No. 21-10806

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

State of Texas; State of Missouri,

Plaintiffs-Appellees,

v.

Joseph R. Biden, Jr., in his official capacity as President of the United States of America; United States of America; Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security; United States Department of Homeland Security; Troy Miller, Acting Commissioner, U.S. Customs and Border Protection; United States Customs and Border Protection; Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement; United States Immigration and Customs Enforcement; Tracy Renaud, in her official capacity as Acting Director of the United States Citizenship and Immigration Services; United States Citizenship and Immigration Services,

Defendants-Appellants

On Appeal from the United States District Court
for the Northern District of Texas
No. 2:21-cv-00067-Z

AMICUS BRIEF OF INDIANA AND 15 OTHER STATES IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTRODUCTION & INTEREST OF *AMICI* STATES

The States of Indiana, Alabama, Arizona, Arkansas, Florida, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, Utah, and West Virginia respectfully submit this brief as *amici curiae* in support of Plaintiffs-Appellees, the States of Texas and Missouri. Illegal immigration across the southwest border levies significant costs on States and their citizens. In recent years, States have borne billions of dollars in new expenses related to education, healthcare, and other government-assistance programs because of the rising influx of illegal aliens. AR 440, 442, 452, 555, 587–88. And this is more than a localized problem or limited to those States on our nation's southwest border; illegal immigration's effects are felt nationwide. Indeed, in many communities the costly upward trend in illegal entries at the border has been associated with a spike in violent crime—including predation on migrants by drug cartels and other bad actors. AR 406, 409–10, 418, 423.

In January 2019, in response to the historic surge in encounters of aliens at the southwest border, the Department of Homeland Security

(DHS) issued a memorandum entitled "Policy Guidance for Implementation of the Migrant Protection Protocols." AR 151. Exercising the agency's express authority under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, the Migrant Protection Protocols (MPP) requires aliens who have no legal entitlement to enter the United States but depart from a third country and transit through Mexico to be returned temporarily to Mexico while awaiting the outcome of their removal proceedings. *See* 8 U.S.C. § 1225(b)(2)(C). DHS has now issued a seven-page Memorandum purporting to rescind MPP—a Memorandum the district court below found to be unlawfully deficient in multiple respects.

Amici States submit this brief to explain why this Court should affirm the district court's order, for *Amici* States have a strong interest in ensuring that any decision lifting MPP is undertaken according to law and after due consideration of the consequences for States and their citizens.

ARGUMENT

I. MPP Is a Vital Tool to Combat Illegal Immigration

A. MPP promotes a fairer and more operationally effective immigration system

MPP has proven to be a vital tool in the fight against illegal immigration and has yielded both a fairer and more operationally effective means of processing aliens—specifically, those aliens who have no legal entitlement to enter the United States but depart from a third country and transit through Mexico to reach the U.S. border. First announced in 2018, MPP authorizes DHS to return those aliens temporarily to Mexico while they await their removal proceedings as an alternative to the mandatory detention during removal proceedings to which the aliens would otherwise be subject under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq*. *See* 8 U.S.C. § 1225(b)(2)(A).

Before MPP's implementation, each year thousands of aliens were paroled in the United States while awaiting a hearing—a process that often took several years. *See* AR 684; Op. 17. And as the district court noted below, among those aliens referred to the Executive Office for Immigration Review, more than thirty percent failed to appear for their hearing and were ordered removed *in absentia*. Op. at 7–8.

Since its implementation, however, MPP has permitted DHS to process tens of thousands of aliens applying for asylum, or other relief from removal, without the need to detain the applicants in the United States during the weeks and months it takes to process their applications. *Id.* And MPP not only obviated the need to detain these aliens, it also significantly reduced the pre-pandemic processing time of these aliens. *See id.* at 17; AR 555, 684. Moreover, MPP also likely led to an overall reduction of encounters at the border and likely encouraged many asylum seekers without meritorious claims to remain in or return to their country of origin. AR 555–56, 683–84.

