and physical health throughout life*, BMJ (Oct. 28, 2020), <https://www.bmj.com/content/371/bmj.m3048>.

⁵⁰ *Key Health Implications of Separation of Families at the Border*, Kaiser Fam. Found. (June 27, 2018), <https://www.kff.org/racial-equity-and-health-policy/fact-sheet/key-health-implications-of-separation-of-families-at-the-border/>.

from reaching their full potential as adults. Family separation has been shown to have a negative impact on the educational success of Latin American children in particular.⁵¹ All of this, in turn, harms amici, whose futures depend on the success of immigrant children.⁵²

Family separation also harms adult family members living in amici's communities. Parents separated from their children report lower well-being and mental health compared to those not separated, and they experience grief, trauma, and rage.⁵³ Poor mental health has been linked to poor financial outcomes, inhibiting parents' potential to succeed and diminishing amici's potential economic growth.⁵⁴

Parents who have been separated from their children also are less likely to pursue healthcare for themselves or their children.⁵⁵ When immigrants do not seek healthcare, their health and the public health of amici's communities at large suffer. Children who cannot access preventive healthcare are more likely to develop health conditions and face difficulties in school, hindering their educational and professional futures and directly undermining their

⁵¹ Muñiz de la Peña, *supra* n.46.

⁵² *See supra* Section I.A.

⁵³ Muñiz de la Peña, *supra* n.46.

⁵⁴ *Data Shows Strong Link Between Financial Wellness and Mental Health*, Enrich (Mar. 24, 2022), <https://www.enrich.org/blog/data-shows-strong-link-between-financial-wellness-and-mental-health>.

⁵⁵ Muñiz de la Peña, *supra* n.46.

ability to become financially independent.⁵⁶ Individuals who do not access healthcare also increase the risk of disease outbreaks in their communities, which local public health departments must then address.⁵⁷

C. MPP Undermines Amici's Investments In Legal Services Programs.

Amici recognize the many ways that immigrants contribute to their communities, and many have invested resources to provide legal services for immigrants, including asylum seekers. MPP undermines those efforts and investments by preventing MPP enrollees from being able to access legal assistance in amici communities.

1. *MPP Prevents Immigrants from Effectively Participating in Their Asylum Proceedings.*

Many MPP enrollees miss their immigration court dates because of the violence and dangerous conditions at the border. Carolina, a 36-year-old Venezuelan woman, had memorized her court date for months, and her life revolved around her opportunity to make her asylum claim. On the morning of her court date, she woke up, put on her best blouse, said a prayer, and got on a bus headed for Laredo, Texas. But gunmen stopped the bus, kidnapped Carolina and her

⁵⁶ *Health & Academic Achievement*, Ctr. For Disease Control (2014), <https://perma.cc/3VXF-Y9LC>.

⁵⁷ In the 1990s, the then-largest rubella outbreak in the nation was associated with a substantial increase in withdrawal from public health services by immigrant communities. Claudia Schlosberg & Dinah Wiley, *The Impact of INS Public Charge Determinations on Immigrant Access to Health Care*, MontanaProBono.net (May 22, 1998), <https://perma.cc/WX9P-PNDB>.

daughter, took them to a stash house packed with other kidnapped migrants, and demanded a ransom. By the time Carolina was released, she had missed her court date and had an *in absentia* order of removal.⁵⁸

While Salvadoran Beatriz and her three children waited for their asylum proceedings, Beatriz's son, Luis, was kidnapped in northern Mexico. Beatriz attended her court date with her two other children and told the judge that her son had gone missing. The judge nevertheless closed Luis's case. Luis eventually was returned from captivity, but because of his closed case the family does not know whether they will be able to enter the United States together.⁵⁹

As these stories show, many MPP enrollees have no fair chance at proving the merits of their asylum claim because of the violence and dangerous border conditions under MPP. What's more, some MPP enrollees have such fear for their safety that they choose to go back to the home countries from which they had fled rather than continue to face the threats of violence in Mexico while they await their hearing.⁶⁰

⁵⁸ Kevin Sieff, *They missed their U.S. court dates because they were kidnapped. Now they're blocked from applying for asylum*, The Wash. Post (Apr. 24, 2021), <https://www.washingtonpost.com/world/2021/04/24/mexico-border-migrant-asylum-mpp/>.

