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; STATE OF MISSOURI.,

Respondents.

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

BRIEF FOR AMERICA FIRST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

America First Legal Foundation (America First Legal or AFL) is a nonprofit organization dedicated to promoting the rule of law in the United States by preventing executive overreach, ensuring due process and equal protection for every American citizen, and encouraging understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.

America First Legal has a substantial interest in this case. Ensuring compliance with our immigration laws, protecting national sovereignty, and promoting the rule of law are core institutional interests at the heart of the organization's mission. Members of AFL's Board of Directors and its staff served in various capacities during the Trump Administration, most prominently in the homeland security and immigration policy areas, obtaining unique knowledge and experience regarding the issues presented in this case. AFL has a significant interest in highlighting the effectiveness of the Migrant Protection Protocols (MPP) using the federal government's own publicly-available statistics and information.*

* All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

The United States Department of Homeland Security (DHS) implemented the Migrant Protection Protocols (MPP) in 2019 in response to a border crisis. DHS quickly realized the benefits MPP created—particularly insofar as it reduced the number of encounters at the border, provided the ultimate backstop against the practice commonly referred to as "catch-and-release," and enhanced its ability to apply meaningful enforcement consequences to aliens apprehended at the border. In total, MPP provided substantial benefits to the federal government, state and local governments, and the American people by reducing illegal immigration via the southwest border, the number of illegal aliens in the United States with unexecuted removal orders, and the volume of meritless asylum claims.

When DHS subsequently terminated MPP after the change in presidential administrations, it did so without considering the substantial benefits MPP provided. Failing to consider those benefits was not only arbitrary and capricious—as noted by Fifth Circuit and the District Court below—but also egregious when considering the immigration system as a coherent whole. Indeed, Congress, through the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, charged the Executive Branch not just with apprehending and processing aliens encountered at the border, but also with actually *removing* them from the United States or granting them relief or protection from removal when they qualify. DHS previously recognized MPP's

enhancement of its ability to achieve that mission, but DHS failed to consider those benefits when it decided to terminate MPP.

Given that express direction from Congress, and this Court's precedent, including *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020), reasoned decision-making in the immigration enforcement context requires considering DHS's ability to actually remove an alien who is found inadmissible—not just DHS's ability to begin administrative processes that could eventually lead to obtaining removal orders for aliens that will likely never be enforced.

DHS's statistics demonstrate that it removes from the United States the overwhelming majority of aliens whom it continuously detains after their apprehension at the United States-Mexico border (southwest border). But the opposite is true for those aliens it releases—the very populations that would otherwise be subject to MPP—with the overwhelming majority remaining in the United States years after their initial apprehension at the southwest border. Because immigration courts rightly grant relief or protection from removal in only a small percentage of cases that originate from the southwest border, releasing aliens from DHS custody with no plan to remove them further compounds the substantial problems created by illegal immigration, as countless illegal aliens with removal orders do not comply with their obligations to depart the United States.

DHS—particularly under the current administration's policies—removes only an exceedingly small fraction of those aliens with final

removal orders every year. Indeed, as documented in reports DHS filed with the District Court below, DHS released over 750,000 aliens into the United States between January 21, 2021, and February 28, 2022. Based on DHS's current abysmal rate of approximately 4,300 removals each month during the first six months of Fiscal Year 2022, it would take DHS approximately 174 months—14.5 years—to remove *just* the aliens it has released into the United States over the last 13 months.

The Fifth Circuit's decision below is exceptionally well-reasoned, well-written, and thorough, and this Court should affirm its decision below for the reasons stated in the respondents' brief alone. America First Legal, however, offers this brief to further highlight the particularly egregious nature of DHS's failure to consider MPP's benefits and its own ability to enforce the immigration laws when terminating the program, while simultaneously considering ideologically and politically-charged factors not found in statute.

ARGUMENT

I. The Integrity of the Immigration System Requires—as Reflected by the Passage of Numerous Laws by Congress—Meaningful Enforcement Outcomes for Aliens Who Violate Our Immigration Laws.