For these reasons, the federal government has described MPP as an "indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system." ECF 54-1 at App.010; *see also Wolf v. Innovation Law Lab*, No. 19-1212 (U.S.), Application for Stay of Injunction at 2. (describing MPP as an "indispensable tool in the United States' efforts . . . to address the migration crisis on our Southwest border."). And MPP has produced significant benefits for States as well: Because of MPP, fewer aliens were paroled into the States in the first place, which certainly reduced the variety of costs imposed by

illegal immigration on States and their citizens. *See* Op. at 17; AR 555, 684.

B. The Biden Administration's termination of MPP jeopardizes the interests of States

The Biden Administration's rescission of MPP has had the predictable effect of undermining the interests of the States and further taxing an immigration system still hampered by the COVID-19 pandemic.

The rescission is a long-promised goal of the new administration. In December 2019, more than a year before taking office, then-candidate Biden decried that "through his Migrant Protection Protocol policies, [President] Trump has effectively closed our country to asylum seekers, forcing them instead to choose between waiting in dangerous situations, vulnerable to exploitation by cartels and other bad actors, or taking a risk to try crossing between the ports of entry." *See The Biden Plan for Securing Our Values as a Nation of Immigrants*, https://joebiden.com/immigration; @JoeBiden, Twitter (Dec. 11, 2019), https://twitter.com/JoeBiden/status/1204835741554987008. Biden pledged to "end [the Trump Administration's] policies, starting with Trump's Migrant Protection Protocols, and restore our asylum laws so that they do what they should be designed

to do—protect people fleeing persecution and who cannot return home safely." *Biden Plan*, *supra*.

As promised, on the first day of the new administration DHS Acting Secretary David Pekoske issued a one-page declaration announcing that MPP would be suspended pending further review. AR 581. Despite the evident time to plan such a move, however, DHS provided no reasoning for its decision. *Id.* And DHS offered no rationale at all until June 2021, when—after Texas and Missouri had brought this challenge to the suspension—the DHS Secretary issued a seven-page Memorandum announcing the immediate and permanent termination of MPP. AR 1–7.

The consequences of the Biden Administration's termination of MPP are both unsurprising and significant. Without MPP, thousands of illegal aliens—the vast majority of whom do not have any legal entitlement to remain in the United States, *see* AR 689—will be paroled in the United States while awaiting the outcome of their removal proceedings. This is certain to impose new, sweeping costs on States in supporting the parolees during the pendency of their removal proceedings—not to mention supporting the thousands who will fail to appear and instead choose to remain in the United States illegally and indefinitely.

This shift in policy also comes at a time when the number of encounters at the southwest border continues to rise and, due to the COVID-19 pandemic, DHS's capacity to process aliens has precipitously declined. For example, in May and June 2021, U.S. Customs and Border Protection recorded over 180,000 and 188,000 encounters, respectively, at the southwest border. *Southwest Land Border Encounters*, U.S. Customs & Border Protection (Sep. 3, 2021), https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters. And in July and August 2021 the count soared to some 210,000 each month. *Id*. These constitute the highest volume of monthly encounters recorded in more than twenty years—a period that includes several previous surges that took place at times when processing was not constrained by recent COVID-19 capacity considerations. *U.S. Border Patrol Monthly Apprehensions (FY 2000 - FY 2019)*, U.S. Customs & Border Protection (Jan. 2020), https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Monthly%20Apprehensions%20%28FY%202000%20-%20FY%202019%29_1.pdf.

Ultimately, the States rely on the federal government to enforce immigration law and to protect their interests in this area. *See Arizona*

v. United States, 567 U.S. 387, 394–400 (2012); *id.* at 397 ("The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States."). Indeed, while "[t]he National Government has significant power to regulate immigration," the Supreme Court has made clear that "with [this] power comes responsibility." *Id.* at 416. The Biden Administration's efforts to eliminate MPP, without consideration of the States' significant vested interests and the litany of evident harms it would cause, is an abdication of that responsibility.

II. The Memorandum Rescinding MPP Fails to Consider Important Aspects of the Policy Problem and Is Thus Arbitrary and Capricious under the APA

The Biden Administration's refusal to consider the costs of rescinding MPP is not just bad policy. It is unlawful as well. The Administrative Procedure Act (APA) requires agencies to "'consider . . . important aspect[s] of the problem'" before them. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910 (2020) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (alterations in original); *see also* 5 U.S.C. § 706(2)(A). DHS has failed to do so.