⁵⁹ *Id.*

⁶⁰ 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.cbsnews.com/news/remain->

Statistics show that these stories are not unique. MPP enrollees are substantially more likely to receive *in absentia* removal orders than other noncitizens not placed in MPP. Of the 67,694 individuals enrolled in MPP, 21,818—32%—were subject to an *in absentia* order of removal; for those not placed in MPP, the *in absentia* rate was just 13%. App. 302a-303a. Another 6,151 MPP cases—9%—were terminated, which may occur when an enrollee fails to appear but the judge does not issue an *in absentia* removal order because of concerns that the enrollee did not have notice of the hearing. App. 303a. Together, then, 41% of MPP enrollees either had their cases terminated or received *in absentia* orders of removal. Put differently, more than four in ten MPP enrollees were ordered removed without even being able to attend a hearing to present their asylum claim.

2. *Amici Recognize the Importance of Full, Fair Immigration Proceedings and Have Invested in Pro Bono Legal Services.*

Recognizing the significant contributions of immigrants to their communities, many amici have invested in legal services for immigrants, including asylum seekers. For example, the County of Los Angeles and the City of Los Angeles have jointly invested \$5 million in the Los Angeles Justice Fund,⁶¹ which was

in-mexico-the-desperate-pleas-of-asylum-seekers-in-el-paso-who-are-subject-to-trumps-policy/.

⁶¹ L.A. Cty. Dep't of Consumer & Bus. Affairs, *Two-Year Report – Legal Representation for Los Angeles County Residents Facing Removal* 8 (Feb. 24, 2020).

created to help strengthen immigrant defense for Angelenos and their families—including by helping immigrants with asylum proceedings.⁶² New York City has invested nearly \$60 million annually through multiple legal services programs that provide legal advice, comprehensive screenings, risk assessments, and legal representation for all types of immigrants, including asylum seekers.⁶³ And San Francisco has invested over \$11.1 million in immigrant legal defense to help sustain programs like the San Francisco Legal Defense Collaborative.⁶⁴

These local initiatives have proved beneficial, helping thousands of immigrants successfully navigate the immigration system. For instance, nearly 60% of the Los Angeles Justice Fund’s clients received positive outcomes from the fund’s creation through February 2020.⁶⁵ If immigrants enrolled in MPP had access to these programs, there is good reason to believe they, too, would benefit from such legal assistance. Represented asylum seekers are five times more likely to be successful in their claims than those

⁶² Dalia Gonzalez et al., *Los Angeles Justice Fund: Safeguarding the Safety Net for L.A. City & County’s Immigrant Communities*, USC Dornsife (Feb. 2021), https://caimmigrant.org/wp-content/uploads/2021/12/LA_Justice_Fund_USC_ERI_03.pdf.

⁶³ 2020 Annual Report, NYC Office of Civ. Just. https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_Annual_Report_2020.pdf.

⁶⁴ San Francisco Immigrant Legal Defense Collaborative, About Us, <https://sfildc.org/>.

⁶⁵ Gonzalez, *supra* n.62.

without an attorney.⁶⁶ The benefits of legal representation are more than just a numbers game: Access to legal representation means that valid claims of persecution are properly heard and adjudicated and that fewer people are returned to countries where they face real risk of torture and death.⁶⁷

By inhibiting MPP enrollees from accessing pro bono legal services, MPP undermines amici's investments and blocks legal services organizations from helping some of the most vulnerable immigrants—people these services were specifically designed to protect. Amici are further harmed when asylum seekers with valid claims for relief are subject to *in absentia* removal orders and cannot be reunited with their family members living in amici's communities.

II. THE FIFTH CIRCUIT ERRED IN HOLDING THAT THE OCTOBER 29 DECISION HAS NO LEGAL EFFECT.

The federal government ably explains how the Fifth Circuit erred by concluding that Section 1225 compels the indefinite use of MPP. *See* Pet. 15-24. Amici write separately to offer additional context for the Fifth Circuit's other error: its determination that

⁶⁶ *Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality*, TRAC Immigration (Dec. 13, 2016), <https://trac.syr.edu/immigration/reports/448/> (affiliated with Syracuse University).

