No. 21A21

In the Supreme Court of the United States

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL.,
Applicants,

v.

STATE OF TEXAS, STATE OF MISSOURI
Respondents.

OPPOSITION TO MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION

Seeking here the extraordinary remedy of a stay pending appeal, the federal government complains that an injunction touching on immigration "imposes a severe and unwarranted burden on Executive authority over immigration policy and foreign affairs," App. 4a, and that the district court's decision would "effectively preclude DHS from" its preferred policy. *Id.* at 37. Neither of these concerns prevented the federal government from acceding to a nationwide injunction against the public-charge rule even after this Court granted review, nor did they keep the federal government from seeking to insulate that decision from judicial review with all its might. *City & Cty. of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 992 F.3d 742, 743 (9th Cir. 2021) (VanDyke, J., dissenting). This Court should give no more weight to the government's protests now.

The Fifth Circuit and the district court got it right as their well-reasoned findings and conclusions amply demonstrate. Though defendants hardly bother to mention it, they request a stay of a permanent injunction supported by a meticulous, 53-page opinion following a full trial on the merits, where they were entitled to introduce whatever evidence they chose. As explained in the court of appeals' similarly thorough 34-page opinion, the district court's decision rests on several "relevant" and "largely uncontested" findings of fact and conclusions of law set forth in

painstaking detail: most relevant here, the district court held that Defendants' termination of the highly effective Migrant Protection Protocols was arbitrary and capricious and further violated the Immigration and Nationality Act in "the[ ] particular circumstances" of this case. App. 18a (citation omitted); *id.* at 4a-5a. And the court of appeals agreed, holding that Defendants had "not come close to showing that it is likely to succeed" on appeal to warrant a stay. *Id.* at 18a, 28a, 32a.

Rightly so. The termination of MPP was unlawful in at least two key ways. *First*, it was arbitrary and capricious. Secretary Mayorkas could not terminate MPP while "fail[ing] to consider [its] main benefits," including "deter[ing] aliens . . . from attempting to illegally cross the border." *Id.* at 80a. DHS even "ignore[ed] its own previous assessment" finding that MPP "demonstrated operational effectiveness." *Id.* at 43a; *id.* at 70a. The Secretary also failed to consider the States' reliance interests or alternative policies within the ambit of MPP. *Second*, terminating MPP caused DHS to systematically violate the mandatory-detention provisions in 8 U.S.C. § 1225. Terminating MPP increased the number of aliens subject to mandatory detention, but DHS "admit[ted] it does not have the capacity to meet its detention obligations under Section 1225." App. 77a. So, "[u]nder *these particular* circumstances, where Defendants cannot meet their detention obligations, terminating MPP necessarily leads to the systemic violation of Section 1225 as aliens are

released into the United States because Defendants are unable to detain them." *Id.* at 78a.

Defendants' irreparable harm showing fares no better. Public reports indicate that the Government in recent weeks has "privately discussed reviving the Trump-era [MPP] policy . . . in order to manage the number of migrants arriving at the border."[1] Defendants' own evidence contradicts claims that re-implementing MPP in good faith will interfere with foreign relations and cause chaos at the border. Any harms Defendants allege arise from their decision to violate federal law—and thus of their own making. Such self-inflicted injuries are the sort of inequitable conduct that precludes a stay, let alone an emergency stay. *Texas v. United States*, 787 F.3d 733, 768 (5th Cir. 2015).[2] This Court should deny Defendants' request for a stay here accordingly.

STATEMENT OF THE CASE

In 2018, an immigration surge caused a "humanitarian and border security crisis," with "severe impacts on U.S. border security and immigration operations." App. 41a. Thousands of inadmissible aliens from Central America crossed the Southern border daily through Mexico and

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[1] Emily Green, *The Biden Admin Is Considering Reviving Trump's 'Remain in Mexico' Policy for Migrants*, VICE (Aug. 18, 2021), https://tinyurl.com/3pexcc4f.

[2] *Accord* STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE 899-903 (10th ed. 2013) (discussing the importance of equitable considerations in this Court's determination of whether a stay is warranted).

claimed asylum upon arrival. *Id.* Most of these claims were without merit, as "only 14 percent of aliens who claimed credible fear of persecution or torture were granted asylum between Fiscal Year 2008 and Fiscal Year 2019." *Id.*

The high volume of "fraudulent asylum claims" and "dramatic increase in illegal migration" made it "harder for the U.S. to devote appropriate resources to individuals who [were] legitimately fleeing persecution." *Id.* (alteration in original). This influx "divert[ed] resources" from legitimate asylum seekers, and illegitimate ones were being released into the interior of the United States, where many disappeared before adjudication of their claims and "simply bec[a]me fugitives." *Id.* (second alteration in original). The influx of illegal aliens imposed non-recoverable costs on the States, including those associated with providing driver's licenses, public education, and healthcare—many of which costs are mandatory and unavoidable, not voluntary. App. 52a-53a. The influx also increased law enforcement and correctional costs, the victimization of migrants by human traffickers, and resultant fiscal and humanitarian harms. *Id.* at 54a.

In response to this ongoing humanitarian crisis, on December 20, 2018, the Trump Administration unilaterally implemented MPP. *Id.* at 2a. Relying on its authority under the INA, 8 U.S.C. § 1225(b)(2)(C), DHS began to return to Mexico tens of thousands of aliens who, though neither nationals nor citizens of Mexico, arrived to the United States

from that country. The United States did so pursuant to federal law, which neither required foreign assistance nor contemplated foreign consent. 8 U.S.C. § 1229a. Mexico subsequently accepted the re-entry of MPP enrollees back within its borders. App. 12a, 31a.

MPP was designed to ensure that "[c]ertain aliens attempting to enter the U.S. illegally or without documentation . . . will no longer be released into the country," only to "fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim." *Id.* at 2a. It proved successful: on October 28, 2019, DHS assessed MPP and found that it "demonstrated operational effectiveness" and "ha[d] been an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system." *Id.* at 43a-44a. DHS reported that it had "observed a connection between MPP implementation and decreasing enforcement actions at the border—including a rapid and substantial decline in apprehensions in those areas where the most amenable aliens have been processed and returned to Mexico pursuant to MPP." *Id.* at 44a.

DHS's investigation explained why. MPP "restor[ed] integrity to the immigration system" because "MPP returnees with meritorious claims [could] be granted relief or protection within months, rather than remaining in limbo for years while awaiting immigration court proceedings in the United States," while "MPP returnees who do not qualify for relief or protection are being quickly removed from the United States."

Id. Thus, "aliens without meritorious claims—which no longer constitute a free ticket into the United States—[were] beginning to voluntarily return home.'" *Id.*; App. 5a, 22a. MPP removed the "perverse incentives" created by allowing "those with nonmeritorious claims . . . [to] remain in the country for lengthy periods of time." *Id.* at 22a (alterations in original).

On Inauguration Day, January 20, 2021, the Biden Administration indefinitely suspended further enrollments in MPP in a two-sentence, three-line memorandum. *Id.* at 36a. Enforcement encounters on the southern border immediately skyrocketed, climbing from 75,000 in January, to 173,000 in April, nearly 189,000 in June, and over 210,000 in July. *Id.* at 51a-52a. This amplified the ongoing border crisis into an outright disaster, emboldening criminal cartels and human traffickers who prey on vulnerable migrants. *Id.* at 54a.

On April 13, 2021, Texas and Missouri challenged DHS's suspension of MPP, alleging that the suspension of the program violated the APA and the INA. *Id.* at 4a. The States moved for a preliminary injunction, but before briefing was concluded, DHS issued a new memorandum (the "June 1 Memorandum") that permanently terminated MPP. *Id.* The June 1 Memorandum failed to discuss any of the following: MPP's role in discouraging illegal border crossings; DHS's own favorable October 28, 2019 assessment of MPP; the States' reliance interests in maintain-

ing MPP; the fact that MPP had allowed DHS to avoid violating its detention obligations under Section 1225 of the INA for tens of thousands of unlawful aliens; or any alternatives less burdensome on the States other than terminating MPP altogether. App. 89a-95a.

The States promptly amended their complaint to challenge the June 1 Memorandum. *Id.* at 36a. The parties agreed to consolidate the preliminary injunction hearing with a trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2). App. 4a. After a bench trial, the district court concluded that the States "are entitled to relief on their APA and statutory claims against Defendants," and vacated the June 1 Memorandum. *Id.* at 35a, 86a. The district court also "craft[ed] injunctive relief to ensure Plaintiffs receive a full remedy" because, as the district court found, an injunction would have "meaningful practical effect independent of . . . vacatur." *Id.* at 35a, 85a-86a (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010)). The district court specifically ordered the Secretary and DHS "to enforce and implement MPP *in good faith* until such a time as it has been lawfully rescinded in compliance with the APA **and** until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section 1255 without releasing any aliens *because of* a lack of detention resources." App. 86a (emphasis in original).

Defendants appealed. *Id.* at 6a. The district court initially granted Defendants seven days to seek emergency relief on appeal, but denied

an additional stay. *Id.* The court of appeals likewise denied a stay for multiple reasons, including that Defendants: (1) had "not come close to a 'strong showing' that [they are] likely to succeed on the merits"; (2) had "not shown that [they] will be irreparably injured absent a stay pending appeal"; and that (3) "[t]he final two *Nken* factors [did] not warrant a stay." *Id.* at 28a (referencing *Nken v. Holder*, 556 U.S. 418 (2009)); *id.* at 32a. The court of appeals also expedited the appeal for consideration before the next available oral argument panel. *Id.* at 34a. The parties have since agreed to a briefing schedule that will conclude merits briefing in the Fifth Circuit in early October, and that court has tentatively scheduled argument for the first week in November.

Defendants nevertheless apply for an emergency stay pending appeal from this Court.

ARGUMENT

"Stays pending appeal to this Court are granted only in extraordinary circumstances." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). "A lower court judgment, entered by a tribunal that was closer to the facts . . . is entitled to a presumption of validity." *Id.* This Court will grant a stay pending appeal only where the applicant demonstrates (1) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"; (2) "a fair prospect that a majority of the Court will conclude that the decision be-

low was erroneous"; and (3) "a likelihood that irreparable harm will result from the denial of a stay." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers). Yet "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 961 (2009) (per curiam). Additionally, "in a close case it may be appropriate to balance the equities, to assess the relative harms to the parties, as well as the interests of the public at large." *Id.* (quotation marks omitted). Defendants fail to meet this daunting standard at every turn.

I. Defendants Are Unlikely To Succeed on the Merits Because They Violated Federal Law.

Defendants cannot show either that there is "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" or that there is "a fair prospect that a majority of the Court will conclude that the decision below was erroneous," *Conkright*, 556 U.S. at 1402, for the same reason: they are wrong on the merits.