Despite MPP's evident benefits and the corresponding costs of revoking the policy, DHS suspended MPP in January via a three-line, two-sentence declaration announcing—without any explanation—that DHS would be suspending new enrollments in MPP "pending further review of the program." AR 581. This unreasoned change in policy plainly violated the APA: It lacked consideration of *any* aspects of the problems confronting American immigration policy.

More than four months after DHS suspended MPP—and several weeks after Texas and Missouri filed this lawsuit challenging this unreasoned change in policy—the DHS Secretary issued the Memorandum at issue here, which "direct[s] DHS personnel to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives or policy guidance issued to implement the program." AR 2. And while this Memorandum contains *some* explanation, it too violates the APA for failing to consider all aspects of the problem.

Indeed, the Memorandum suffers—at the very least—from the same two deficiencies for which the Supreme Court invalidated the rescission of the Deferred Action for Childhood Arrivals (DACA) program

in *Regents*: It fails to consider (1) "alternatives that are within the ambit of the existing policy" and (2) "whether there was legitimate reliance" on the existing MPP policy. *Regents*, 140 S. Ct. at 1913 (internal quotation marks, brackets, and citations omitted). Each of these failures are independently sufficient to render the Memorandum unlawful.

A. The Memorandum fails to consider alternatives

The obligation of federal agencies to consider alternatives to their chosen policies was definitively established at least as far back as *State Farm*, but the Court's recent decision in *Regents* confirms just how significant and unwavering this obligation is: Agencies retain this obligation even if they *correctly* conclude that *some* change must be made to existing policy.

In *Regents*, DHS had rescinded DACA on the ground that the program was unlawful, and the Court expressly declined to "evaluate the claims challenging the explanation and correctness of th[at] illegality conclusion." *Id.* at 1910. The Court nevertheless held that, even if that conclusion were correct, DHS could not completely rescind the program without giving meaningful consideration to alternative options—in particular, keeping elements of the program that may have been lawful. *See*

id. at 1912 ("Even if it is illegal for DHS to extend work authorization and other benefits to DACA recipients . . . the DACA Memorandum could not be rescinded in full 'without any consideration whatsoever' of a forbearance-only policy." (quoting *State Farm*, 463 U.S. at 51)).

Accordingly, it is not enough for DHS to provide sufficient policy reasons for discontinuing MPP—and it is far from clear the agency did so here in any case. *Regents* holds that even if the Memorandum clears that bar, it still must specifically identify—and explain why DHS rejected—alternatives to completely rescinding current policy.

The Memorandum fails to do so. While it claims DHS "considered various alternatives" to terminating MPP, the Memorandum's discussion of this aspect of the problem is limited to a single paragraph that neither identifies specific alternatives nor advances any rationale beyond conclusory assertions. AR 5; *see also* Appellants Br. 48–49 (recounting DHS's conclusory statements).

Underscoring its all-or-nothing approach, the Memorandum's discussion of "alternatives" begins by noting that DHS could "maintain[] the status quo"—which, given its earlier suspension of MPP, would effectively amount to terminating the program—or it could keep MPP and

"resum[e] new enrollments in the program." *Id.* Beyond this, the Memorandum does nothing more than briefly suggest that "the program could be modified in some fashion" without specifically identifying any such potential modifications. *Id.* The Memorandum thus fails to establish the agency considered any alternatives short of terminating the entire MPP program. And it therefore violates the rule "that when an agency rescinds a prior policy its reasoned analysis must consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" *Regents*, 140 S. Ct. at 1913 (quoting *State Farm*, 463 U.S. at 51 (alterations in original)).