Tens of millions of people across the world have expressed a desire to live in the United States. Neli Esipova et al., More *Than 750 Million Worldwide Would Migrate if They Could*, Gallup (Dec. 10, 2018), https://bit.ly/3JEcGq2 (estimating 158 million

potential migrants would like to move to the United States if they could). And through the INA and other statutes, Congress has enacted a comprehensive legislative scheme to facilitate the lawful immigration of individuals to the United States each year. *See, e.g.,* 8 U.S.C. § 1151, 1153. Notwithstanding the desires of hundreds of millions of potential immigrants—and aside from individuals who qualify as "immediate relatives" of U.S. citizens—Congress imposed caps on the number of aliens who can lawfully enter the United States each year. *Id.*

But the allure of a better life inside the United States remains, creating a magnet for aliens to unlawfully enter the United States and circumvent the lawful process established by Congress.

And so, Congress has repeatedly acted to create a comprehensive statutory scheme to direct the Executive Branch to secure the international border between the United States and Mexico. Whether through requiring DHS to detain all aliens apprehended in the border environment, as mandated by 8 U.S.C. § 1225, *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018); creating an expedited removal process under the same statute; curtailing the parole authority in 8 U.S.C. § 1182(d)(5)(A), Pet. App. 13a-15a (discussing the statutory history of the parole power);[†] explicitly stating in the Secure Fence Act of 2006 that the Department of Homeland

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[†] While not addressed in substance in this brief, the Fifth Circuit's recitation and explanation of the restrictions on the use of the parole power are compelling and precisely correct.

Security must achieve "operational control" of the border as defined as "the prevention of *all* unlawful entries into the United States," Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 or the fact that unlawfully entering or reentering the United States remains a criminal offense under 8 U.S.C. §§ 1325 and 1326; preventing aliens from unlawfully entering and being released into the United States is an unambiguous requirement.

Further—and critically—Congress has directed that DHS "shall remove" an alien within a 90-day period after obtaining a final order of removal. 8 U.S.C. § 1231(a)(1)(A). Congress provided some exceptions in other parts of section 1231, but the general command is clear. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020) ("interpret[ing] a statute in accord with the ordinary public meaning of its terms at the time of its enactment").

These statutes work together to provide integrity to the entire immigration system. It is simply not enough that DHS deter and detain illegal aliens at the border. DHS must also remove them from the United States after the aliens receive administratively final orders of removal. After all, what is the point of having a process if there is no meaningful consequence at the end of that process?

II. MPP Provided Numerous Benefits Related to the Systemic Integrity of the Immigration System: Not Only Reducing the Flow of New Illegal Aliens into the United States, But Also Enabling DHS to Provide Meaningful Enforcement Consequences for Aliens Apprehended at the Southwest Border.

As the Fifth Circuit noted, before MPP, "resource constraints forced DHS to release thousands of undocumented aliens into the United States and to trust that those aliens would voluntarily appear for their removal proceedings." Pet. App. 7a. Most prominently among those it released into the United States were aliens traveling as members of family units, which DHS "generally cannot detain . . . for more than approximately twenty days in ICE family unit facilities" due to the requirements of the *Flores* Settlement Agreement. *Id.* at 391a (Declaration of then-Assistant Secretary for Border Security and Immigration, David Shahoulian, citing *Flores v. Garland*, No. CV 85-4544).

As the District Court stated below, the border crisis that precipitated MPP's implementation, and its "resulting influx of immigrants had severe impacts on U.S. border security and immigration operations." Pet. App. 157a. "[M]ost aliens lacked meritorious claims for asylum . . . [with] only 14 percent of aliens who claimed credible fear of persecution or torture [being] granted asylum between Fiscal Year 2008 and Fiscal Year 2019." *Id.* This made it "harder for the U.S. to devote appropriate resources to individuals who [were]

legitimately fleeing persecution." *Id.* "The influx did not just divert resources from legitimate asylum seekers, but illegal aliens with *meritless* asylum claims were being released into the United States." *Id.*

In response, the Trump Administration implemented MPP.

> Under MPP, DHS instead returned certain undocumented aliens [from countries other than Mexico] to Mexico for the duration of their removal proceedings. MPP's goal was "to ensure that certain aliens attempting to enter the U.S. illegally or without documentation ... will no longer be released into the country, where they often fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim."

Pet. App. 7a-8a (citation omitted).

As DHS recognized in 2019, using MPP resulted in significant benefits, including a decrease in apprehensions of illegal aliens at the southwest border. J.A. 189. Specifically, border apprehensions decreased by 64% between May and September 2019, and for Central American families, by 80%. *Id.* According to DHS's own publicly-available statistics, the actual number of aliens apprehended over that period decreased from 144,116 aliens in May 2019, to

52,546 in September, and decreased each subsequent month thereafter until June 2020.‡ *See* U.S. Customs and Border Protection, *Southwest Border Land Encounters*, https://bit.ly/3uC6ISn (last visited April 13, 2022).

