No. 21-10806

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS AND STATE OF MISSOURI,
Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*,
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 14 OTHER STATES IN OPPOSITION TO THE MOTION FOR ADMINISTRATIVE STAY AND FOR STAY PENDING APPEAL

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The States of Indiana, Alabama, Arizona, Arkansas, Florida, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia respectfully submit this brief as *amici curiae* in opposition to the Motion for Administrative Stay and for Stay Pending Appeal. Illegal immigration across the southwest border levies significant costs on the 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 leave the district court's order in place, for *Amici* States have a strong interest in ensuring that any decision lifting MPP is undertaken according to law and after 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. Before its 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*. *Id.* at 7–8. After the introduction of MPP, however, fewer aliens were paroled into the United States and pre-pandemic processing time was significantly diminished. *See id.* at 17; AR 555, 684.

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. These positive changes have most certainly lessened the variety of costs imposed by illegal immigration on the States and their citizens.

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

The Biden Administration's termination 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*, Biden Harris, https://joebiden.com/immigration/; *see also* @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." *The Biden Plan for Securing Our Values as a Nation of Immigrants*, *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 the States in supporting the parolees during the pendency of their removal proceedings—not to mention the thousands who will fail to appear and instead choose to remain in the United States illegally.

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. *See Southwest Land Border Encounters*, U.S. Customs & Border Protection (Aug. 12, 2021), https://www.cbp.gov/news-room/stats/southwest-land-border-encounters. And in July 2021 the count soared to over 210,000. These constitute the highest numbers of monthly encounters recorded by United States Customs and Border Protection 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.

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 not done 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 whatever—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). And 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. Yet 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.

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. 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. *Id.* (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 United States scarcely challenges these observations. Its response on this point does not identify any discussion in the Memorandum of reliance interests that could be affected by terminating MPP, but merely quotes the Memorandum's assertion that DHS considered "'the impact such a decision could have on border management and border communities.'" Mot. 18 (quoting AR 5). Such an isolated suggestion obviously cannot constitute sufficient consideration of anything, and in any case there is nothing to suggest that this particular phrase has anything to do with reliance at all. This phrase does not mention reliance—on the part of States or anyone else—and is immediately followed by the puzzling announcement that the Secretary "considered the Department's

experience designing and operating a phased process, together with interagency and nongovernmental partners, to facilitate the safe and orderly entry into the United States of certain individuals who had been placed in MPP." AR 5. Whatever this means, it certainly does not have anything to do with States' reliance on MPP.

Left without any actual discussion of reliance interests in the Memorandum, the United States instead insists that DHS was not required to "consider State reliance interests" at all because "the States have no cognizable reliance interest in a *discretionary* program." Mot. 18. This argument, however, is squarely foreclosed by *Regents*. There the Court acknowledged that the DHS Secretary "plainly exercised such discretionary authority in winding down [DACA]," 140 S. Ct. at 1910, but it held that the Secretary was nevertheless obligated to "consider[] potential reliance interests," *id.* at 1913. Indeed, it reiterated that the Secretary was obligated to do so even though "the DACA Memorandum stated that the program 'conferred no substantive rights' and provided benefits only in two-year increments," and 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." *Id.* at

1913–14 (internal citation omitted). While such factors "are surely pertinent in considering the strength of any reliance interests," the APA still requires that such "consideration must be undertaken by the agency in the first instance, subject to normal APA review." *Id.*

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). Because this Memorandum fails to do so, it is arbitrary, capricious, and unlawful under the APA.

CONCLUSION

The Court should deny the motion for administrative stay and for stay pending appeal.

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 2,578 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: August 18, 2021

/s/ Thomas M. Fisher
Thomas M. Fisher

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 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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