⁶⁷ *Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis* 23, Medecins Sans Frontières (May 2017), https://www.doctorswithoutborders.org/sites/default/files/2018-06/msf_forced-to-flee-central-americas-northern-triangle.pdf.

the October 29 Decision had no legal effect because it was not a new and reviewable final agency action. That holding ignores black-letter administrative law and should be reversed.

A. The October 29 Decision Constitutes Final Agency Action Under A Straightforward Application Of Administrative Law Principles.

The Fifth Circuit repeatedly insisted that the October 29 Decision “did not constitute a new and separately reviewable ‘final agency action.’” App. 23a; *see also* App. 21a, 125a. The court’s holding on this point meant that the October 29 Decision could not satisfy the injunction’s second condition, which requires DHS to maintain MPP until it has been “lawfully rescinded in compliance with the APA.” App. 212a. But the Fifth Circuit’s conclusion is internally inconsistent and contradicts black-letter administrative law. If, as the Fifth Circuit held, the June 1 Decision was a reviewable agency action, *see* App. 16a–19a, so too is the October 29 Decision.

The APA provides for judicial review of agency action that is “final.” 5 U.S.C. § 704. To qualify as “final,” this Court has explained, agency action must (1) “mark the consummation of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature,” and (2) constitute action “by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citation and quotation omitted); *accord U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 597–98 (2016).

In the October 29 Decision, Secretary Mayorkas announced that he was “hereby terminating MPP,” “[e]ffective immediately,” and he explicitly “superse[d] and rescind[ed] the June 1 memorandum, Secretary Nielsen’s January 25, 2019 memorandum, and any other guidance or other documents prepared by the Department to implement MPP.” App. 263a-264a. Because the district court injunction required DHS to maintain MPP until it has been “lawfully rescinded in compliance with the APA,” App. 212a, the October 29 Decision provided that “the termination of MPP w[ould] be implemented as soon as practicable after a final judicial decision to vacate the *Texas* injunction,” App. 264a. The October 29 Decision plainly satisfies both prongs of the *Bennett* test—indeed, Respondents have never argued to the contrary.

In evaluating the first *Bennett* prong, this Court considers whether the action is “informal, or only the ruling of a subordinate official, or tentative.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967) (citations omitted). Put differently, the question is “whether an action is properly attributable to the agency itself and represents the culmination of that agency’s consideration of an issue.” *Soundboard Ass’n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018).

Here, there is nothing “tentative or interlocutory” about the October 29 Decision. *See Bennett*, 520 U.S. at 178. The October 29 Decision was issued by Secretary Mayorkas himself, which shows that it represents the consummation of DHS’s decisionmaking process. *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020) (finding agency action that was

“issued under the authority of the [EPA] Administrator himself” satisfied the first *Bennett* criteria).

The October 29 Decision also was “issued after extensive factfinding” by DHS, another indicator that it is a culmination of the agency’s consideration of the issue. *See Hawkes*, 578 U.S. at 597. The Secretary issued the October 29 Decision after “once more assess[ing] whether MPP should be maintained, terminated, or modified in a variety of different ways[,]” and only after he had considered legal filings in suits related to MPP, conditions at the border, and data on enrollment in MPP; and met with internal and external stakeholders, including border states. *See App. 259a*.

The Secretary also explicitly “examined considerations that the District Court determined were insufficiently addressed in the June 1 memo,” and based his decision on “careful[] consider[ation]” of “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.” *App. 260a*. That type of careful deliberation satisfies the first *Bennett* prong. *See Hawkes*, 578 U.S. at 597 (first prong satisfied where agency action issued after “extensive factfinding”); *Nat’l Ass’n of Home Builders v. Norton*, 415 F.3d 8, 14 (D.C. Cir. 2005) (promulgation of survey protocols satisfied first *Bennett* prong where they “were published after [agency] solicited input from specialists and reviewed data from past field seasons”); *Safari Club Int’l v. Jewell*, 842 F.3d 1280, 1289 (D.C. Cir. 2016) (first *Bennett* prong satisfied

where the content of agency’s permit suspension decision “reveal[ed] a considered determination”).