Further, in addition to not identifying alternatives, the Memorandum fails to provide any reasoned explanation for rejecting them. It simply asserts that preserving MPP "would not be consistent with this Administration's vision and values and would be a poor use of the Department's resources" and that modifying MPP "would require a total redesign that would involve significant additional investments in personnel and resources." AR 5. The APA demands more than such conclusory statements. Even if "there may be a valid reason" ultimately to reject a particular alternative policy, the APA requires the agency to "establish

that DHS considered that option." *Regents*, 140 S. Ct. at 1913. The Memorandum here fails to do so, and that "omission alone renders . . . [the] decision arbitrary and capricious." *Id.*

B. The Memorandum fails to consider reliance interests

Nor do the Memorandum's deficiencies stop there. It also "fail[s] to address whether there was 'legitimate reliance'" on the existing MPP policy. *Regents*, 140 S. Ct. at 1913 (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996)). As the district court observed below, the Memorandum "fail[s] to consider the costs to Plaintiffs and Plaintiffs' reliance interests in the proper enforcement of federal immigration law." Op. 37. Indeed, "the agency did *not* consider the costs to the States *at all*." *Id.*

Notably, the federal government scarcely challenges these observations in its brief. Indeed, its response on this point does not identify any discussion in the Memorandum of reliance interests that could be affected by terminating MPP. Instead, the federal government insists that the specified "costs to States" do not qualify as "legitimate reliance interests" that must be considered under the APA. Appellants Br. 46.

The federal government is unclear as to whether it believes costs to States *never* qualify as a "legitimate reliance interest" or if these costs merely do not so qualify in this instance. *See id.* (arguing *Regents* "did not categorically hold that costs to States must be considered in undertaking any and all agency actions" but was "'one factor to consider' in that context" (quoting 140 S. Ct. at 1914)). Either way, however, *Regents* squarely forecloses the federal government's position.

The Court in *Regents* acknowledged that the DHS Secretary "plainly exercised such discretionary authority in winding down [DACA]," 140 S. Ct. at 1910, but it nevertheless held that consideration of "potential reliance interests . . . must be undertaken by the agency," *id.* at 1913. The Court explained that "there was much for DHS to consider," *including costs to States*: "States and local governments could lose $1.25 billion in tax revenue each year." *Id.* at 1914. And it found that even though DHS—if it had addressed the issue—may have eventually concluded that "reliance interests in benefits that it views as unlawful are entitled to no or diminished weight" the Secretary was nevertheless obligated to weigh the States' interests. *Id.*

Notably, the Court applied this requirement in *Regents* even though "the DACA Memorandum stated that the program 'conferred no substantive rights' and provided benefits only in two-year increments." *Id.* at 1913. While such factors "are surely pertinent in considering the strength of any reliance interests," the Court made clear that the APA still requires such "consideration . . . be undertaken by the agency in the first instance, subject to normal APA review." *Id.* at 1913–14. Thus, the States' evident reliance interests here—which include the significant cost savings MPP produces by reducing the number of aliens illegally present within their borders—required due consideration from DHA, whether or not the agency is right that it could ultimately discount these interests in a properly reasoned decision.

Finally, in an attempt to further excuse its failure to consider any of the States' reliance interests, the federal government asserts that the Memorandum "cannot be arbitrary and capricious for failing to imagine and fully consider potential reliance interests the States never articulate." Appellants Br. 47. Yet unlike in notice-and-comment rulemaking—from which the federal government attempts analogize, *id.*—here the States were never afforded the opportunity to formally articulate their

reliance interests before the decision was made. It would therefore be nonsensical to require discussion of only those reliance interests raised by a party. The States have clearly specified an array of consequences and reliance interests implicated by the decision—interests that the Memorandum unlawfully failed to address.

In rescinding MPP—as in rescinding DACA—DHS "was not writing on a blank slate," and it was therefore "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 (internal quotation marks and citation omitted). This obligation is especially important in light of DHS's failure to follow notice-and-comment procedures here—leaving States with no formal opportunity to raise their affected interests and help develop an adequately informed decision. Because this Memorandum fails to provide any meaningful consideration of the States' significant and evident reliance interests, it is arbitrary and capricious, and unlawful under the APA.

CONCLUSION

The Court should affirm the district court's order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Fed. R. App. P. 27(d)(2)(A) and 29(a)(5) because it contains 3,007 words as measured by Microsoft Word software. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, Roman-style typeface of 14 points or more.

Dated: October 19, 2021 *<u>/s/ Thomas M. Fisher</u>*
Thomas M. Fisher

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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