Defendants' jurisdictional objections are without basis: as the district court's findings clearly reveal, the States suffer concrete, remediable injuries that demonstrate standing, and the rescission of the June 1 Memorandum is subject to judicial review. And on the merits, the June 1 Memorandum was arbitrary and capricious due to a host of procedural defects, and contrary to law because it leads directly to defendants' der-

eliction of statutorily required duties. Defendants simply refuse to engage with—much less refute—the district court's extensive factual findings, which "are subject to review only for clear error." *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) (citing FED. R. CIV. P. 52(a)(6)).

A. Defendants cannot escape judicial review of their unlawful agency action.

Defendants provide several reasons why they believe the Court should avoid the merits claims, each of which has been rejected by both the district court and the court of appeals. These twice-rejected arguments are no more meritorious for the repetition.

1. The States have standing.

Defendants first assert (at 16-17) that the States lack standing because the States failed to carry their evidentiary burden in the district court. To the extent Defendants press this issue, it surely is unworthy of certiorari, and is little more than an attempt to evade clear-error review. But Defendants are in any event mistaken.

Defendants focus (at 16-17) criticize the States' reliance on the increased costs they would suffer through issuing drivers' licenses, alleging this fails to confer standing. This is sufficient. *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). But even if it were not, this was far from the States' only demonstrated injury. To the contrary, the district court found that

the States had standing based on costs associated with (1) driver's licenses, (2) education, (3) healthcare, and (4) law enforcement and corrections. App. 52a-55a.

The court of appeals acknowledged as much; as it explained, the district court found "eight facts central to the standing issue" that were (and remain essentially) "uncontested," including: (1) "'aliens present in Texas because of MPP's termination would apply for driver's licenses,'" *Id.* at 8a; (2) "'[s]ome school-age child aliens who would have otherwise been enrolled in MPP are being releases or paroled into the United States,'" *id.* at 9a; (3) "[s]ome aliens who would otherwise have been enrolled in MPP . . . will use state-funded healthcare services or benefits," *id.*, and (4) yet others will "'commit crimes in Texas," *id.* The record supports that each of these facts will impose additional costs on the States. *Id.* at 7a-9a. The Fifth Circuit noted that "[t]he Government does not challenge *any* of these findings," which would in any event not be "clearly erroneous in light of the record as a whole." *Id.* at 9a.

Even now, Defendants challenge only one of these findings—related to driver's licenses—and that halfheartedly. That alone is enough to dispense with their argument that the States lack standing. But Defendants do not establish clear error even as to the costs associated with driver's licenses. Their complaint (at 16) that the States "submitted no evidence that they incurred any additional costs after MPP enrollments

dramatically declined" fails to clear the high bar set by clear-error review. Instead, it reflects a difference of opinion with the district court's findings of fact. The Northern District *of Texas* found that driving is a practical necessity *in Texas* and that some aliens present in Texas because of the MPP's termination would apply for driver's licenses, increasing costs to the State. App. 53a. "If the district court's view of the evidence is plausible in light of the entire record, an appellate court may not reverse even if it is convinced that it would have weighed the evidence differently in the first instance." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021). This is doubly true where, as here, Defendants request the extraordinary relief of an injunction pending appeal.

Defendants' contention (at 17) that the States' harms are self-inflicted because they provide certain benefits to aliens likewise fails. Even assuming Defendants have elected to provide certain benefits to aliens, this ignores that the States lack discretion under this Court's precedent to deny aliens access to free and public education. *See Plyler v. Doe*, 457 U.S. 202, 230 (1982). The States cannot be said to have created their own harm by complying with this Court's precedents establishing an obligation to provide benefits, such as education, on illegally present individuals. Nor can States simply ignore the effects of increased crime within their borders. As a result, the States' costs from incarcerating criminal aliens are not "self-inflicted" in any meaningful sense.

2. The June 1 Memorandum is reviewable.

Defendants next assert that the June 1 Memorandum is unreviewable because (at 17-19) the Secretary's decision was "committed to agency discretion" and because (at 19-20) review is barred by 8 U.S.C. §1252(f). Neither is correct.

a. Defendants assert, citing *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993), that the June 1 Memorandum (and accompanying rescission of the MPP) is unreviewable because it is committed to agency discretion. In particular, they rely on 8 U.S.C. § 1225(b)(2)(c)'s statement that the Secretary "may return" certain aliens to contiguous territory.

Defendants' argument inverts the APA's "basic presumption of judicial review." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (cleaned up). "To honor the presumption of review," this Court has read section 701(a)(2) "quite narrowly, confining it to those rare administrative decisions traditionally left to agency discretion." *Id.* These limited categories include: (1) a "decision not to institute enforcement proceedings," *Regents*, 140 S. Ct. at 1905 (citing *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985)); (2) "a decision not to reconsider a final action," *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (citing *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987)); (3) "a decision . . . to terminate an employee in the interests of national security," *Lincoln*, 508 U.S. at 192 (citing *Webster v. Doe*, 486

U.S. 592, 599-601 (1988)); and (4) "[t]he allocation of funds from a lump-sum appropriation," *Lincoln*, 508 U.S. at 192. None of those apply here.

And while this Court also acknowledges certain decisions cannot be reviewed in the "rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Weyerhaeuser*, 139 S. Ct. at 370, this Court has readily outlined key principles by which to measure Defendants' administrative actions. Here, Defendants failed to comply with the APA in multiple respects, and, as the court of appeals explained, Section 1225 includes provisions restraining DHS's discretion. App. 17a.

Moreover, Defendants conflate the exercise of ordinary discretion—which can be "set aside" if "abuse[d]," 5 U.S.C. § 706(2)(A)—with unreviewable agency action "committed to agency discretion by law." *Id.* § 701(a)(2); *see Weyerhaeuser*, 139 S. Ct. at 370. When Congress wants to grant "sole and unreviewable discretion," it knows how, as it did elsewhere in Section 1225. 8 U.S.C. § 1225(b)(1)(A)(iii)(I).

Defendants conflate ordinary discretion—such as through the use of "may" in Section 1225(b)(2)(C)—with this greater, unreviewable discretion. In the norm, as here, agency action can be set aside "if it [is] made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis." *Wong Wing Hang v. INS*, 360 F.2d 715, 718 (2d Cir. 1966). As it can when an agency fails to account for reliance interests, or when it fails to consider less-disruptive policies

when changing course. *Regents*, 140 S. Ct. at 1913-15. The mere presence of some discretion does not render decisions unreviewable. *E.g.*, *Regents*, 140 S. Ct. at 1905-07. Even if the statute "leave[s] much to the Secretary's discretion," it "do[es] not leave his discretion unbounded." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019). As the court of appeals recognized, section 1225 includes provisions restraining DHS in this case. App. 17a (collecting citations constraining DHS's discretion). Put simply, this is not a "case in which there is no law to apply." *Dep't of Commerce*, 139 S. Ct. at 2569 (quotation omitted).

b. Defendants further contend (at 19-20) that 8 U.S.C. § 1252(f)(1) prohibits the district court's injunction. It is true that "Congress stripped all courts, save for [this] Court, of jurisdiction to enjoin or restrain the operation of 8 U.S.C. §§ 1221-1232 on a class-wide basis." *Hamama v. Adducci*, 946 F.3d 875, 877 (6th Cir. 2020). But the States do not seek to enjoin operation of those portions of the INA: quite the opposite. The States seek to require DHS to follow law that it would prefer to ignore. "Congress rarely intends to prevent courts from enforcing its directives to federal agencies. For that reason, this Court applies a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (citation and internal quotation marks omitted).

Defendants assert that this reasoning was rejected by two Justices concurring in *Nielsen v. Preap*, 139 S. Ct. 954, 975 (2019) (plurality op.).

They are again mistaken. *First*, this Court expressly declined to reach this issue in *Preap*. *Id.* at 962 ("Did the *Preap* court overstep this limit by granting injunctive relief for a class of aliens that includes some who have not yet faced—but merely 'will face'—mandatory detention? The District Court said no, but we need not decide."). Second, the plaintiffs in *Preap* sought to prevent DHS from enforcing a statute mandating that "[t]he Attorney General shall take into custody" certain classes of aliens that this Court has collectively referred to "as 'criminal aliens'" on a classwide basis. *Id.* at 960.

The States seek the opposite. Rather than challenging the application of mandatory provisions of the INA, the States here challenge the June 1 Memorandum as arbitrary and capricious, and seek enforcement of the INA's mandatory provisions.[3] This is not a challenge to "enjoin or restrain the operation of the provisions of part IV of this subchapter," 8 U.S.C. § 1252(f)(1), but rather a challenge to the June 1 Memorandum in order to vindicate those provisions' enforcement. Insofar as that re-

[3] As detailed, *infra* 25-26, the States have not and do not contend that Defendants have no choice but to either detain or return aliens to contiguous territory under Section 1225. Defendants may parole an alien into the United States "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). They also "may release" an alien arrested on a warrant and detained "pending a decision on whether the alien is to be removed from the United States" "on bond" or "conditional parole." 8 U.S.C. § 1226(a).

sults in Defendants *complying with* their statutory obligations, the injunction plainly does not "restrain the operations" of the INA.[4] *Id.* For these reasons, the Court should reject defendants' continued insistence that federal courts lack jurisdiction over this dispute.

B. The June 1 Memorandum is arbitrary and capricious.

The federal government is also wrong on the merits. "The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained," *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021), which implies a host of procedural obligations. Courts must ensure "the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.* The agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). It must consider the reliance interests of those affected by the regulation, *Regents*, 140 S. Ct. at 1913-15, must consider less-disruptive policies in the light of those interests.

[4] Even assuming the district court lacked the authority to issue an injunction (which it did not), section 1252(f) provides no ground for staying the judgment pending resolution of the Fifth Circuit's highly accelerated appeal. *See Preap*, 139 S. Ct. at 962 (2019)

Id. The Agency may not offer pretextual or *post hoc* explanations of its actions. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Both the district court (App. 68a-76a) and the court of appeals (*id.* at 18a-27a) concluded that the June 1 Memorandum was arbitrary and capricious because it violated several of these commands. The district court found that the June 1 Memorandum was arbitrary and capricious because the agency failed to consider the benefits of MPP, relied on reasons for terminating MPP that were arbitrary, and failed to consider the effect terminating MPP would have on DHS's ability to detain aliens subject to mandatory detention. The court of appeals affirmed, concluding that "the Secretary failed to consider several relevant factors and important aspects of the problem." *Id.* at 19a (cleaned up). These included "(a) the States' legitimate reliance interests, (b) MPP's benefits, (c) potential alternatives to MPP, and (d) [section] 1225's implications." *Id.*

1. The June 1 Memorandum failed to consider MPP's benefits.

In October 2019, DHS itself concluded that asylum applicants "with non-meritorious claims often remain in the country for lengthy periods of time," creating "perverse incentives." App. 46a (citing AR 687). After implementing MPP, DHS determined "'aliens without meritorious claims—which no longer constitute[d] a free ticket into the United States—[were] beginning to voluntarily return home." *Id.* at 70a (citing

AR 687). The district court made findings of fact—reviewable only for clear error—on these issues. *Id.* at 44a-46a. And as the district court concluded, "[t]he June 1 Memorandum never once mentions these benefits." *Id.* at 70a. It also explained that these benefits were a "cornerstone" of DHS's prior immigration policy. *Id.* at 46a.