MPP also allowed for there to be consequences for aliens apprehended along the border. "MPP returnees who do not qualify for relief or protection [were] being quickly removed from the United States. Moreover, aliens without meritorious claims—which no longer constitute a free ticket into the United States—[were] beginning to voluntarily return home." J.A. 189. DHS noted, in summary:

> In recent years, only about 15% of Central American nationals making asylum claims have been granted relief or protection by an immigration judge. Similarly, affirmative asylum grant rates for nationals of Guatemala, El Salvador, and Honduras were approximately 21% in Fiscal Year 2019. At the same time, there are . . . over one million pending cases in DOJ immigration courts, in addition to several hundred thousand asylum cases pending with USCIS. These unprecedented backlogs have strained DHS resources and challenged its ability to *effectively execute the laws*

‡ The increase in "encounters" occurred after meaningful operation of MPP had suspended due to pandemic-related conditions.

> *passed by Congress and deliver appropriate immigration consequences*: those with meritorious claims can wait years for protection or relief, and those with non-meritorious claims often remain in the country for lengthy periods of time.

Id. 196. Plainly, MPP enhanced DHS's ability to "deliver appropriate immigration consequences" to illegal aliens apprehended at the border and delivering these appropriate immigration consequences were several of the main benefits of MPP. Pet. App. 192a. It gave DHS the ability to comply with the comprehensive statutory scheme provided by Congress to secure the southwest border.

III. Additional Statistics Highlight the Extent of MPP's Substantial Benefits.

In addition to the evidence in the record, separately published statistics highlight *why* MPP provided such substantial benefits to the integrity of the immigration system. In short, particularly under current policies, DHS has an abysmal record when it comes to enforcing the law against those aliens who have been released from its custody at the southwest border into the United States. DHS is and was clearly aware of these facts, as reports regularly published by it and other Executive Branch departments have extensively documented as much.

A. The DHS Fiscal Year 2020 Enforcement Lifecycle Report Makes It Abundantly Clear: DHS Removes Those Aliens it Detains, and it Does Not Remove Those Aliens it Releases Into the United States.

In December 2020, DHS published a comprehensive report about the actual *outcomes* of encounters along the southwest border. Department of Homeland Security Office of Immigration Statistics, Fiscal Year 2020 Enforcement Lifecycle Report (Dec. 2020), https://bit.ly/3O6prgx.

By comparing data from the Department of Justice and DHS, the report described "the final or most current outcomes, as of March 31, 2020, associated with the 3.5 million Southwest Border encounters occurring between 2014 and 2019." *Id.* at 1. Overall, the report found that just "59 percent of the 3.5 million Southwest Border encounters between 2014 and 2019 had been resolved through a final outcome of repatriation or relief/protection from removal as of the end of 2020 Q2." *Id.* The report noted the shifts in demographic characteristics of aliens encountered over this period and noted that the changes were meaningful "because of dramatic differences in enforcement outcomes across" the various demographic groups. *Id.* For example:

- "Most encounters of aliens from Mexico, single adults, and non-asylum seekers were fully resolved (i.e., either repatriated or granted relief) relatively quickly[.]" *Id.*
- "[M]ost encounters of aliens from countries other than Mexico, [aliens in family units]

> and [unaccompanied alien children], and asylum seekers remained in an unresolved status . . . even years after their initial encounter[.] *Id.*

Critically, DHS noted that the disparities in outcomes reflected "differences in detention practices." *Id.* at 17. Simply stated, aliens who were subject to catch-and-release policies were allowed to remain in the United States. Notably:

- DHS only continuously detained 42 percent of aliens encountered between 2014 and 2019. *Id.* But for those encounters, "aliens were repatriated *98 percent of the time*, with 0.5 percent resulting in relief or other protection from removal and 1.5 percent remaining unresolved as of March 31, 2020." *Id.* (emphasis added). Overall, just "1 percent of continuously detained encounters resulted in unexecuted removal orders."
- By comparison, aliens released into the United States were most likely to remain in the United States years after their encounters.
- Aliens "never detained following their initial encounters were repatriated 30 percent of the time, with 15 percent granted relief and 55 percent unresolved." *Id.* Most of the unresolved cases were still being processed, but "11 percent were subject to unexecuted removal orders,

including 10 percent subject to *in absentia* orders." *Id.*

- Aliens "partially detained," meaning those initially detained but released before a final enforcement outcome, "resulted in repatriations just 3 percent of the time and relief just 12 percent of the time, with 85 percent still unresolved, including 18 percent with unexecuted removal orders (14 percent *in absentia* orders)." *Id.*