There also can be no dispute that the October 29 Decision satisfies the second *Bennett* prong. The decision to terminate MPP is “definitive [in] nature” and “gives rise to ‘direct and appreciable legal consequences.’” *Hawkes*, 578 U.S. at 598 (quoting *Bennett*, 520 U.S. at 178). There is no question that “if [the October 29 Decision] survived judicial review,” it would have “practical and legal consequences.” *Alaska Dep’t of Env’t Conservation v. EPA*, 540 U.S. 461, 483 (2004). For individuals seeking asylum at the border, the decision to terminate MPP would have the practical and legal effect of allowing them to pursue their asylum claims without being expelled from the United States. Indeed, Secretary Mayorkas recognized the consequences that would follow in the October 29 Decision itself, explaining that he would seek to “minimize [potential] adverse consequences of any policy shifts on border states.” App. 314a-315a.

That the October 29 Decision was preceded by the earlier June 1 Decision does not change the analysis. This Court’s administrative law precedent teaches that enacting a new final agency action after a prior agency action has been vacated is entirely commonplace. Where, as here, an agency’s justifications for a challenged action are found to be “inadequate,” the agency on remand can “do one of two things.” *Regents*, 140 S. Ct. at 1907. First, it can expand on its initial decision, offering “a fuller explanation of the agency’s reasoning *at the time of the agency action*”; in this circumstance, the agency may “elaborate on” its original reasons, but it “may not provide new ones.” *Id.* at

1907-08 (quotation omitted). Alternatively, the agency can decide to “deal with the problem afresh’ by taking *new* agency action”; under this approach, by contrast, the agency is “not limited to its prior reasons,” though it still “must comply with the procedural requirements for new agency action.” *Id.* at 1908 (quoting *Chenery*, 332 U.S. at 201).

The government in this case elected to take the second route, issuing a new final agency action that rested on several “new reasons” that were “absent from” the June 1 Decision. *Id.* at 1908. The October 29 Decision expressly addressed each of the considerations that the district court had faulted DHS for failing to address in the June 1 Decision. *See* App. 259a. It discussed asserted benefits of MPP and contentions that terminating MPP would increase unlawful immigration, potential costs of termination, and alternatives to complete termination. *See infra* Section II.C.

The D.C. Circuit’s decision in *Fisher v. Pension Benefit Guaranty Corp.*, 994 F.3d 664, 669 (D.C. Cir. 2021), is instructive. In the original underlying case, the district court remanded to the agency after finding it had “failed to address” critical issues in its decision. *Fisher v. Pension Benefit Guar. Corp.*, 151 F. Supp. 3d 159, 168 (D.D.C. 2016). Thereafter, the agency issued a new decision, relying on new reasons to address the district court’s order that it had failed to consider particular issues. In a subsequent case, the district court rejected plaintiff’s arguments that these new reasons constituted impermissible post-hoc rationalizations for the initial denial, concluding that “the Board issued a new decision, and, as a result, the

explanations the PBGC now offers are contemporaneous, not *post hoc*.” *Fisher v. Pension Benefit Guar. Corp.*, 468 F. Supp. 3d 7, 19 (D.D.C. 2020), *aff’d* 994 F.3d 664 (D.C. Cir. 2021) (*Fisher II*).

The D.C. Circuit affirmed, explaining that “the district court’s remand presented the [agency] with a choice: either rest on its 2011 decision while elaborating on its prior reasoning, or issue a new decision featuring additional reasons absent from its 2011 decision. Contrary to appellant’s view, the [agency] chose the second option.” *Fisher*, 994 F.3d at 669-70. Just so here: because the district court told DHS to “reconsider” the June 1 Decision and look at matters it “wholly ignored,” DHS could not simply offer a fuller explanation for its termination decision, but instead had to take new action. *Fisher II*, 468 F. Supp. 3d at 19. That is precisely what DHS did.