As the court of appeals further explained, the Secretary did not mention, let alone meaningfully discuss these findings. *Id.* at 22a. This fails to comply with the APA. When an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy" it must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* "It would be arbitrary or capricious to ignore such matters." *Id.*

Defendants assert (at 28) that, because the June 1 Memorandum suggests "the same problems would be addressed by using a different mix of policy tools," the district court's "finding simply displaced the Secretary's policy judgment." But even assuming (contrary to both the district court and court of appeals) that the June 1 Memorandum does suggest other policy options might better address the problem, that conclu-

sion does not relieve the Secretary of the obligation to provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC*, 556 U.S. at 515. The June 1 Memorandum does not expressly mention, let alone discuss, the benefits of the prior policy.

Even further assuming that the June 1 Memorandum does vaguely reflect consideration of the benefits of MPP, it is not enough to simply state *ipse dixit* that an agency considered an issue. *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986); *see also Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020); *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010); *Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002). DHS may not simply say that it considered the issue. It must actually do so. Here, under any telling, it did not.

2. The June 1 Memorandum reached arbitrary conclusions.

The June 1 Memorandum did arbitrarily rely on the alleged "high percentage of cases completed through the entry of *in absentia* removal orders" associated with MPP—specifically 44%. App. 72a-74a. The June 1 Memorandum explains only that this "raises questions . . . about the design and operation of the program." *Id.* at 92a. The district court noted two defects in this analysis. *First*, the district court concluded that this analysis reaches no policy conclusion at all. *Id.* at 73a-74a (quoting *State Farm*, 463 U.S. at 52). *Second*, the district court concluded that DHS's own data suggest comparable *in absentia* removal rates before MPP's

implementation. *Id.* at 74a. Thus, the June 1 Memorandum did not conclude that 44% was a high rate of *in absentia* removal, whether MPP was the cause, and if so whether that meant the MPP performed as intended. *Id.* at 74a-75a.

To be sure, as Defendants contend (at 30) the Secretary was not required to perform an in-depth empirical analysis. Nonetheless, the agency must "examine the relevant data and articulate a satisfactory explanation for its actions including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (quotation omitted). And the agency must address the statistics that are in the record. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (holding "an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice") (cleaned up). By failing to explain whether a 44% *in absentia* removal rate was high, how it compared to *in absentia* removal rates outside the MPP, or whether a 44% removal rate meant that the program was working effectively, the June 1 Memorandum was arbitrary and capricious.

3. The June 1 Memorandum failed to consider the States' reliance interests.

As both the district court (App. 71a-72a) and court of appeals (*id.* 20a-22a), concluded, the June 1 Memorandum was arbitrary and capricious for failing to consider the States' reliance interests. Defendants

contend (at 31) that the Secretary "expressly considered the effects of the rescission 'on border management and border communities, among other potential stakeholders.'" But as the court of appeals explained, "[i]n its seven-page June 1 Memorandum, DHS does not directly mention any reliance interests, especially those of the States." App. 20a. More troubling is that the June 1 Memorandum failed to consider these interests even after Texas and Missouri provided notice to the Secretary through the original complaint filed much earlier. *Id.* at 35a (explaining that the States originally challenged DHS's January 20 unreasoned suspension of MPP). To mention the interests of "border communities," "nongovernmental organizations," and "local officials in border communities," *id.* at 93a, is not to consider the reliance interests of States.

Defendants further contend (at 30) that the States "have not shown that they took any actions in reliance on the MPP." This argument conflicts with the district court's findings and is foreclosed by this Court's opinion in *Regents*. *First*, the district court found that the "termination of the MPP has and will continue to increase the number of aliens being released into the United States." App. 51a. The district court also discussed in detail the agreement between DHS and Texas that would give Texas "an opportunity to consult and comment on" proposed actions related to immigration enforcement. *Id.* at 47a-48a. While the district court did not pass on the States' claims related to this agreement, the agreement shows that both Texas and DHS were aware that the State had

significant reliance interests in federal enforcement of congressionally mandated immigration policies.

Second, even setting the district court's extensive factual findings to one side, this Court's opinion in *Regents* required DHS to consider reliance interests, including States' reliance interests. 140 S. Ct. at 1914. The Deferred Action for Childhood Arrivals program was a discretionary program, like MPP. *Id.* at 1910. But this Court nonetheless explained that "[w]hen an agency changes course, . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Id.* at 1913. And this Court described contentions by States and local governments that they "could lose $1.25 billion in tax revenue each year" as "not necessarily dispositive" but "certainly noteworthy concerns." *Id.* at 1914. "Because DHS was not writing on a blank slate, it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* at 1915. Here, DHS simply did not consider the States' reliance interests, rendering the June 1 Memorandum arbitrary and capricious.

4. The June 1 Memorandum failed to consider alternatives within the ambit of MPP.

The lower courts correctly held that June 1 Memorandum is also arbitrary and capricious for failing to address alternatives to terminating the MPP. *See* App. 24a. "[W]hen an agency rescinds a prior policy[,] its

reasoned analysis must consider the alternatives that are within the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913 (quotation omitted). The June 1 Memorandum addressed modifications to the MPP in only one conclusory sentence: "I also considered whether the program could be modified in some fashion, but I believe that addressing the deficiencies identified in my review would require a total redesign that would involve significant additional investments in personnel and resources." App. 93a.

While DHS need not have considered "all policy alternatives," *Regents*, 140 S. Ct. at 1914 (quoting *State Farm*, 463 U.S. at 51), it nonetheless was required to "consider alternatives that [were] within the ambit of the existing policy." *Id.* at 1913. Merely stating that these alternatives were considered was not enough. *See, supra*, 19-21. And as the court of appeals recognized, the alternative policies that DHS claims it considered are outside the ambit of MPP. App. 24a.

5. The June 1 Memorandum failed to consider the effect of rescission on its compliance with Section 1225.

Finally, the district court also concluded that the June 1 Memorandum was arbitrary and capricious because it failed to consider the rescission's impact on DHS's obligations to detain certain aliens under Section 1225. *Id.* at 75a-76a. As discussed in more detail below, that conclusion was also correct.

C. The June 1 Memorandum caused systematic violations of Section 1225.

The district concluded that "Section 1225 provides the government two options vis-à-vis aliens seeking asylum: (1) mandatory detention; or (2) return to a contiguous territory." App. 77a. "Failing to detain or return aliens pending their immigration proceedings violates Section 1225." *Id.* "Under *these particular* circumstances, where Defendants cannot meet their detention obligations, terminating MPP necessarily leads to the systemic violation of Section 1225." *Id.* at 78a. Put simply, "aliens are released into the United States because Defendants are unable to detain them." *Id.*

The district court was not blind to other alternatives, as Defendants suggest. It further concluded that parole is an alternative, "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." *Id.* (quoting 8 U.S.C. § 1182(d)(5)(A)). The federal government may also, as the district court recognized, release certain aliens on "bond" or "conditional parole." 8 U.S.C. § 1226(a)(2).

The district court was correct to conclude that, in general, the statutory scheme requires detention. If an alien subject to expedited removal lacks credible fear of persecution, the alien can invoke further administrative proceedings but "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). Even if the officer

determines that the "alien has a credible fear of persecution . . . the alien shall be detained for further consideration of the application for asylum." *Id.* § 1225(b)(1)(B)(ii).

For aliens not going through expedited removal (that is, aliens given a Notice to Appear), the INA typically mandates detention: "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for" removal proceedings. *Id.* § 1225(b)(2)(A). The INA *does* give the federal government an alternative choice if the alien "is arriving on land . . . from a foreign territory contiguous to the United States"—namely, the government "may return the alien to that territory pending" asylum proceedings. *Id.* § 1225(b)(2)(C).

The States do not, and have never, contended that this scheme mandates MPP. The second option—under section 1225(b)(2)(C))—is *optional*. *See* 8 U.S.C. § 1225(b)(2)(C) (providing that the federal government "may return the alien to that territory"). The federal government can always choose the first option: detention. And the States recognize that Defendants may grant parole on a case-by-case basis for urgent humanitarian reasons or release certain aliens on bond or conditional parole.

Defendants assert (at 21) that the district court's conclusion was "egregiously mistaken" and insist (at 23) that the "implications of the

district court's interpretation of Section 1225 are staggering," essentially because DHS lacks resources to detain all aliens covered by Section 1225, and prior administrations have not sought to detain all such aliens.

But what Defendants fail to do, as the court of appeals explained, is point to statutory authority to "simply release every alien described in section 1225 *en masse* into the United States." App. 29a. Indeed, by enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress "specifically narrowed the executive's discretion" to grant parole due to the "concern that parole . . . was being used by the executive to circumvent congressionally established immigration policy." *Cruz-Miguel v. Holder*, 650 F.3d 189, 199 & n.15 (2d Cir. 2011). Relying on many of their own documents, this is exactly what the district court found that Defendants are doing. *See, e.g.*, App. 77a & n.11.

Thus, one reason that there are so many aliens requiring detention (or, purportedly, in need of parole) is Defendants' suspension of the MPP. In these circumstances, the district court properly found that Defendants' suspension of MPP is causing their ongoing violation of Section 1225. *Id.* at 76a-78a. Absent termination of MPP, many fewer aliens would be (unlawfully) paroled into the United States simply because Defendants purport to lack resources to detain them. *Id.* at 77a-78a.

II. The Remaining Factors Do Not Favor a Stay.

Defendants cannot satisfy the remaining stay factors because they have no cognizable interest in continuing to violate federal law, whatever harm they may suffer is self-inflicted, and there is no public interest in failing to enforce federal immigration laws or in perpetuating unlawful agency action. And the public interest—which the Government does not discuss—favors restoring a powerful tool to address the massive humanitarian crisis and tragedy unfolding at the border.

A. It is the States, not Defendants, who have established they will suffer irreparable harm.

Where, as here, "the lower court has already performed th[e] task" of determining the parties' respective harms "in ruling on a stay application, its decision is entitled to weight and should not lightly be disturbed." *Williams v. Zbaraz*, 442 U.S. 1309, 1312 (1979) (Stevens, J., in chambers).

Before the district court, it was the States—not Defendants—that "show[ed] . . . they are suffering ongoing and future injuries as a result of the termination of MPP." App. 83a-84a. The court of appeals agreed, *id.* at 32a, finding this "largely uncontested," *id.* at 5a. Thus, this portion in the two lower courts' almost ninety combined pages of "thorough analysis" "warrant respect." *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3, 5 (2019) (Sotomayor, J., dissenting from grant of stay).

Defendants' principal claim of irreparable injury (at 35) is that the district court's injunction supposedly "dictates the United States' foreign policy" by requiring it "to immediately negotiate with Mexico" about MPP's reinstatement. Citing declarations of David Shahoulian and Ricardo Zuniga that were first submitted at the *stay* stage—after the district court's final judgment following a bench trial—Defendants argue (at 35-36) that the injunction "effectively dictat[es] the content of the United States' negotiations with foreign sovereigns." This argument has no merit.

