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, Case No. 2:21-cv-00067-Z

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION

This Court should vacate the extraordinary and deeply flawed permanent injunction entered by the district court in this case. The injunction improperly overrides discretion Congress expressly gave the Department of Homeland Security (DHS) to determine how to best manage migrants arriving by land at the southern border and undermines the authority and discretion of the Executive Branch over foreign affairs. The district court's ruling that the DHS Secretary must re-implement the Migrant Protection Protocols (MPP) is unprecedented and should be reversed.

Plaintiffs have not met their burden to establish standing. Moreover, the decision whether to use the contiguous-territory-return authority in 8 U.S.C. § 1225(b)(2)(C) is committed to agency discretion, and is unreviewable. Plaintiffs' claims therefore fail at the threshold.

In any event, and critically, the district court's ruling that Section 1225 erects a novel detain-or-return mandate that requires DHS to continue MPP until the agency has sufficient capacity to detain millions of additional noncitizens must be set aside. That deeply intrusive holding has no foundation in the statute and is impossible to meet because no Congress, including the Congress that enacted Section 1225(b)(2)(C), has ever appropriated sufficient funds to allow DHS to do so. That mandate effectively requires DHS to utilize MPP in perpetuity, given insufficient congressional funding to detain all noncitizens amenable to processing

under Section 1225, and it sets a standard that is inconsistent with the statutory scheme, the history of agency implementation of Section 1225, and the broad discretion the Executive Branch has over immigration. It also violates statutory limits Congress placed on district court jurisdiction specifically to protect that broad discretion and prevent courts from restricting the operation of the Immigration and Nationality Act (INA). As a result, this Court should, at a minimum, vacate the portion of the injunction requiring MPP to continue until DHS "has sufficient detention capacity to detain all aliens subject to … Section [1225]," and the associated onerous monthly reporting requirements, to permit the Secretary discretion to issue a new termination memorandum addressing any flaws this Court might ultimately find in the June 1, 2021 termination memorandum.

The district court's ruling that the Secretary's June 1 Memorandum ending MPP violates the Administrative Procedure Act (APA) is similarly flawed, as it held the Secretary to an incorrect and heightened standard. The Secretary's detailed memorandum, supported by an extensive administrative record, noted MPP's mixed effectiveness, acknowledged competing policy considerations, and explained that ending the program would allow DHS to better devote its resources to more effective measures for managing regional migration. Nothing more is required.

Finally, even if the Secretary had to provide further explanation or consider additional factors before deciding to end MPP, the appropriate remedy would have

been, at most, to remand for additional explanation, without vacating the memorandum, let alone issuing a sweeping and intrusive injunction. By issuing an injunction requiring Defendants to re-implement MPP, the district court effectively dictated that Defendants engage in targeted diplomatic negotiations with Mexico to restart MPP, interfering with foreign affairs and upending ongoing bilateral negotiations to advance the Executive's broader goals and policies for managing migration and the border. The injunction also required DHS, and other agencies, to reconstitute necessary infrastructure and redeploy staffing from other critical border and enforcement operations. These disruptions far outweigh the speculative and minor financial harms the States purportedly faced as a result of MPP's termination, and make the district court's injunctive remedy patently improper.

The Court should reverse the district court's ruling and vacate the injunction.

ARGUMENT

I. The States Lack Standing.

As an initial matter, Plaintiffs lack standing. Plaintiffs argue they suffered injuries from the termination of MPP based on a potential increase in the number of noncitizens released, and costs the States might incur if these individuals settle in Texas or Missouri. Pls' Br. 12-22. But as explained, Gov't Br. 12-23, these injuries are speculative and not supported by evidence in the record. The district court's adoption of these unsupported claims was thus clearly erroneous.

Plaintiffs first argue "costs associated with providing driver's licenses to aliens is sufficient to satisfy the injury in fact requirement" and that this Court's decision in the DAPA case "compels the conclusions that Plaintiffs have standing here because the relevant evidence in the two cases is essentially indistinguishable." Pls' Br. 13 & n.2. But Plaintiffs fail to account for the many distinctions between the findings in the DAPA case and this one, and fail to meet requirements this Court set out for establishing standing on a driver's-license theory. Gov't Br. 15-18. Plaintiffs also fail to respond to Defendants' argument that Plaintiffs bore a higher burden to establish standing at trial than applied at the preliminary injunction stage in the DAPA case. *Id.* at 17. Instead, Plaintiffs revert to the argument that *potential* costs are sufficient, even if they cannot point to any evidence of *actual* additional costs since MPP enrollments declined. Pls' Br. 14-15. Plaintiffs' contention contravenes longstanding Supreme Court precedent. *See* Gov't Br. 15-17, 19-22.[1]