DHS’s October 29 Decision reflects its decision to enact new agency action in response to the district court’s order, and the October 29 Decision constitutes final agency action under this Court’s precedent. The Fifth Circuit erred in refusing to consider it.

B. The Fifth Circuit’s Erroneous Conclusion Ignored The Relevant Legal Inquiry And Rested On Inapposite Analogies.

1. *The Reopening Doctrine Is Irrelevant Here.*

Without explanation, the Fifth Circuit did not consider whether the October 29 Decision constituted final agency action under *Bennett*. Instead, it simply announced that “[t]he October 29 Memoranda did not constitute a new and separately reviewable ‘final agency action,’” and stated that its “holding to that

effect [wa]s dictated by the well-established reopening doctrine.” App. 23a (quotation omitted). Yet the court did not explain why it applied the reopening doctrine—which is far afield and which “no party had briefed,” Pet. 29—instead of black-letter law on final agency action. Its application of the reopening doctrine was error.

The Fifth Circuit noted that “[t]he 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.” App. 23a. That is incorrect. The reopening doctrine has nothing to do with determining whether a later-in-time agency action constitutes a “final agency action” as a general matter—that inquiry is governed by *Bennett*. Instead, the reopening doctrine applies “where an agency conducts a rulemaking or adopts a policy on an issue at one time, and then in a later rulemaking restates the policy or otherwise addresses the issue again without altering the original decision.” *Wash. All. of Tech. Workers v. U.S. Dep’t of Homeland Sec.*, 892 F.3d 332, 345 (D.C. Cir. 2018) (quotation omitted). In such cases, the doctrine “allows an otherwise stale challenge to proceed because the agency opened the issue up anew, and then reexamined and reaffirmed its prior decision.” *Id.* at 346 (quotation omitted).

The reopening doctrine is about timeliness, not finality. Indeed, it *assumes* that the later-in-time agency action constitutes a final, reviewable agency action. Take the Fifth Circuit’s own illustration: “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.’ 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?” App. 23a (quoting *Nat’l Ass’n of Reversionary Prop. Owners v. Surface Transp. Bd.*, 158 F.3d 135, 141 (D.C. Cir. 1998)). The Fifth Circuit cited no authority—nor could it—to argue that the “later rulemaking” is somehow *not a final agency action*, whether or not it reconsiders the initial final agency action or merely reaffirms it. Indeed, “[i]f for any reason [an] agency reopens a matter and, after reconsideration, issues a new and final order, that order is reviewable on its merits, *even though the agency merely reaffirms its original decision.*” *Sendra Corp. v. Magaw*, 111 F.3d 162, 167 (D.C. Cir. 1997) (emphasis added). “The new order is, in other words, final agency action.” *Id.*

Respondents’ only defense of the Fifth Circuit’s approach is that “the reopening doctrine presents a very close analogue to the question whether the October Memoranda actually reconsidered the termination decision.” Resp. Br. 19. But that gives up the game: The relevant question is whether the October 29 Decision is a final agency action such that it is separately reviewable—not whether it reconsidered the prior termination decision. Put differently, the threshold question is simply whether the October 29 Decision is a final and reviewable agency action. The answer under *Bennett* is yes. The Fifth Circuit incorrectly determined that it was not and accordingly erred in refusing to consider the October 29 Decision.

A separate question, going to the merits of the October 29 Decision, might be whether the October 29 Decision reconsidered the termination decision consistent with the APA—did it consider, for example, “the States’ legitimate reliance interests, (2) MPP’s benefits, (3) potential alternatives to MPP, and (4) the legal implications of terminating MPP”? App. 103a. The answer to this question, too, is yes, though no court has yet considered it because of the Fifth Circuit’s error.

2. *The Fifth Circuit’s Other Rationales for Its “No Legal Effect” Determination Are Unsound.*

The Fifth Circuit separately suggested that the existence of the district court injunction somehow changed the calculus of whether the October 29 Decision is a final agency action. *See* App. 35a-37a. But the injunction does nothing to alter the October 29 Decision’s finality.