First, whatever the merit of Defendants' evidence submitted post-judgment, the evidence they submitted *at trial* failed to substantiate these allegations. Mr. Shahoulian's earlier declaration submitted at trial, Ex. C, provided no concrete evidence of diplomatic interference from restoring MPP, but instead spoke vaguely of "a close, delicate, and dynamic conversation" on immigration issues, *id.* ¶ 2; an ill-defined need "to react and adjust their policy and operational responses as necessary," *id.* ¶ 5; a vague desire to "work together to look for more robust regional solutions to manage migration," *id.* ¶ 15; and a lofty allusion to "delicate bilateral (and multilateral) discussions and negotiations," *id.* ¶ 16. Likewise, the State Department's declaration submitted at trial, Ex. B, relied on vague invocations of "long-term strategic partnerships," *id.* ¶ 4; "focus[ing] energy and resources on collective action," *id.* ¶ 7;

"address[ing] root causes" of issues at the border, *id.* ¶ 12; and improving "bilateral relationships" with countries south of the border, *id.* ¶ 10.

But other than stating that Mexico approved the shut-down of a migrant camp in Mexico where migrants faced violence and sexual abuse, *id.* ¶ 15—an allegation that supports *the States'* claims here—neither timely submitted declaration alleged that Mexico opposed the initiation of MPP, refused to cooperate in its implementation, or lobbied for its termination. Indeed, notably absent from DHS's trial evidence was any specific allegation that Mexico requested the termination of MPP at any point, that Mexico would be unwilling to cooperate in re-implementing MPP, or that MPP would somehow disrupt other diplomatic efforts to address illegal immigration. *See* Ex. B; Ex C.

On the contrary, to the extent it addressed the question at all, DHS's trial evidence (correctly) portrayed Mexico as a willing participant in MPP and conceded that the cancellation of MPP was a unilateral decision of the Biden Administration. DHS admitted that, "[s]hortly after the DHS announcement" of MPP, Mexico promptly "committed to a number of steps that were important to the functioning of MPP." Ex. C ¶ 5. DHS conceded that "[a]fter MPP was initiated, the United States and Mexico coordinated closely in response to changing conditions" in implementing MPP. *Id.* ¶ 6. DHS's evidence emphasized that the decision to terminate MPP came from President Biden and DHS alone, not

from the Mexican government. *See id.* ¶ 10 (noting that MPP was cancelled, not because of Mexican objections, but because "the Department would like to now devote" diplomatic resources "to other strategic initiatives"). Defendants cite no trial evidence to challenge any of the district court's factual findings on these points as clearly erroneous—because none exists.

The stay-stage declarations of Mr. Shahoulian and Mr. Zuniga, which Defendants cite here, fare no better. The August 16 declaration of Mr. Shahoulian addresses the diplomatic relationship with Mexico only to argue that MPP's "entire infrastructure" cannot be reestablished "within seven days." App. 102a. As the court of appeals held, that argument is a "strawman." *Id.* at 28a. The district court's order requires DHS to reimplement MPP "in good faith," not "overnight." *Id.* Other than that, Mr. Shahoulian merely speculates that re-implementing MPP "*may* complicate foreign relations with Mexico now and in the future." *Id.* at 104a (emphasis added). This speculative statement is a far cry from the Government's predictions (at 35-36) of imminent diplomatic chaos.

Likewise, Mr. Zuniga's post-judgment declaration discusses at length the Administration's efforts to address so-called "irregular migration" through other policies, App. 116a-121a, but it never explains how reimplementing MPP would interfere with any of those other diplomatic efforts. Similarly, Mr. Zuniga correctly portrays Mexico as a

willing partner in implementing MPP, *see id.* at 121a-22a. Other than these statements, Mr. Zuniga merely argues that implementing MPP "immediate[ly]" and "hastily," without "appropriate humanitarian safeguards," would "negatively and impact U.S.-Mexico bilateral relations." *Id.* at 122a-24a. But the district court did not require DHS to re-implement MPP "hastily" or recklessly, but to do so "in good faith." Neither declaration provides any specific explanation of how re-implementing MPP will interfere with any other diplomatic efforts to address illegal migration.

The simplest course for this Court is to defer to the district court's fact findings: "The United States initiated MPP unilaterally," and "nothing prevents DHS from refusing to admit asylum applicants at ports of entry" without "Mexico's cooperation." App. 83a n.15.

Moreover, Defendants' invocation of vague concerns of potential inference with foreign relations to avoid complying with the APA and the INA proves far too much. As Defendants themselves argue, implementing virtually any significant immigration policy may have collateral consequences for foreign relations. But the Government may not use such foreign-policy implications as a blank check to avoid complying with the law—including the APA and the INA. *See Massachusetts v. EPA*, 549 U.S. 497, 534 (2007) ("[W]hile the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws."). After all, the APA's "foreign affairs" exception relieves

the Executive Branch only of certain notice-and-comment obligations, not all its other legal obligations. 5 U.S.C. § 553(a)(1).

Defendants also argue repeatedly that the district court's injunction supposedly forces them to re-implement MPP "precipitously," "abruptly," "within hours," and "on a highly compressed timeline." App. 4, 6, 12, 37; *see also id.* at 11, 35, 38. Again, as the court of appeals explained, "[t]his is a strawman" because "[t]he district court did not order the Government to restore MPP's infrastructure overnight." *Id.* at 28a. Rather, "[i]t ordered that, once the injunction takes effect . . . , DHS must 'enforce and implement MPP *in good faith*.'" *Id.* And the Government does not (and cannot) "argue that good faith is an unreasonably high standard to meet." *Id.*

For the same reasons, Defendants' argument "an *abrupt* restart" to MPP "would also threaten chaos at the border," Appl. 38 (emphasis added), is a "strawman," App. 28a. Implementing MPP "in good faith" does not require DHS to create "chaos at the border." On the contrary, in light of the unprecedented border crisis that has unfolded in seven months since DHS *suspended* MPP, the Government's argument that *re-implementing* MPP will cause "chaos" and a "humanitarian . . . emergency" at the border (at 2, 38) rings particularly hollow. As Defendants have apparently admitted in private, Green, *supra* n.1, the humanitarian emergency at the border is occurring *now*, and it has continued to escalate since MPP's suspension in January, with hundreds of thousands of

illegal crossings per month, a massive explosion in cartel activity and human trafficking of migrants, disruption of border communities, and many other evils—with no signs of slacking. DHS determined in 2019, and the district court found, that MPP provides an "indispensable tool" to *alleviate* this humanitarian crisis. App. 44a. It is Defendants' argument (at 39) that is "hard to take seriously."

Defendants further argue (at 6, 38) that the district court's injunction will be disruptive. The lower courts have already soundly rejected similar claims and evidence. The district court found—and the court of appeals agreed—that such "problems are entirely self-inflicted[,]" App. 81a, "and therefore do not count." *Id.* at 29a-30a (citing 11A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2021) ("[A] party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted")); *see also, e.g.*, *Second City Music, Inc. v. City of Chicago, Ill.*, 333 F.3d 846, 850 (7th Cir. 2003) (Easterbrook, J.). This Court too should give no weight to Defendants' assertion of "self-inflicted" injuries. *Pennsylvania v. New Jersey*, 426 U.S. 660, 667 (1976) (per curiam) (holding that "no [party] can be heard to complain about damages inflicted by its own hand") (quotation marks omitted).

Even if Defendants will suffer some harm absent a stay, such harm was entirely avoidable. *See* App. 30a-31a; *see also S.F. Real Est. Invs. v. Real Est. Inv.. Tr. of Am.*, 692 F.2d 814, 818 (1st Cir. 1982) (Breyer,

J.) ("Under these circumstances, any 'harm' caused . . . would seem largely self-inflicted; it was not only not irreparable . . . , but entirely avoidable."). Defendants "could have avoided" these problems "by delaying preparatory work until the litigation was resolved." App. 81a (quoting *Texas*, 809 F.3d at 187, *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016)). Or they "could have avoided" any disruptions "by informing Mexico that termination of MPP would be subject to judicial review until the litigation was resolved." *Id.* "Mexico is capable of understanding that DHS is required to follow the laws of the United States which include the APA and INA." *Id.*

Insofar as Defendants claim disruption because MPP had been in the process of termination for "months" since January (at 38) that establishes only that the June 1 Memorandum was a "*post hoc*" rationalization "for a decision that was already made," which does not reflect good faith (and would itself be arbitrary and capricious under the APA). App. 30a-33a, 82a.[5] Such inequitable conduct defeats Defendants' re-

[5] In the district court, Defendants effectively admitted that they began terminating and winding down MPP long *before* DHS announced its termination on June 1, 2021. *See* ECF No. 70, at 8 (stating that "new initiatives" to replace MPP have been "in place for nearly six months"); *id.* at 10-11 (hailing the "wind-down of MPP" that began in January 2021); *id.* at 11 (citing, in July, "more than four months of diplomatic and programmatic engagement" focused on terminating MPP); *see also* Ex.

quest for an equitable stay pending further proceedings. *Id.* at 31a (citing *In re GGW Brands, LLC*, No. 2:13-bk-15130, 2013 WL 6906375, at *26-*27 (Bankr. C.D. Cal. Nov. 15, 2013)); *accord Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814-15 (1945); Shapiro, *supra* n.2, at 899-903.

Defendants claim (at 11) that they cannot restart MPP without "securing cooperation from the Government of Mexico[.]" But, as noted above, "MPP was adopted and launched unilaterally, just as it was later terminated unilaterally." App. 83a; *id.* at 2a, 31a. The United States only obtained Mexico's agreement to permit entry of MPP enrollees back into Mexico after the fact. App. 2a. Defendants do not maintain that Mexico has withdrawn that consent. *Id.* at 12a, 31a. "And even if Mexico's cooperation may be required to return an alien who has already been admitted, nothing prevents DHS from refusing to admit asylum applicants at ports of entry in the first place—before they ever enter the United States." *Id.* at 83a.

Finally, Defendants suggest (at 34) that they will suffer irreparable harm because they believe the Secretary's determination was lawful, which conflates the irreparable-harm and merits inquiries of the stay analysis. *See Ind. State Police*, 556 U.S. at 960. In any event, the June 1

B, at ¶ 16 (alluding to Mexico's participation in "the wind-down process [for MPP] *since February*") (emphasis added).

Memorandum was arbitrary and capricious under the APA, and contrary to DHS's obligations under the INA, for the reasons discussed above.

B. The balance of the equities and the public interest favor the States.

For the reasons stated above, this is not "a close case," *id.*, so the Court need not reach the balancing of equities, the relative harms, and the public interest. But if it does, these additional factors weigh overwhelmingly against granting a stay.