Overall, DHS's report makes clear a fundamental fact understood by the men and women who enforce our laws every day: catching and releasing aliens into the United States is illogical and undermines existing immigration laws. Explaining all the reasons why could fill a treatise, but DHS clearly and specifically noted the aggregate effects of releasing aliens into the United States in this report, issued roughly six months before Secretary Mayorkas issued his memorandum purporting to terminate MPP.

B. Monthly Reports Submitted to the District Court Below Document DHS Releasing Over 750,000 Aliens into the United States Over the Last 13 Months.

In addition to DHS's acknowledgment of MPP's benefits in 2019, and its recognition of the wide disparity in enforcement outcomes in the Enforcement Lifecycle Report described above, recent DHS statistics revealed from monthly reporting requirements to the District Court below further demonstrate the irrationality of the mass release of aliens into the United States.

DHS has released into the United States hundreds of thousands of illegal aliens over the roughly 13-month period from January 21, 2021, through February 28, 2022.

- Combined, between January 2021 and November 2021, DHS, through U.S. Customs and Border Protection (CBP), released into the United States at least 403,360 illegal aliens apprehended along the southwest border. Defendants' Monthly Report of Dec. 15, 2021, ECF 119-1, *Texas v. Biden*, No. 2:21-CV-067-Z, 2021 WL 4552546 (N.D. Tex. June 7, 2021).
- In December 2021, CBP released at least 55,626 illegal aliens, Defendants' Monthly Report of Jan. 12, 2022, ECF 124-1 at 6.
- In January 2022, CBP released at least 46,186. Defendants' Monthly Report of Feb. 15, 2022, ECF 129-1 at 6.
- And in February 2022, CBP released at least 39,069. Defendants' Monthly Report of Mar. 15, 2022, ECF 133-1 at 6.

Altogether, according to DHS, CBP released at least 544,241 illegal aliens into the United States between January 21, 2021, and February 28, 2022. But CBP's releases only tell part of the story, because U.S. Immigration and Customs Enforcement (ICE) also has released hundreds of thousands of aliens over the same period.

- From January 2021 through September 2021, ICE released at least 120,930 illegal

aliens into the United States. Defendants' Monthly Report of Dec. 15, 2021, ECF 119-2 at 20.

- ICE released another 18,731 in October 2021 and 20,673 in November 2021. Defendants' Monthly Report of Dec. 15, 2021, ECF 119-2 at 18.
- ICE released another 19,173 in December 2021. Defendants' Monthly Report of Jan. 12, 2022, ECF 124-2 at 4.
- ICE released another 16,387 in January 2022. ECF No. 129-2 at 4.
- ICE released another 15,974 in February 2022. Defendants' Monthly Report of Mar. 15, 2022, ECF 133-2 at 4.

Altogether, according to DHS, ICE has released at least 211,868 illegal aliens into the United States since January 21, 2021.

Combined, these self-reported numbers from DHS indicate that it has released *at least* 756,109 illegal aliens from the southwest border into the United States between January 21, 2021, and February 28, 2022—many, if not all, of whom would have been deterred from coming or would have been returned to Mexico had MPP been implemented to the fullest extent possible.[§]

[§] Notably, these releases appear not to include unaccompanied alien children, nor do they include the number of aliens who evade apprehension. So, the actual number of illegal aliens who

C. Additional Data Demonstrate That DHS Will Not Remove the Overwhelming Majority of Aliens Released into the United States.

Unfortunately, the release of at least 756,019 illegal aliens into the United States over a 13-month period does not paint the complete picture.

That number is in addition to the over 1.2 million aliens who had pending cases in immigration courts at the end of FY 2020 (before these new releases occurred). Executive Office of Immigration Review, PENDING CASES, NEW CASES, AND TOTAL COMPLETIONS (Jan. 19, 2022), https://bit.ly/3veGmVM. And that number is also in addition to the roughly 1.2 million aliens subject to administratively final orders of removal who remained in the United States as of January 30, 2021. Decl. of Peter B. Berg, *Texas v. Biden*, 524 F. Supp. 3d 598 (S.D. Tex. 2021) (No. 78-1).