The Fifth Circuit mused that because the injunction had already vacated the June 1 Decision and ordered the government to implement MPP until it was properly rescinded pursuant to the APA, the October 29 Decision’s “legal effect is one part nullity and one part impending.” App. 35a. Even aside from failing to cite any legal authority for this conclusion, neither half of the Fifth Circuit’s equation holds up to scrutiny. On the “nullity” point, as Petitioners point out, the October 29 Decision superseded and rescinded not just the June 1 Decision but all previous agency memoranda implementing MPP. Pet. Reply at 7. It did not simply vacate a decision already vacated by the district court’s injunction.

On the “impending” point, the Fifth Circuit asserted that the October 29 Decision was merely “impending” because the injunction had directed the government to implement MPP until it terminated MPP in accordance with the APA. App. 36a. But that reasoning is as wrong as it sounds, and the Fifth Circuit’s logic creates a curious chicken-and-egg problem: The injunction can only be vacated if DHS “lawfully rescind[s]” MPP “in compliance with the APA,” App. 212a, and the only way to lawfully rescind MPP is by taking new final agency action while the injunction remains in place.

To the extent the Fifth Circuit meant to suggest that the purportedly “impending” nature undercuts finality under *Bennett*—though, again, it undertook no such analysis—that would be wrong. In *Domestic Securities, Inc. v. SEC*, 333 F.3d 239 (D.C. Cir. 2003), the D.C. Circuit rejected an analogous argument that an SEC order requiring use of a new system was not a final agency action because the order’s implementation was conditioned on approval of a different mechanism such that the order would not immediately go into effect. *Id.* at 245-46. The D.C. Circuit explained that “[t]he existence of this condition to . . . implementation” did not affect the order’s finality “because the condition was unrelated to the substance of the [order].” *Id.* at 246. So too here: The existence of the injunction is not some separate agency process that indicates the agency’s intent to reconsider its October 29 Decision. To the contrary, the October 29 Decision was specifically tailored to address the legal issues motivating the injunction.

The Fifth Circuit therefore had no legal justification for refusing to acknowledge the October 29 Decision as a reviewable final agency action. Instead, the crux of the Fifth Circuit’s issue with the October 29 Decision was its view that the government was participating in gamesmanship by simultaneously enacting a new agency action on MPP and appealing the district court’s injunction on an earlier agency action.

But electing to remedy alleged deficiencies in a particular agency action while litigation is ongoing—what the Fifth Circuit variously referred to as “unclean hands,” “litigation tactics,” a “pattern of belated shifts,” “eleventh-hour” surprises, “gamesmanship,” throwing a “last-minute wrench,” and playing “a game of heads I win, tails I win, and I win without even bothering to flip the coin,” App. 3a, 47a, 48a, 50a, 124a, 125a—is commonplace, and not at all unusual or pernicious. *See, e.g.*, Pet. Reply 7-8 (citing cases); *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 437 (D.C. Cir. 2018) (dismissing as moot plaintiffs’ challenge to EPA rule where EPA had since “promulgated amendments” to challenged rule); *Nat’l Mining Ass’n v. Dep’t of Interior*, 251 F.3d 1007, 1011 (D.C. Cir. 2001) (dismissing challenges as moot due to changes in regulations). Indeed, the district court in the present case recognized that issuance of the June 1 Decision mooted any challenge to the prior January 20 suspension of MPP. *See* App. 167a (“[T]he flaws of the January 20 Memorandum were mooted when DHS completed its review and issued the June 1 Memorandum that terminated the MPP program.”).

Neither the Fifth Circuit nor Respondents have cited any authority for the contention that an agency

is forbidden from remedying alleged deficiencies in an agency action while simultaneously appealing the conclusion that there were any such deficiencies. Agencies must have this flexibility. That is especially so when, as here, “the government had to pursue an appeal of the portion of the injunction embodying the district court’s unprecedented interpretation of Section 1225, but reasonably chose to obviate the need for further litigation about the adequacy of the June 1 decision’s explanation by issuing a new decision.” Pet. Reply 8. The Fifth Circuit’s rationale would tie DHS’s hands without legal justification and in a manner inconsistent with this Court’s precedent on final agency action.