The balance of the equities and public interest favor enforcing federal law, not implementing an unlawful memorandum. The lower courts correctly found that Defendants have "no public interest in the perpetuation of unlawful agency action." App. 32a; *id.* at 84a (quoting *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)). But there is a "public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *Id.* (quoting *Washington v. Reno*, 35 F.3d 1093, 1102 (6th Cir. 1994)). Moreover, "the public has an interest in stemming the flow of illegal immigration." App. 84a (citing *United States v. Escobar*, No. 2:17-CR-529, 2017 WL 5749620 at *2 (S.D. Tex. Nov. 28, 2017) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976))). "And the public has interest in the enforcement of immigration laws, including Section 1225." *Id.* (citing Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115, 100

Stat. 3359, 3384 (1986) ("[T]he immigration laws of the United States should be enforced vigorously and uniformly.")).

Defendants' arguments to the contrary lack merit. *First*, Defendants suggests (at 40) that the balance of harms always favors the federal government in immigration cases. Not so. Stays are not warranted in immigration cases when the federal government is refusing to perform its obligations under the APA or immigration laws duly enacted by Congress. *See Texas*, 787 F.3d at 769. To be sure, when a federal court prevents the Executive Branch from *enforcing* the nation's immigration laws, a stay may be appropriate. *See, e.g.*, *Wolf v. Innovation L. Lab*, 140 S. Ct. 1564 (2020); *Innovation L. Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019). But here, Defendants are violating, not enforcing, federal immigration law. App. 76a-78a. "There is always a public interest in prompt" enforcement of the immigration laws. *Nken*, 556 U.S. at 436. But that interest would be served by *denying* a stay here. There is no public interest in abdicating statutory obligations. *Texas*, 787 F.3d at 768.

Second, Defendants suggest (at 5) that the district court's permanent injunction threatens the separation of powers. Again, not so. The courts below simply ordered the result mandated by Congress. *See, e.g.*, App. 32a. Indeed, the very institution of judicial review is premised on the notion that requiring the Executive Branch to comply with the law does not offend the separation of powers. In any event, the Executive

Branch's "claims that the injunction offends separation of powers" goes to "the resolution of the case on the merits, not whether the injunction is stayed pending appeal." *Texas*, 787 F.3d at 767-68.

Finally, even if this were a "close case," the Court should consider "the interests of the public at large." *Ind. State Police*, 556 U.S. at 960. Defendants do not address this factor at all. *See* Appl. 35-40. Here, "the interests of the public at large" include all the victims of the current seven-month border crisis, including States, border communities, and the migrants themselves. Defendants admit that migrants undertake enormous risks in "embarking on dangerous and often futile journeys to the United States." App. 116a. By eliminating the "free ticket into the United States," *id.* at 5a, MPP served to discourage such futile and dangerous journeys ad thus as an "indispensable tool in addressing the ongoing crisis at the southern border," *id.* at 44a. The public interest overwhelming favors the restoration of this "indispensable tool." *Id.*

CONCLUSION

The Court should deny the motion for a stay pending appeal.

Respectfully submitted.

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Exhibit A

Assessment of the Migrant Protection Protocols (MPP)
October 28, 2019

I. Overview and Legal Basis

The Department of Homeland Security (DHS) remains committed to using all available tools to address the unprecedented security and humanitarian crisis at the southern border of the United States.

- At peak of the crisis in May 2019, there were more than 4,800 aliens crossing the border daily—representing an average of more than *three apprehensions per minute*.

- The law provides for mandatory detention of aliens who unlawfully enter the United States between ports of entry if they are placed in expedited removal proceedings. However, resource constraints during the crisis, as well as other court-ordered limitations on the ability to detain individuals, made many releases inevitable, particularly for aliens who were processed as members of family units.

Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) authorizes the Department of Homeland Security to return certain applicants for admission to the contiguous country from which they are arriving on land (whether or not at a designated port of entry), pending removal proceedings under INA § 240.

- Consistent with this express statutory authority, DHS began implementing the Migrant Protection Protocols (MPP) and returning aliens subject to INA § 235(b)(2)(C) to Mexico, in January 2019.

- Under MPP, certain aliens who are nationals and citizens of countries other than Mexico (third-country nationals) arriving in the United States by land from Mexico who are not admissible may be returned to Mexico for the duration of their immigration proceedings.

The U.S. government initiated MPP pursuant to U.S. law, but has implemented and expanded the program through ongoing discussions, and in close coordination, with the Government of Mexico (GOM).

- MPP is a core component of U.S. foreign relations and bilateral cooperation with GOM to address the migration crisis across the shared U.S.-Mexico border.

- MPP expansion was among the key "meaningful and unprecedented steps" undertaken by GOM "to help curb the flow of illegal immigration to the U.S. border since the launch of the U.S.-Mexico Declaration in Washington on June 7, 2019."[1]

[1] https://www.whitehouse.gov/briefings-statements/readout-vice-president-mike-pences-meeting-mexican-foreign-secretary-marcelo-ebrard/

- On September 10, 2019, Vice President Pence and Foreign Minister Ebrard "agree[d] to implement the Migrant Protection Protocols to the fullest extent possible."[2]

- Therefore, disruption of MPP would adversely impact U.S. foreign relations—along with the U.S. government's ability to effectively address the border security and humanitarian crisis that constitutes an ongoing national emergency.[3]

II. MPP Has Demonstrated Operational Effectiveness

In the past nine months—following a phased implementation, and in close coordination with GOM—DHS has returned more than 55,000 aliens to Mexico under MPP. MPP has been an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system.

Apprehensions of Illegal Aliens are Decreasing

- Since a recent peak of more than 144,000 in May 2019, total enforcement actions—representing the number of aliens apprehended between points of entry or found inadmissible at ports of entry—have decreased by 64%, through September 2019.

- Border encounters with Central American families—who were the main driver of the crisis and comprise a majority of MPP-amenable aliens—have decreased by approximately 80%.

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

MPP is Restoring Integrity to the System

- Individuals returned to Mexico pursuant to MPP are now at various stages of their immigration proceedings: some are awaiting their first hearing; some have completed their first hearing and are awaiting their individual hearing; some have received an order of removal from an immigration judge and are now pursuing an appeal; some have established a fear of return to Mexico and are awaiting their proceedings in the United States; some have been removed to their home countries; and some have withdrawn claims and elected to voluntarily return to their home countries.

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[2] https://www.whitehouse.gov/briefings-statements/readout-vice-president-mike-pences-meeting-mexican-foreign-secretary-marcelo-ebrard/

[3] https://www.whitehouse.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/

- MPP returnees with meritorious claims can be granted relief or protection within months, rather than remaining in limbo for years while awaiting immigration court proceedings in the United States.

    - The United States committed to GOM to minimize the time that migrants wait in Mexico for their immigration proceedings. Specifically, the Department of Justice (DOJ) agreed to treat MPP cases such as detained cases such that they are prioritized according to longstanding guidance for such cases.

    - The first three locations for MPP implementation—San Diego, Calexico, and El Paso—were chosen because of their close proximity to existing immigration courts.

    - After the June 7, 2019, Joint Declaration between GOM and the United States providing for expansion of MPP through bilateral cooperation, DHS erected temporary, dedicated MPP hearing locations at ports of entry in Laredo and Brownsville, in coordination with DOJ, at a total six-month construction and operation cost of approximately $70 million.

    - Individuals processed in MPP receive initial court hearings within two to four months, and—as of October 21, 2019—almost 13,000 cases had been completed at the immigration court level.

    - A small subset of completed cases have resulted in grants of relief or protection, demonstrating that MPP returnees with meritorious claims can receive asylum, or any relief or protection for which they are eligible, more quickly via MPP than under available alternatives.

    - Individuals not processed under MPP generally must wait years for adjudication of their claims. There are approximately one million pending cases in DOJ immigration courts. Assuming the immigration courts received no new cases and completed existing cases at a pace of 30,000 per month—it would take several years, until approximately the end of 2022, to clear the existing backlog.

- MPP returnees who do not qualify for relief or protection are being quickly removed from the United States. Moreover, aliens without meritorious claims—which no longer constitute a free ticket into the United States—are beginning to voluntarily return home.

    - According to CBP estimates, approximately 20,000 people are sheltered in northern Mexico, near the U.S. border, awaiting entry to the United States. This number—along with the growing participation in an Assisted Voluntary Return (AVR) program operated by the International Organization for Migration (IOM), as described in more detail below—suggests that a significant proportion of the 55,000+ MPP returnees have chosen to abandon their claims.

III. Both Governments Endeavor to Provide Safety and Security for Migrants

- The Government of Mexico (GOM) has publicly committed to protecting migrants.
    - A December 20, 2018, GOM statement indicated that "Mexico will guarantee that foreigners who have received their notice fully enjoy the rights and freedoms recognized in the Constitution, in the international treaties to which the Mexican State is a party, as well as in the current Migration Law. They will be entitled to equal treatment without any discrimination and due respect to their human rights, as well as the opportunity to apply for a work permit in exchange for remuneration, which will allow them to meet their basic needs."
        - Consistent with its commitments, GOM has accepted the return of aliens amenable to MPP. DHS understands that MPP returnees in Mexico are provided access to humanitarian care and assistance, food and housing, work permits, and education.
        - GOM has launched an unprecedented enforcement effort bringing to justice transnational criminal organizations (TCOs) who prey on migrants transiting through Mexico—enhancing the safety of all individuals, including MPP-amenable aliens.
    - As a G-20 country with many of its 32 states enjoying low unemployment and crime, Mexico's commitment should be taken in good faith by the United States and other stakeholders. Should GOM identify any requests for additional assistance, the United States is prepared to assist.
- Furthermore, the U.S. government is partnering with international organizations offering services to migrants in cities near Mexico's northern border.
    - In September 2019, the U.S. Department of State Bureau of Population, Refugees, and Migration (PRM) funded a $5.5 million project by IOM to provide shelter in cities along Mexico's northern border to approximately 8,000 vulnerable third-country asylum seekers, victims of trafficking, and victims of violent crime in cities along Mexico's northern border.
    - In late September 2019, PRM provided $11.9 million to IOM to provide cash-based assistance for migrants seeking to move out of shelters and into more sustainable living.
- The U.S. Government is also supporting options for those individuals who wish to voluntarily withdraw their claims and receive free transportation home. Since November 2018, IOM has operated its AVR program from hubs within Mexico and Guatemala, including Tijuana and Ciudad Juarez. PRM has provided $5 million to IOM to expand that program to Matamoros and Nuevo Laredo and expand operations in other Mexican

northern border cities. As of mid-October, almost 900 aliens in MPP have participated in the AVR program.

- The United States' ongoing engagement with Mexico is part of a larger framework of regional collaboration. Just as United Nations High Commissioner for Refugees has called for international cooperation to face the serious challenges in responding to large-scale movement of migrants and asylum-seekers travelling by dangerous and irregular means, the U.S. Government has worked with Guatemala, El Salvador, and Honduras to form partnerships on asylum cooperation (which includes capacity-building assistance), training and capacity building for border security operations, biometrics data sharing and increasing access to H-2A and H-2B visas for lawful access to the United States.