Aside from permitting these aliens to remain in the United States for years during the pendency of their removal proceedings as demonstrated by the Enforcement Lifecycle Report, DHS's recent statistics also demonstrate that it will only eventually deport a mere fraction of this population.

- For example, ICE reports that in all of FY 2021, it removed a total of only 59,590 aliens from the United States. IMMIGRATION AND CUSTOMS ENFORCEMENT, FY 2021

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have entered the United States during this time is likely much higher.

DETENTION STATISTICS, Cell P29-R29, https://www.ice.gov/detain/detention-management (last visited April 13, 2022).

- Halfway through FY 2022, ICE has only removed 25,986 aliens from the United States. IMMIGRATION AND CUSTOMS ENFORCEMENT, DETENTION FY22 YTD, ALTERNATIVES TO DETENTION FY 2022 YTD AND FACILITIES FY 2022 YTD, Cell P29-R29, https://www.ice.gov/detain/detention-management (last visited April 13, 2022).
- And for context, in FY 2020—before the current Administration took office—ICE removed 185,884 aliens from the United States. IMMIGRATION AND CUSTOMS ENFORCEMENT, FY 2020 DETENTION STATISTICS, Cell P29-R29, https://www.ice.gov/detain/detention-management (last visited April 13, 2022).

In sum, these statistics demonstrate that DHS knows—after all, it publishes the information on the internet or discloses it to the public in court filings—it is extremely unlikely that it will ever, or even attempt to, remove aliens from the United States that it releases into the United States after apprehending them at the southwest border—a result completely contrary to the benefits DHS acknowledged obtaining by using MPP.

Considering the facts above in combination with the clear commands of Congress to apprehend, detain, and remove those aliens who violate our laws, it is quite difficult to understand the logic behind

knowingly releasing well over 750,000 illegal aliens into the United States from the southwest border over a 13-month period as DHS has done and documented to the District Court below, while only removing approximately 4,300 aliens every month as DHS has done in the first six months of this Fiscal Year. Indeed, if removals continue at that rate, it will take DHS approximately 174 months—14.5 years—to remove *just* the aliens it has released into the United States over the last 13 months.

IV. By Failing to Consider MPP's Benefits and Its Ability to Apply Meaningful Enforcement Consequences, DHS Acted Arbitrary and Capriciously by Terminating MPP.

Secretary Mayorkas failed to consider the benefits MPP provided when he terminated the program. Because Congress has provided clear directions to DHS about how to secure the border, and DHS knows that without MPP it will struggle to ever come close to complying with those directions, Secretary Mayorkas's decision to terminate MPP was a clear error in judgment for failing to consider the relevant factors. Accordingly, the decision to terminate MPP was arbitrary and capricious for that reason alone.

"Revocation constitutes a reversal of the agency's former views as to the proper course." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983). A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is at least a presumption that those policies will be carried out

best if the settled rule is adhered to. *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807–808 (1973). Accordingly, an agency changing its course by rescinding a rule has an obligation to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance. *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020).

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the Court must ensure that the agency has examined the relevant data and articulated a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

In reviewing that explanation, this Court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *State Farm,* 463 U.S. at 43 (citations omitted).

Agency action is lawful only if it rests on a consideration of the relevant factors found in its

authorizing statutes; the question is whether "the agency has acted reasonably and thus has 'stayed within the bounds of its statutory authority.'" *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 315 (2014); *see also Michigan v. E.P.A,* 576 U.S. 743, 750 (2015).

Secretary Mayorkas failed to adequately explain his analysis of the relevant factors at issue: namely, the benefits DHS previously identified MPP as providing, as well as his Department's own available statistics on its ability to faithfully execute the laws Congress charged it with enforcing. *See* Pet. App. 346a-360a. And the Fifth Circuit rightly found as much. *Id.* 107a-110a. To the extent that DHS addressed MPP's supposed shortcomings, the Fifth Circuit rightly found those to be "irrational" considering the record before the Court. *Id.* 108a-109a.