C. The October 29 Decision To Terminate MPP Was Sound.

The Secretary’s October 29 Decision to terminate MPP was “both reasonable and reasonably explained.” *Multicultural Media, Telecom & Internet Council v. FCC*, 873 F.3d 932, 937 (D.C. Cir. 2017) (Kavanaugh, J.); *see also Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

In reaching its termination decision, DHS considered a wide variety of sources. *See* App. 287a. This was no perfunctory exercise. The Secretary and his staff also “met with a broad array of internal and external stakeholders with divergent views about MPP,” including “state and local elected officials across the border region.” App. 287a.

The Secretary explained that DHS had “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,” but that expectation was belied by record evidence “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.” App. 288a. Such violence on the ground can lead to family separation and trauma that persists even after families are reunited. *See supra* Section I.B.

The Secretary also explained how these unsafe conditions undercut asylees’ “ability to attend and effectively participate in court proceedings in the United States.” App. 289a. The record revealed that “[i]ndividuals in MPP faced multiple challenges accessing counsel and receiving sufficient information about court hearings,” App. 289a, and the Secretary observed that “[i]nadequate access to counsel casts doubt on the reliability of removal proceeding[s],” App. 299a; *accord* App. 304a (documenting reports “that individuals abandoned claims or otherwise failed to appear for proceedings because of insecurity in Mexico and inadequate notice about court hearings”). These real barriers to access to counsel posed by MPP undermine amici’s investments in legal services for asylum seekers. *See supra* Section I.C.

Notably, the Secretary also carefully considered concerns raised by border states. He “sought to understand and address the impacts that Departmental policies and practices may have on communities” and “consulted with numerous state and local officials” at

the border. App. 314a. And the Secretary stated that “even after his many consultations,” he was “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.” App. 318a.

The Secretary also carefully considered, and ultimately rejected, several alternatives to terminating MPP. *See* App. 340a. In particular, the Secretary considered whether MPP could be modified “to better protect individuals returned to Mexico and ensure, among other things, timely and accurate notice about court hearings.” App. 342a. The Secretary nevertheless ultimately determined that potential modifications to the program “fail to address the fundamental problems with MPP”—“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.” App. 342a.

At bottom, in issuing the October 29 Decision DHS did precisely what the district court asked when the court rejected the June 1 Decision: It carefully considered “critical factors,” including purported benefits of MPP, claims that terminating MPP would increase border crossings, potential costs and reliance interests, and alternatives to terminating MPP. *See* App. 192a-195a. The Fifth Circuit bent over backwards to avoid remanding to the district court to consider this thorough and thoughtful termination decision. This Court should not bless that approach.

CONCLUSION

For the foregoing reasons and the reasons set forth in Petitioners' brief, amici urge this Court to reverse the decision below.

Respectfully submitted,

DANIEL R. SUVOR

Counsel of Record

JAMES A. BOWMAN

O'MELVENY & MYERS LLP

400 South Hope Street

18th Floor

Los Angeles, CA 90071

(213) 430-6000

dsuvor@omm.com

jbowman@omm.com

Counsel for Amicus Curiae

County of Los Angeles, Calif.

*Additional Counsel Listed in
Appendix*

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APPENDIX

APPENDIX A

LIST OF AMICI CURIAE

DANIEL R. SUVOR
JAMES A. BOWMAN
O'MELVENY & MYERS
LLP
400 South Hope Street
18th Floor
Los Angeles, CA 90071

*Counsel for Amicus Curiae
County of Los Angeles, Cali-
fornia*

KEVIN MORROW
Acting City Attorney
One Civic Plaza N.W.
4th Floor, Room 4072
Albuquerque, NM 87102

*Counsel for Amicus Curiae
City of Albuquerque, New
Mexico*

ADAM N. CEDERBAUM
Corporation Counsel
One City Hall Square,
Room 615
Boston, MA 02201

*Counsel for Amicus Curiae
City of Boston, Massachu-
setts*

MICHAEL R. HAAS
City Attorney
210 Martin Luther King Jr.
Blvd., Room 401
Madison, WI 53703

*Counsel for Amicus Curiae
City of Madison, Wisconsin*

MARGARET C. DAUN
Corporation Counsel
901 N. 9th Street,
Room 303
Milwaukee, WI 53233