IV. Screening Protocols Appropriately Assess Fear of Persecution or Torture

- When a third-country alien states that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico, the alien is referred to U.S. Citizenship & Immigration Services (USCIS). Upon referral, USCIS conducts an MPP fear-assessment interview to determine whether it is more likely than not that the alien will be subject to torture or persecution on account of a protected ground if returned to Mexico.
    - MPP fear assessments are conducted consistent with U.S. law implementing the *non-refoulement* obligations imposed on the United States by certain international agreements and inform whether an alien is processed under—or remains—in MPP.
    - As used here, "persecution" and "torture" have specific international and domestic legal meanings distinct from fear for personal safety.
- Fear screenings are a well-established part of MPP. As of October 15, 2019, USCIS completed over 7,400 screenings to assess a fear of return to Mexico.
    - That number included individuals who express a fear upon initial encounter, as well as those who express a fear of return to Mexico at any subsequent point in their immigration proceedings, including some individuals who have made multiple claims.
    - Of those, approximately 13% have received positive determinations and 86% have received negative determinations.
    - Thus, the vast majority of those third-country aliens who express fear of return to Mexico are not found to be more likely than not to be tortured or persecuted on account of a protected ground there. This result is unsurprising, not least because aliens amenable to MPP voluntarily entered Mexico en route to the United States.

V. Summary and Conclusion

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

This broken system has created perverse incentives, with damaging and far-reaching consequences for both the United States and its regional partners. In Fiscal Year 2019, certain regions in Guatemala and Honduras saw 2.5% of their population migrate to the United States, which is an unsustainable loss for these countries.

MPP is one among several tools DHS has employed effectively to reduce the incentive for aliens to assert claims for relief or protection, many of which may be meritless, as a means to enter the United States to live and work during the pendency of multi-year immigration proceedings. Even more importantly, MPP also provides an opportunity for those entitled to relief to obtain it within a matter of months. MPP, therefore, is a cornerstone of DHS's ongoing efforts to restore integrity to the immigration system—and of the United States' agreement with Mexico to address the crisis at our shared border.

Appendix A: Additional Analysis of MPP Fear-Assessment Protocol

U.S. Citizenship and Immigration Services (USCIS) strongly believes that if DHS were to change its fear-assessment protocol to affirmatively ask an alien amenable to MPP whether he or she fears return to Mexico, the number of fraudulent or meritless fear claims will significantly increase. This prediction is, in large part, informed by USCIS's experience conducting credible fear screenings for aliens subject to expedited removal. Credible fear screenings occur when an alien is placed into expedited removal under section 235(b)(1) of the Immigration and Nationality Act – a streamlined removal mechanism enacted by Congress to allow for prompt removal of aliens who lack valid entry documents or who attempt to enter the United States by fraud – and the alien expresses a fear of return to his or her home country or requests asylum. Under current expedited removal protocol, the examining immigration officer – generally U.S. Customs and Border Protection officers at a port of entry or Border Patrol agents – read four questions, included on Form I-867B, to affirmatively ask each alien subject to expedited removal whether the alien has a fear of return to his or her country of origin.[4]

The percentage of aliens subject to expedited removal who claimed a fear of return or requested asylum was once quite modest. However, over time, seeking asylum has become nearly a default tactic used by undocumented aliens to secure their release into the United States. For example, in 2006, of the 104,440 aliens subjected to expedited removal, only 5% (5,338 aliens) were referred for a credible fear interview with USCIS. In contrast, 234,591 aliens were subjected to expedited removal in 2018, but 42% (or 99,035) were referred to USCIS for a credible fear interview, significantly straining USCIS resources.

Table A1: Aliens Subject to Expedited Removal and Share Making Fear Claims, FY 2006 - 2018

Fiscal Year	Subjected to Expedited Removal	Referred for a Credible Fear Interview	Percentage Referred for Credible Fear
2006	104,440	5,338	5%
2007	100,992	5,252	5%
2008	117,624	4,995	4%
2009	111,589	5,369	5%
2010	119,876	8,959	7%
2011	137,134	11,217	8%
2012	188,187	13,880	7%
2013	241,442	36,035	15%
2014	240,908	51,001	21%
2015	192,120	48,052	25%
2016	243,494	94,048	39%
2017	178,129	78,564	44%
2018	234,591	99,035	42%

[4] *See* 8 C.F.R.§ 235.3(b)(2).

Transitioning to an affirmative fear questioning model for MPP-amenable aliens would likely result in a similar increase. Once it becomes known that answering "yes" to a question can prevent prompt return to Mexico under MPP, DHS would experience a rise in fear claims similar to the expedited removal/credible fear process. And, affirmatively drawing out this information from aliens rather than reasonably expecting them to come forward on their own initiative could well increase the meritless fear claims made by MPP-amenable aliens.

It also bears emphasis that relatively small proportions of aliens who make fear claims ultimately are granted asylum or another form of relief from removal. Table A2 describes asylum outcomes for aliens apprehended or found inadmissible on the Southwest Border in fiscal years 2013 – 2018. Of the 416 thousand aliens making fear claims during that six-year period, 311 thousand (75 percent) had positive fear determinations, but only 21 thousand (7 percent of positive fear determinations) had been granted asylum or another form of relief from removal as of March 31, 2019, versus 72 thousand (23 percent) who had been ordered removed or agreed to voluntary departure. (Notably, about 70 percent of aliens with positive fear determinations in FY 2013 – 2018 remained in EOIR proceedings as of March 31, 2019.)

Table A2: Asylum Outcomes, Southwest Border Encounters, FY 2013 – 2018

Year of Encounter	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**Total**
Total Encounters	490,093	570,832	446,060	560,432	416,645	522,626	3,006,688
Subjected to ER	225,426	222,782	180,328	227,382	160,577	214,610	1,231,105
Fear Claims[1]	39,648	54,850	50,588	98,265	72,026	100,756	416,133
Positive Fear Determinations[2]	31,462	36,615	35,403	76,005	55,251	75,856	310,592
Asylum Granted or Other Relief[3]	3,687 *11.7%*	4,192 *11.4%*	3,956 *11.2%*	4,775 *6.3%*	2,377 *4.3%*	2,168 *2.9%*	21,155 *6.8%*
Removal Orders[4]	9,980 *31.7%*	11,064 *30.2%*	9,466 *26.7%*	17,700 *23.3%*	12,130 *22.0%*	11,673 *15.4%*	72,013 *23.2%*
Asylum Cases Pending	17,554 *55.8%*	21,104 *57.6%*	21,737 *61.4%*	53,023 *69.8%*	40,586 *73.5%*	61,918 *81.6%*	215,922 *69.5%*
Other	241	255	244	507	158	97	1,502

Source: DHS Office of Immigration Statistics Enforcement Lifecycle.

Notes for Table A2: Asylum outcomes are current as of March 31, 2019.

[1] Fear claims include credible fear cases completed by USCIS as well as individuals who claimed fear at the time of apprehension but who have no record of a USCIS fear determination, possibly because they withdrew their claim.

[2] Positive fear determinations include positive determinations by USCIS as well as negative USCIS determinations vacated by EOIR.

[3] Asylum granted or other relief includes withholding of removal, protection under the Convention Against Torture, Special Immigrant Juvenile status, cancelation of removal, and other permanent status conferred by EOIR.

[4] Removal orders include completed repatriations and unexecuted orders of removal and grants of voluntary departure.

Implementing MPP assessments currently imposes a significant resource burden to DHS. As of October 15, 2019, approximately 10% of individuals placed in MPP have asserted a fear of return to Mexico and have been referred to an asylum officer for a MPP fear assessment. The USCIS Asylum Division assigns on average approximately 27 asylum officers per day to handle this caseload nationwide. In addition, the Asylum Division must regularly expend overtime resources after work hours and on weekends to keep pace with the same-day/next-day processing requirements under MPP. This workload diverts resources from USCIS's affirmative asylum caseload, which currently is experiencing mounting backlogs.

Most importantly, DHS does not believe amending the process to affirmatively ask whether an alien has a fear of return to Mexico is necessary in order to properly identify aliens with legitimate fear claims in Mexico because under DHS's current procedures, aliens subject to MPP **may raise a fear claim to DHS at any point in the MPP process**. Aliens are not precluded from receiving a MPP fear assessment from an asylum officer if they do not do so initially upon apprehension or inspection, and many do. As of October 15, 2019[5], approximately 4,680 aliens subject to MPP asserted a fear claim and received an MPP fear-assessment **after** their initial encounter or apprehension by DHS, with 14% found to have a positive fear of return to Mexico. Additionally, Asylum Division records indicate as of October 15, 2019[6], approximately 618 aliens placed into MPP have asserted **multiple** fear claims during the MPP process (from the point of placement into MPP at the initial encounter or apprehension) and have therefore received multiple fear assessments to confirm whether circumstances have changed such that the alien should not be returned to Mexico. Of these aliens, 14% were found to have a positive fear of return to Mexico.

Additionally, asylum officers conduct MPP fear assessments with many of the same safeguards provided to aliens in the expedited removal/credible fear context. For example, DHS officers conduct MPP assessment interviews in a non-adversarial manner, separate and apart from the general public, with the assistance of language interpreters when needed.[7]

In conducting MPP assessments, asylum officers apply a "more likely than not" standard, which is a familiar standard. "More likely than not" is equivalent to the "clear probability" standard for statutory withholding and not unique to MPP. Asylum officers utilize the same standard in the reasonable fear screening process when claims for statutory withholding of removal and protection under the Convention Against Torture (CAT).[8] The risk of harm standard for withholding (or deferral) of removal under the Convention Against Torture (CAT) implementing regulations is the same, i.e., "more likely than not."[9] In addition to being utilized by asylum

[5] USCIS began tracking this information on July 3, 2019.
[6] USCIS began tracking this information on July 3, 2019.
[7] USCIS Policy Memorandum PM-602-0169, *Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols*, 2019 WL 365514 (Jan. 28, 2019).
[8] See INA § 241(b)(3); 8 C.F.R. § 1208.16(b)(2) (same); See 8 C.F.R. § 1208.16(c)(2).
[9] *See* 8 C.F.R. § 1208.16(c)(2); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8480 (Feb. 19, 1999) (detailing incorporation of the "more likely than not" standard into U.S. CAT ratification history); *see also Matter of J-F-F-*, 23 I&N Dec. 912 (BIA 2006).

officers in other protection contexts, the "more likely than not" standard satisfies the U.S. government's *non-refoulement* obligations.