DHS's decision to terminate MPP fares no better when considering the post-hac explanations offered in the October Termination Memorandum. In that document, DHS admitted that MPP reduced illegal immigration. Pet App. 308a, 312a. However, it "concluded that this benefit cannot be justified, particularly given the substantial and unjustifiable human costs on the migrants who were exposed to harm while in Mexico, and the way in which MPP detracts from other regional and domestic goals and policy initiatives that better align with this Administration's values." *Id.* 313a.

In December 2018, when the government announced MPP, it stated that MPP was expected to provide numerous benefits for the immigration system, including reducing false asylum claims, more

quickly adjudicating meritorious asylum claims, clearing the backlog of unadjudicated asylum applications, and, perhaps most importantly, stemming migration flows across our southwest border. The evidence demonstrates that it did these things.

But in October 2021, to justify MPP's termination, the government cited "provid[ing] legal and regular pathways for individuals seeking protection and opportunity to work in the United States", "concerns about the safety and security of those returning to Mexico", "tackling humanitarian concerns," "address[ing] root causes", "providing regional approaches to lawful pathways" for mass migration, and "managing migratory flows at the border, and doing so in a humane way, consistent with the Administration's values." *Id.* 340a-343a. No statutory citations were provided as authority for these considerations because none support them. Rather, the government unlawfully substituted its own partisan political open-borders "values" for the factors that *Congress* intended it to consider, as memorialized in our duly enacted immigration laws.

Similarly, while the government considered at length the needs of illegal aliens for "pathways" and "opportunit[ies] to work in the United States," it did not seriously consider the impact of terminating MPP, and the increase in illegal immigration such termination admittedly will cause, on the employment opportunities and personal safety of American citizens. Instead, the government dismissed these as "marginal costs":

> The fact that some noncitizens might reside in the United States rather than being returned to Mexico and thus access certain services or impose law enforcement costs is not, in the Secretary's view, a sufficiently sound reason to continue MPP. Federal immigration policy virtually always affects the number of people living within the States. Notably, not all of those burdens are borne by border States—many noncitizens proceed to interior States; others are detained by the federal government. In this case, the Secretary has made the judgment that any marginal costs that might have been inflicted on the States as a result of the termination of MPP are outweighed by the other considerations and policy concerns

Id. 317a-318a.

Critically, DHS failed to address adequately the effect that terminating MPP would have on its ability to faithfully execute the immigration laws in a manner that would result in meaningful enforcement outcomes. Rational thinking, requires consideration of how DHS's termination of MPP will affect its ability to meaningfully enforce the 1.2 million administratively final removal orders for aliens already in the United States, or what it will do to enforce the removal orders for the majority of the 1.2 million aliens with cases currently pending in immigration court—a small minority of which will

receive something other than an order of removal if laws are faithfully interpreted and executed. And of course, it would also require meaningful consideration of how DHS plans to enforce the law for the tens of thousands of aliens it releases from the border into the United States each month MPP is not in effect. All these considerations are relevant factors DHS had to consider—but DHS did not.

DHS also failed to quantify either the benefits of MPP to the States, or the law enforcement and other marginal costs that might be inflicted on the States as a result of the termination of MPP. It failed to specify the cited "other considerations and policy concerns" it relied on to dismiss their States' very real concerns, and then to assess and quantify their cost to the States and the citizens of communities used for the resettlement of illegal aliens. But even assuming the immigration laws do not require the government to evaluate its immigration policy decisions through the prism of what is best for American citizens, the government was not "writing on a blank slate" in this case.

Given the evidence that releasing illegal aliens into the United States, as the government has done and continues to promise to do on an unprecedented scale, practically guarantees that they will remain here indefinitely, something more than a general statement of "values" was required to satisfy the "reasoned decision-making" standard. *Regents*, 140 S. Ct. at 1915 (citations omitted); *Michigan*, 576 U.S. at 758.

CONCLUSION

Releasing illegal aliens into the United States practically guarantees that they will remain in the United States indefinitely. MPP addressed this problem by employing the comprehensive statutory framework provided by Congress in a manner that permitted DHS to detain certain illegal aliens, return others to Mexico pending the duration of their removal proceedings, and effectively use other statutory authorities like expedited removal.

The Biden Administration's decision to terminate MPP was not only substantively unlawful, but in failing to consider MPP's benefits and DHS's own available statistics about its ability to faithfully execute the immigration laws, was also egregiously arbitrary and capricious.

The Court should affirm the decision below.

Respectfully submitted,

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APRIL 14, 2022