Plaintiffs next argue their claimed injuries are traceable to MPP's termination because the "termination of MPP necessarily increases the number of aliens present in the United States" generally. Pls. Br. 15. But Plaintiffs point to no supporting evidence in the record. *See id*. at 15-16; Gov't Br. 12-14. Nor do they point to evidence establishing that terminating MPP resulted in increased numbers of

[1] On appeal, Plaintiffs do not cite or argue there is evidence to support costs besides those associated with driver's licenses, and have thus narrowed their assertion of standing to a driver's-license theory.

migrants residing in Texas and Missouri specifically. Instead they argue incorrectly that the district court was permitted to "predict[]" such an effect based only on Texas's location and a report from 2016, well before MPP, estimating the number of "unauthorized immigrants" in Missouri. Pls' Br. 20-21.[2]

Plaintiffs later argue that evidence in the Administrative Record establishes that one of MPP's goals was to reduce "meritless" asylum claims, thus reducing the number of individuals with such claims in the Plaintiff States. Pls' Br. 19. As explained, however, while this was a *goal* of MPP, the record does not establish that it was met, particularly since border encounters fluctuated, and at various times increased, while MPP was in place. Gov't Br. 12-13.[3] Moreover, as the Secretary

[2] Plaintiffs argue this report says "nearly 6 in 100 aliens who remain unlawfully in the United States reside" in Missouri, *id*. at 21, but it actually estimates the "unauthorized" population of Missouri is only 0.5 percent of the estimated "unauthorized immigrant population" of the United States, or 5 out of every 1,000. ROA.1446. And while it does not give a complete demographic breakdown, the data it does provide (*e.g*. 45% of that population is Mexican) indicates the majority, if not overwhelming majority, are from countries that were not subject to MPP anyway. *Id*.

[3] Plaintiffs selectively quote the trial transcript to argue Defendants conceded MPP deterred meritless asylum claims. Pls' Br. 19-20. The transcript belies Plaintiffs' claim. At trial, the district court cited the "Metric MPP implementation contributes to decreasing the volume of inadmissible aliens arriving in the United States," and asked, "is there any point in this record where those questions raised about the effectiveness of MPP are answered," to which counsel responded: "What's the actual answer to that, I'm not sure it's known from this record." ROA.3210-11. Even assuming Plaintiffs' allegations on this point were plausible, plausible allegations at trial are not sufficient to establish standing; they must point to actual evidence of a concrete injury. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562

noted, many individuals returned under MPP were subsequently reencountered trying to cross the border, undermining the claim that MPP was a successful deterrent. Gov't Br. 13. The Secretary further concluded that, to the extent MPP did deter anyone, it may have caused "abandonment of potentially meritorious protection claims," rather than meritless ones. ROA.1687. Plaintiffs cannot claim they are injured if the only evidence in the record demonstrates MPP deterred individuals with bona fide legal claims, and not individuals with meritless claims, from attempting to cross the border.

The lack of evidence in the record that ending MPP has effected the populations of these two States also means Plaintiffs lack any concrete injury that is redressable by restarting MPP. *Contra* Pls' Br. 16. Plaintiffs acknowledge that, even under MPP, DHS retains discretion as to whether to return eligible noncitizens to Mexico. *Id*. Further, returning noncitizens under MPP requires Mexico's willingness to accept them, making redressability entirely speculative. *See Three Expo Events v. Dallas*, 907 F.3d 333, 341 (5th Cir. 2018); *Talenti v. Clinton*, 102 F.3d 573, 578 (D.C. Cir. 1996); Gov't Br. 22-23.[4]

(1992); Gov't Br. 14, 17. Plaintiffs have not done so, and Defendants have never conceded otherwise.