Exhibit B

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

STATE OF TEXAS, STATE OF MISSOURI, *Plaintiffs.* v. JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*, *Defendants.*	Civil Action No. 2:21-cv-00067-Z

DECLARATION OF EMILY MENDRALA

I, Emily Mendrala, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge and information made known to me in the course of my employment, hereby make the following declaration with respect to the above-captioned matter:

1. I am currently Deputy Assistant Secretary in the Bureau of Western Hemisphere Affairs at the U.S. Department of State and have held this position since January 20, 2021. Prior to this appointment, I was a member of President-Elect Biden's transition, serving on the Agency Review Team for the Department of State with a focus on the Bureau of Western Hemisphere Affairs. From 2017 to 2021, I was Executive Director of the Center for Democracy in Americas, promoting U.S. policies of engagement toward the Americas. During my tenure with the Center, I became very familiar with the issues we are confronting at the U.S. southern border and led educational travel delegations to the

border for policy leaders and other stakeholders. In addition, I have served as Director for Legislative Affairs in the National Security Council and as a Special Adviser to the Coordinator for Cuban Affairs and in the Office of Central American Affairs in the State Department. I was also a Professional Staff Member on the Senate Foreign Relations Committee, where I worked on Western Hemisphere policy matters for the Committee.

2. As Deputy Assistant Secretary, I oversee the Department's work on regional migration and Cuban affairs. I engage regularly with interlocutors throughout the Department and interagency to advance the U.S. government's regional migration policy.

3. I am familiar with the lawsuit that the States of Texas and Missouri have filed in the United States District Court in the Northern District of Texas seeking to enjoin the U.S. government from enforcing or implementing the discontinuance of the Migrant Protection Protocols (MPP) either through the Acting Secretary of Homeland Security's January 20, 2021 memorandum suspending enrollment in the MPP,[1] or the Secretary of Homeland Security's June 1, 2021 memorandum formally terminating MPP.[2] Granting this injunction will have a significant adverse impact on U.S. foreign policy, including our relationship with the governments of El Salvador, Guatemala and Honduras (the "northern Central American countries") and Mexico.

4. Addressing regional irregular migration and its root causes is a top U.S. foreign policy priority. To sustainably reduce irregular migration in, from, and through North and Central America, the United States must establish long-term strategic partnerships with the governments in the region to catalyze structural change to root out corruption and

[1] Memorandum from David Pekoske, Acting Sec'y of Homeland Sec., *Suspension of Enrollment in the Migrant Protection Protocols Program* (Jan. 20, 2021).

[2] Memorandum from Alejandro Mayorkas, Sec'y of Homeland Sec., *Termination of the Migrant Protection Protocols Program* (Jun. 1, 2021).

impunity, improve security and the rule of law, and increase economic opportunity. These efforts must be coordinated in a comprehensive foreign policy framework to address regional migration that includes adequate protection, expanded legal pathways and regional solutions.

5. President Biden introduced such a framework on February 2, 2021 through Executive Order 14010, 86 Fed. Reg. 8267, *Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*. Among other things, Executive Order 14010 outlines a new comprehensive, multi-pronged foreign policy approach toward collaboratively managing migration throughout North and Central America. The two main prongs are the Root Causes Strategy and the Collaborative Migration Management Strategy.

6. The Root Causes Strategy focuses on the three main challenges that drive irregular migration: governance and anticorruption, economic opportunity, and security, to rebuild hope in the region. Through this strategy, the United States seeks to partner with Mexico and the northern Central American countries to promote accountability and advance a safe, democratic and prosperous region, where people can advance economically, live in safety, and create futures for themselves and their families instead of embarking on dangerous and often futile journeys to the United States.

7. The Collaborative Migration Management Strategy is devoted to fostering the international cooperation and partnership with Mexico and Central American countries necessary to focus resources and energy on collective action that will enhance safety and economic opportunity, strengthen legal pathways for those who choose to migrate or are

forcibly displaced from their homes, and reduce irregular migration. As Secretary of State Blinken stated on February 2, 2021, "The United States remains committed to working with governments in the region to address irregular migration and ensure safe, orderly, and humane migration. We are working to establish and expand a cooperative, mutually respectful approach to managing migration across the region that aligns with our national values and respects the rights and dignity of every person."

8. Mexico is an essential partner for the United States in the implementation of both the Root Causes Strategy and the Collaborative Migration Management Strategy. On March 1, 2021, Presidents Biden and López Obrador issued the U.S.-Mexico Joint Declaration, in which they committed to immigration policies that recognize the dignity of migrants and the imperative of orderly, safe and regular migration. They further committed to collaborate on a joint effort to address the root causes of regional migration, improve migration management, and develop legal pathways for migration. They also directed the Secretariat of Foreign Relations and the Department of State, respectively, to engage with the governments of the northern Central American countries, as well as with civil society and private sectors, through policies that promote equitable and sustainable economic development, combat corruption, and improve law enforcement cooperation against transnational criminal smuggling networks.

9. As Acting Assistant Secretary of State Chung stated in her remarks before the U.S. House Foreign Affairs Subcommittee on Western Hemisphere, Civilian Security, Migration and International Economic Policy on April 28, 2021, Mexico has already begun taking actions to advance these commitments. It has reinforced its efforts to reduce irregular northbound movements through its territory – launching a major enforcement action in

southern Mexico in March with over 10,000 personnel. It has further committed to increasing its enforcement personnel strength to 12,000. The Mexican government continues to look for ways to invest in and develop its own communities as well as contribute to stronger Central American economies and engage with regional and international partners to share the burden. In addition, Mexico continues to be a leader in the region in offering international protection for those fleeing persecution.

10. On June 8, Vice President Harris met with President López Obrador during her first foreign trip as Vice President, reflecting the priority the Administration is placing on addressing irregular migration. Together they announced a new partnership to work jointly in Central America to address the root causes of irregular migration to Mexico and the United States, as well as efforts to disable human trafficking and human smuggling organizations. During this visit, the U.S. and Mexican governments signed a memorandum of understanding to establish a strategic partnership between the two countries to address the lack of economic opportunities in the northern Central American countries, which will include fostering agricultural development and youth empowerment programs, and co-creating and managing a partnership program enabling them to better deliver, measure and communicate about assistance to the region.

11. The United States has likewise worked to secure key commitments from the governments of the northern Central American countries to advance both the Root Causes Strategy and the Collaborative Migration Management Strategy. Both Secretary Blinken and Vice President Harris have been engaged on these issues throughout the region, as has Special Envoy for the Northern Triangle Zúñiga.

12. For example, on June 1, 2021, Secretary Blinken met with foreign ministers from Costa Rica, Guatemala, Honduras, El Salvador, Nicaragua, Panama and Mexico in San José, Costa Rica at a meeting of the Central America Integration System (SICA) – the economic and political organization of the region's states. The leaders discussed the U.S. strategy to address the root causes of migration, including generating economic opportunities for Central Americans and advancing the essential work of reducing violence and addressing the COVID-19 pandemic and climate change. Secretary Blinken emphasized that Central America can be a stronger region if the people and countries cooperate to jointly tackle these challenges. Vice President Harris has had several conversations with the president of Guatemala about migration issues, and on June 7, 2021, she met with President Giammattei in Guatemala City. Both leaders acknowledged the need to work as partners to address irregular migration from Central America.

13. As a result of these and other U.S. diplomatic efforts, the northern Central American countries have engaged in migration management, and the governments make decisions about humane enforcement in ways that are appropriate for each country. We have seen the result in increased access to protection, apprehensions of irregular migrants, and greater numbers of checkpoints.

14. For example, the United States and Guatemala are collaborating to deepen bilateral law enforcement cooperation to combat migrant smugglers, human traffickers, and narcotics traffickers including through the reconstitution of a Mobile Tactical Interdiction Unit focused on dismantling transnational criminal activities in Guatemala, by providing U.S. law enforcement personnel to train and advise Guatemalan border security and law enforcement, and by the Guatemalan government identifying and seizing the illicit assets

of those criminal organizations. The Guatemalan government has also committed to collaborate with the United States to establish Migration Resource Centers in Guatemala that will provide protection screening and referrals for people in need of protection, others seeking lawful pathways to migrate, as well as returning migrants in need of reintegration support in Guatemala. The first Migration Resource Center has already become operational.

15. For its part, the United States has already taken several actions to advance the administration's efforts to enact a comprehensive approach to regional migration. One of the first was to commence the wind-down of the MPP policy. From a foreign policy perspective, the MPP wind-down was a crucial initial step in implementing the new policy. As a result of the U.S. "Remain in Mexico" policy, an informal camp had formed in Matamoros, Tamaulipas along the U.S.-Mexico border consisting of thousands of migrants primarily from Central America living in squalid conditions for extended periods while, for some, they were awaiting the commencement or completion of their U.S. immigration proceedings. This camp was located in a dangerous area where the migrants faced the risk of murder, sexual and gender-based violence, kidnaping or extortion on a daily basis. The governments of the northern Central American countries expressed concern for the safety of their nationals residing in the camp as well as elsewhere along the U.S.-Mexico border where migrants faced similar conditions while awaiting their immigration proceedings. The Government of Mexico shared these concerns.

16. After the U.S. government announced the wind-down of the MPP policy on February 11, 2021, President López Obrador applauded this move and welcomed the United States'

commitment to "regularize the situation of migrants." Since the announcement of the MPP wind-down process, the Mexican and U.S. governments have worked together to implement this process, including determining the prioritization of the intake. Through the MPP wind-down process, the informal migrant camp in Matamoros was closed in early March 2021, and Mexican officials welcomed its closure. On May 7, 2021, during a telephone conversation with Vice President Harris, President López Obrador stated, "We agree with the migration policies you are developing and we are going to help, you can count on us." International Organization partners, such as the United Nations High Commissioner for Refugees (UNHCR), International Organization for Migration (IOM), and others, responded positively to the decision to wind down and terminate MPP, and some acted as partners in the wind-down effort.

17. Reversing the MPP wind-down and termination process would undercut current U.S. foreign policy. The Mexican government and our international organization partners have been essential partners in the wind-down process since February. Re-implementing MPP would nullify more than four months of diplomatic and programmatic engagement with them to restore safe and orderly processing at the U.S. southern border. It would also require the U.S. government to divert attention and limited resources away from its current U.S. foreign policy goals mentioned above towards negotiating with Mexico the re-implementation of MPP.

18. In addition, reversing the wind-down and termination of MPP at this stage would be harmful to our bilateral relationships with Mexico and the northern Central American countries, as well as with our partner international organizations, as it would diminish their trust that the United States follows through on its commitments. As a result, these

countries and international organizations will be less inclined to cooperate with the United States in implementing its broader, long-term foreign policy goals, including the Root Causes Strategy and the Collaborative Migration Management Strategy, and this in turn would adversely impact the U.S. government's efforts to stem the flow of irregular migration in the region.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on this 25th day of June, 2021

Emily Mendrala
Deputy Assistant Secretary
Bureau of Western Hemisphere Affairs
U.S. Department of State

Exhibit C

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

STATE OF TEXAS, STATE OF MISSOURI, *Plaintiffs,* v. JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*, *Defendants.*	)	Civil Action No. 2:21-cv-00067-Z

DECLARATION OF DAVID SHAHOULIAN

I, David Shahoulian, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge, and documents and information made known or available to me from official records and reasonably relied upon in the course of my employment, hereby declare as follows:

Introduction

1. I am the Assistant Secretary for Border Security and Immigration at the Department of Homeland Security (DHS) and have been in this role since January 20, 2021. I previously served at DHS as Deputy General Counsel from June 29, 2014 to January 19, 2017.