*Counsel for Amicus Curiae
County of Milwaukee, Wiscon-
sin*

JAMES R. ROWADER, JR.
City Attorney
City Hall, Room 210
350 South Fifth Street
Minneapolis, MN 55415

*Counsel for Amicus Curiae
City of Minneapolis, Minne-
sota*

NICK HERMAN
General Counsel
 1526 East Franklin
 Street, Suite 200
 Chapel Hill, NC 27514

*Counsel for Amicus Curiae
 Town of Carrboro, North
 Carolina*

CELIA MEZA
Corporation Counsel
 2 N. LaSalle Street,
 Suite 580
 Chicago, IL 60602

*Counsel for Amicus Curiae
 City of Chicago, Illinois*

ANDREW W. GARTH
City Solicitor
 801 Plum Street,
 Room 214
 Cincinnati, OH 45202

*Counsel for Amicus Curiae
 City of Cincinnati, Ohio*

LESLIE J. GIRARD
County Counsel
 168 West Alisal Street,
 3rd Floor
 Salinas, CA 93901

*Counsel for Amicus Curiae
 County of Monterey, Califor-
 nia*

HON. SYLVIA O. HINDS-
 RADIX
Corporation Counsel
 100 Church Street
 New York, NY 10007

*Counsel for Amicus Curiae
 City of New York, New York*

BARBARA J. PARKER
City Attorney
 One Frank H. Ogawa
 Plaza, Sixth Floor
 Oakland, CA 94612

*Counsel for Amicus Curiae
 City of Oakland, California*

CHRISTOPHER J. CASO
City Attorney
1500 Marilla Street,
Room 7DN
Dallas, TX 75201

Counsel for Amicus Curiae
City of Dallas, Texas

KRISTIN M. BRONSON
City Attorney
1437 Bannock Street,
Room 353
Denver, CO 80202

Counsel for Amicus Curiae
City and County of Denver,
Colorado

ANGELA LOCKETT
Corporation Counsel
401 Broadway, Suite 104
Gary, IN 46402

Counsel for Amicus Curiae
City of Gary, Indiana

DIANA P. CORTES
City Solicitor
1515 Arch Street,
17th Floor
Philadelphia, PA 19102

Counsel for Amicus Curiae
City of Philadelphia, Pennsyl-
vania

KRYSIA KUBIAK
Solicitor
City-County Building
414 Grant Street,
Third Floor
Pittsburgh, PA 15219

Counsel for Amicus Curiae
City of Pittsburgh, Pennsylva-
nia

SUSANA ALCALA WOOD
City Attorney
915 I Street, Fourth Floor
Sacramento, CA 95814

Counsel for Amicus Curiae
City of Sacramento, Califor-
nia

HOWARD G. RIFKIN
Corporation Counsel
550 Main Street,
Room 210
Hartford, CT 06103

Counsel for Amicus Curiae
City of Hartford, Connecticut

ARTURO G. MICHEL
City Attorney
900 Bagby, 4th Floor
Houston, TX 77002

Counsel for Amicus Curiae
City of Houston, Texas

MICHAEL FEUER
City Attorney
200 North Main Street
City Hall East Suite 800
Los Angeles, CA 90012

Counsel for Amicus Curiae
City of Los Angeles, California

LYNDSEY M. OLSON
City Attorney
15 West Kellogg Boulevard,
Suite 400
Saint Paul, MN 55102

Counsel for Amicus Curiae
City of Saint Paul, Minnesota

DAVID CHIU
City Attorney
City Hall Room 234
One Dr. Carlton B.
Goodlett Pl.
San Francisco, CA 94102

Counsel for Amicus Curiae
City and County of San Francisco, California

WILLIAM C. FOSBRE
City Attorney
747 Market Street,
Room 1120
Tacoma, WA 98402

Counsel for Amicus Curiae
City of Tacoma, Washington

5a

LAUREN LANGER
City Attorney
Best Best & Krieger LLP
300 South Grand Ave.,
25th Floor
Los Angeles, CA 90071

Counsel for Amicus Curiae
City of West Hollywood, Cali-
fornia