[4] To the extent Plaintiffs argue MPP could be applied to some individuals without Mexico deciding those individuals could remain in Mexico, Texas has acknowledged in other cases that Mexico's cooperation is required and that the injunction "ensures only that the Defendants will attempt to re-establish the Migrant

Finally, the district court erred in concluding that the States were entitled to special solicitude. Gov't Br. 18-19. Plaintiffs do not respond to Defendants' argument that even if such solicitude were appropriate, it would not relieve Plaintiffs of their obligation to satisfy Article III standing requirements. Nor do they address this Court's discussion of the specific circumstances necessary for special solicitude, the Court's statement that these circumstances "will seldom exist," or the fact that the alleged procedural right here is categorically different than the right cited in *Texas* and *Mass. v. EPA*. *See* Gov't Br. 18-19.

II. The Secretary's Decision is Not Subject to Judicial Review.

Plaintiffs' claims are not reviewable because the decision to terminate MPP is committed to agency discretion, Gov't Br. 23-27, Plaintiffs are not within the zone of interests of Section 1225, *id*. at 27-28, and the June 1 Memorandum was not a reviewable final agency action, *id*. at 28-30. Plaintiffs' contrary arguments, Pls' Br. 22-26, lack merit.

Plaintiffs argue that the decision to end MPP is not committed to agency discretion because there is a "general presumption favoring judicial review of administrative action," and because 5 U.S.C. § 701(a)(2), which bars review under

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Protection Protocols in good faith; it cannot require Mexico to agree to reconstitute the program on the same terms as previously existed, and even if it could do so it could not bind Mexico to those terms." Consolidated Reply at 12-13, *Texas v. Biden*, No. 4:21-cv-579 (N.D. Tex. Oct. 11, 2021).

the APA of "agency action" that "is committed to agency discretion by law," should be read narrowly to permit review under the APA's standard requiring "a rational explanation." Pls' Br. 24. But, as explained, if agency action is committed to agency discretion by law, then the statutory provisions for APA review do not apply at all. Gov't Br. 26-27. If the arbitrary-and-capricious standard could supply the requisite "meaningful standard" to take an agency decision outside the ambit of Section 701(a)(2), *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993), then *nothing* would be committed to agency discretion. And as its text makes clear, Section 1225(b)(2)(C) commits the decision whether to return noncitizens to the agency's discretion. *See* 8 U.S.C. 1225(b)(2)(C) (the Secretary "*may* return" certain noncitizens) (emphasis added); *see also* Pls' Br. 39 (acknowledging returning noncitizens "under Section 1225(b)(2)(C) [] is *optional*" (emphasis in original)). And, more broadly, Congress gave the Secretary discretion to choose what immigration authorities—including contiguous-territory-return—to use and provided no standard to cabin that discretion. *See* 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a)(3); Gov't Br. 6, 24-25.

Plaintiffs next cite *DHS v. Regents*, 140 S. Ct. 1891, 1905-07 (2020), for the proposition that the "mere presence of some discretion does not render decisions unreviewable." Pls' Br. 23. But *Regents* held DACA was reviewable "because DACA is not simply a non-enforcement policy" and instead "created a program for conferring affirmative immigration relief" that was subject to review. *Id*. at 1906. At

trial in this case, the district court acknowledged that "[t]he termination of MPP does not itself, unlike DACA, create affirmative benefits," ROA.3126, and Plaintiffs offer no reason to disturb that conclusion. Plaintiffs cite *Texas v. United States*, 809 F.3d 134, 167 (5th Cir. 2015), to argue that reviewable agency action need not directly confer benefits if it removes "a categorical bar on receipt of those benefits." Pls' Br. 24. In *Texas*, however, this Court emphasized that the States did "not challenge the Secretary's decision to 'decline to institute proceedings,'" but rather challenged DAPA because it made certain individuals "*lawfully present*," "a change in designation that confers eligibility for substantial federal and state benefits on a class of otherwise ineligible aliens." 809 F.3d at 168. Terminating MPP, in contrast, neither confers nor removes a bar to eligibility for public benefits. Gov't Br. 25-26. And the fact that MPP had procedures and dedicated infrastructure, Pls' Br. 24, is irrelevant, because the Supreme Court has held that an agency's "decision to discontinue" an entire discretionary program is, like a "decision against instituting enforcement proceedings," committed to agency discretion and "accordingly unreviewable under § 701(a)(2)." *Lincoln v. Virgil*, 508 U.S. 182, 193 (1993).