2. In Mexico, as in the United States, migration is a politically and emotionally charged issue, in part because of the profound impact that migration-related policies and operations have on individuals and communities. As a result, discussions between the U.S. and Mexican governments regarding migration management in the region and at our shared border are

fluid, sensitive, and iterative. The United States and Mexico have maintained a close, delicate, and dynamic conversation on this issue for many years.

3. Critical to these conversations is the ability of each country to (1) alter policies or operations as circumstances change, and (2) trust that the other country will follow through with its commitments. Over the course of the past five months, in response to changing circumstances and given the change in administration, the U.S. Government has undertaken a review of various migration-related policies as it pursues a series of new strategies, both unilaterally and in partnership with foreign partners and international organizations. The decisions to first suspend new enrollments into the Migrant Protection Protocols (MPP) program, and then to terminate MPP following close review of the program, are part of the Department's new strategies in response to changing circumstances.

4. As discussed further below, an injunction interfering with the U.S. Government's ability to proceed with the termination of MPP would undermine the Administration's overall strategy for managing migration in the region, complicate the U.S. Government's bilateral relationship with Mexico, divert limited government resources and detract from important DHS missions, and hinder the Department's ongoing efforts to build its capacity to process individuals at ports of entry and adjudicate asylum claims in a safe, orderly, and humane manner consistent with our laws.

Governments need the ability to change policies and operations in response to changing circumstances

5. As regional migration trends evolve, governments need the ability to react and adjust their policy and operational responses as necessary, consistent with their overall strategic visions for migration management and humanitarian protection. In December 2018, DHS announced plans to utilize its authority under Section 235(b)(2)(C) of the Immigration and

Nationality Act (INA) to create a new program—the Migrant Protection Protocols (MPP)—aimed at returning certain non-Mexican applicants for admission to Mexico for the duration of their U.S. removal proceedings.[1] Because MPP required such individuals to temporarily reside in Mexico, implementation of MPP required close collaboration and negotiation with the Government of Mexico. Shortly after the DHS announcement, Mexico reaffirmed its sovereign right to manage migration in its territory—including whether to admit or deny entry to foreign nationals—and committed to a number of steps that were important to the functioning of MPP. Such steps included utilizing federal resources (personnel and infrastructure) to receive individuals returned to Mexico under MPP; granting temporary, humanitarian status to persons enrolled in MPP; ensuring that such individuals received equal treatment and protection from discrimination, as well as the right to request work authorization; and providing MPP enrollees with the ability to access selected social services.[2]

6. After MPP was initiated, the United States and Mexico coordinated closely in response to changing conditions, including substantial operational challenges that surfaced during the program's implementation. One such challenge—the onset of the COVID-19 pandemic—required significant coordination and flexibility to protect public health and address other changes in the border environment. In March 2020, for example, the Department of Justice suspended removal hearings for MPP enrollees due to the pandemic. This suspension fundamentally altered the situation at the border given that one of MPP's principal

[1] *See Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration,* Dec. 20, 2018 *available at* https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration (last visited June 23, 2021).

[2] *Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act,* Dec. 20, 2018 *available at* https://www.gob.mx/sre/en/articulos/position-of-mexico-on-the-decision-of-the-u-s-government-to-invoke-section-235-b-2-c-of-its-immigration-and-nationality-act-185795?idiom=en (last visited June 23, 2021)

objectives was to promptly process the claims of MPP enrollees returned to Mexico. Without court hearings, the MPP program was unable to deliver on this objective, leaving MPP enrollees with no way to have their claims considered. And as the months passed, more and more MPP enrollees found themselves in challenging circumstances in Mexico for a prolonged—and frankly indefinite—length of time with no avenue for relief.

7. Moreover, the fact that tens of thousands of individuals remained in Mexico for long periods with no movement in their immigration cases placed a strain on community resources along Mexico's northern border. This contributed to instability and insecurity in some communities, which complicated US-Mexico bilateral relations and undermined the ability of some MPP enrollees to wait for adjudications to resume.

8. Additionally, and just as important, the lack of court hearings violated the premise under which the Government of Mexico agreed to provide temporary status in Mexico to MPP enrollees in the first place: namely, that the United States would have a functioning, rapid immigration court process in which MPP enrollees could participate. Mexican officials made clear that providing temporary status (and relatedly, the ability to access select social services in Mexico) was to be provided only to those "involved in immigration proceedings."[3] But with the closure of the non-detained immigration courts due to COVID-19, there were no such proceedings. Even now, after more than a year, it is still unclear when many of those enrolled in MPP would have had their cases heard. This challenge required a new solution and a change in policy and operations.

[3] *See Press Conference with Legal Counsel Alejandro Alday on the Bilateral Relationship with the United States*, Dec. 20, 2018 *available at* https://www.gob.mx/sre/prensa/press-conference-with-legal-counsel-alejandro-alday-on-the-bilateral-relationship-with-the-united-states (last visited June 23, 2021).

9. On February 2, 2021, President Biden issued Executive Order (EO) 14010, 86 Fed. Reg. 8267, *Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*.[4] In this EO, President Biden directed the Secretary of Homeland Security to review and determine whether to modify or terminate MPP. Furthermore, the President directed the Secretary to consider a phased strategy for the safe and orderly entry into the United States of those individuals who were placed in MPP.

10. Upon the completion of the required review, the Secretary announced his decision to terminate MPP.[5] Among the reasons provided, the Secretary noted that MPP required a significant amount of diplomatic engagement with the Government of Mexico that the Department would like to now devote to other strategic initiatives that will allow for better and more consistent border management. From DHS's perspective, it is simply not a wise use of taxpayer resources to continue to focus bilateral energy on a program that cannot operate as intended in the current border environment, and that, even if continued, would involve significant and complicated burdens on border security personnel and resources that would detract from important DHS mission sets. As the internal review of MPP showed, significant modifications to the current operational and policy structure of MPP

[4] *See* Executive Order 14010, *Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border,* 86 Fed. Reg. 8267 (Feb. 2, 2021), *available at* https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration (last visited June 23, 2021)

[5] *See* Secretary Alejandro N. Mayorkas, "Termination of The Migrant Protection Protocols Program," June 1, 2021 *available at* https://www.dhs.gov/publication/dhs-terminates-mpp-and-continues-process-individuals-mpp-united-states-complete-their (last visited June 23, 2021).

would have been required to restart the program and to ensure that participants can remain in Mexico pending their immigration proceedings.

11. For instance, restarting the MPP program would have required the United States, in partnership with Mexico, to provide information about updated hearing times and locations to up to 26,000 individuals in Mexico with active cases. Before the pandemic, MPP relied on in-person document service during initial encounter, or follow-up in-person interactions, with MPP enrollees. However, now that all previously scheduled hearings have lapsed due to court closures, the United States would need to devise a new way to contact the 26,000 MPP enrollees with active cases. The United States would also likely need to process each of these individuals at a port of entry, reschedule each of their hearings, service required court documents, and then return them to Mexico once again. The United States would also need to reestablish the process for bringing these individuals into and out of the United States to attend their future hearings.

12. Additionally, even before COVID-19 forced the suspension of immigration hearings for MPP enrollees—and throughout the time that immigration courts have been shuttered—some program participants experienced inadequate and unstable access to housing, income, and safety, which made it challenging for some to remain in Mexico for the time required to complete their proceedings. In order to address these matters, including security-related concerns along the border, the United States would need to devote significant foreign assistance to counterparts operating in Mexico. The level of financial and diplomatic engagement that would be required to address these concerns would detract from this Administration's broader goal of establishing a comprehensive regional strategy for managing migration.

13. Rather than devote efforts to reestablishing and overhauling the MPP program, DHS seeks to refocus efforts to address the root causes of migration from Central America, improve regional migration management, enhance protection and asylum systems throughout North and Central America, expand cooperative efforts to combat smuggling and trafficking networks, and pursue other initiatives. These efforts are part of a broader strategy to address irregular migration in a more sustainable and effective way. Many of those efforts will require engagement with Mexico and, as is the President's prerogative, DHS can choose to focus on these efforts with Mexico rather than negotiations over MPP. This kind of evolution in response to new dynamics at the border should not be impeded.

Governments need the ability to trust that each country will uphold the actions to which it commits

14. Policy and operational decisions on migration matters are often the subject of intense scrutiny and criticism. In the case of U.S.-Mexico negotiations on these matters, both governments have been willing to endure domestic criticism for policies or operational decisions taken jointly, because each has believed these actions were ultimately in their country's best interests. However, if either party is prevented from upholding commitments made in the course of negotiations, the foundation of trust upon which these negotiations are premised erodes. In fact, as noted above, it is partly because of the necessary closure of immigration courts, which impeded the U.S. commitment to provide MPP enrollees with meaningful access to immigration court proceedings, that DHS has been required to develop *new* policy and operational options. To maintain a trusted relationship with Mexico, DHS must have the ability to negotiate a new approach to address migration-related issues, including when that means moving away from MPP.

15. Just as DHS worked closely with and made a series of commitments to the Government of Mexico to initiate MPP, DHS has similarly negotiated closely with Mexico on the recent steps the Department has taken, including the ongoing phased approach to processing certain MPP enrollees into the United States and the decision to terminate MPP. The U.S. and Mexican governments continue to work together to look for more robust regional solutions to manage migration. If Mexico cannot trust the United States to keep its commitments in these negotiations, the result would be the inability to negotiate in good faith or make hard decisions. This is especially important when it comes to issues of migration management, which are inherently multinational in nature.

16. An order interfering with DHS's termination of MPP, or otherwise requiring DHS to re-institute the program, would wreak havoc on the Administration's approach to managing migration in the region, including by undermining the Government's ability to engage in the delicate bilateral (and multilateral) discussions and negotiations required to achieve a comprehensive solution. Such an order would require the United States to renege on the reasoned—and I believe more effective—strategy being developed with Mexico. Moreover, restarting MPP operations would require new and costly investments from both governments to re-establish the infrastructure that sat dormant for more than a year due to COVID-19.

17. An order to delay termination of MPP or to restart the program would also draw resources from other efforts aimed at more effectively and sustainably addressing irregular migration in the region, such as the creation of a dedicated court docket to hear cases in a more timely fashion, other efforts to streamline the adjudication of asylum cases coming from the border, the expansion of alternative lawful migration pathways in the region, and regional

efforts to address the underlying causes of migration.[6] Instead of focusing on these efforts, the Department would be forced to implement a discretionary program that the Department's recent review concluded would require a total redesign involving significant additional investments in personnel and resources. This redesign would come at tremendous opportunity cost and would detract from the work taking place to advance the vision for migration management and humanitarian protection articulated in Executive Order 14010.[7] In sum, such an order would undermine the Executive's ability to operationalize its considered policy vision with respect to an issue that is central to both domestic and foreign policy interests.

[6] *Id.*
[7] *Id.*