Plaintiffs also fail to meaningfully respond to the government's argument that Section 1252(a)(2)(B)(ii) independently precludes judicial review. Gov't Br. 23; 8 U.S.C. § 1252(a)(2)(B)(ii) (providing "no court shall have jurisdiction to review" any "decision or action of … the Secretary … the authority for which is specified

under this subchapter to be in the discretion of … the Secretary"). In a footnote, Plaintiffs argue that this bar to review does not apply when a plaintiff challenges the extent of an official's authority because authority is not a matter of discretion. Pls' Br. 24 n.7. But the Secretary is ending a program that Plaintiffs concede is discretionary, Pls' Br. 39, and that never existed prior to 2019.

Plaintiffs' claims also fail because they do not fall within the zone of interests of Section 1225(b)(2)(C). Plaintiffs argue that the zone-of-interests test is not especially demanding, and that the relevant inquiry is whether they are within the zone of interests of the INA as a whole, rather than Section 1225(b)(2)(C). Pls' Br. 25-26. Even if that were correct—which it is not, *see* Gov't Br. 27-28—Plaintiffs point to nothing in the INA that suggests Congress intended States to be able to challenge the Secretary's exercise of his discretionary authority under Section 1225(b)(2)(C), and various provisions in the INA indicate precisely the opposite, *id*.

The district court also erred in holding that the June 1 Memorandum, which was a general statement of policy, was a reviewable final agency action. ROA.2944-46; Gov't Br. 28-30. Plaintiffs respond that the relevant inquiry is "whether the rule has binding effect on agency discretion or severely restricts it," and that the June 1 Memorandum had sufficient legal consequences to be final agency action because it withdrew the agency's previously-held discretion. Pls' Br. 27. Plaintiffs argue the "primary distinction … turns on whether an agency intends to bind *itself* to a

particular legal position." *Id.* (quoting *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019)). But the June 1 Memorandum merely explained how the agency would exercise its statutory discretion at that time. The memorandum did not purport to bind the agency to a particular legal position narrowing the scope of discretion the statute provides, or to limit the agency's ability to exercise the full range of that discretion in the future. *See* ROA.1685, 1688. Because it did not bind DHS to any legal position on the limits of the agency's authority, it is not a reviewable final agency action. *See* Gov't Br. 30.

III. The Secretary's Decision Does Not Cause DHS to Violate Section 1225.

Nothing in Section 1225 mandates the use of the contiguous-territory-return authority in Section 1225(b)(2)(C), or sets a standard concerning detention capacity that DHS must satisfy before the Secretary can exercise his discretion to instead use other options under the INA. *See* Gov't Br. 31-37. Plaintiffs' arguments to the contrary, Pls' Br. 37-39, lack merit. Accordingly, this Court at a minimum should vacate the portion of the injunction requiring DHS to continue to use the return authority until it has sufficient capacity to detain every noncitizen subject to Section 1225. Neither the motion panel's nor the Supreme Court's stay order supports this aspect of the injunction, which is plainly erroneous and deeply intrusive. Vacating this aspect of the district court's injunction is necessary to ensure that the Secretary is able, in the future, to exercise his clear statutory authority to elect to terminate

MPP in a new agency action, should the courts ultimately affirm the vacatur of the June 1 Memorandum.

Tellingly, Plaintiffs' primary argument with respect to Section 1225 does not mention the return provision in Section 1225(b)(2)(C), but rather addresses other statutory provisions that authorize DHS to detain certain noncitizens in other circumstances. Pls' Br. 37-38 (citing §§ 1225(b)(1)(B)(iii)(IV), (b)(1)(B)(ii), (b)(2)(A)). Based on these separate provisions, Plaintiffs argue that the district court correctly held that Section 1225 provides the government with only "two options," either return or detain, and that "[f]ailing to detain or return aliens pending their immigration proceedings violates Section 1225." *Id*. at 37 (quoting ROA.2961). But the INA does not set out this binary choice, nor does it impose a near-universal detention mandate for all inadmissible applicants for admission who are not returned to a contiguous territory or preclude their release from DHS custody. *See* Gov't Br. 33-34.

Plaintiffs acknowledge that the INA contains "other alternatives" and that, in addition to return or detention, "parole is an alternative." Pls' Br. 37. They further concede that "the federal government may also … release certain aliens on 'bond' or 'conditional parole.'" *Id*; *see also* Gov't Br. 33-34. The motions panel similarly acknowledged that the government has other options, including parole or bond, and that the injunction merely prohibits the government from "simply releas[ing] every

alien described in § 1225 *en masse* into the United States." *Texas v. Biden*, 10 F.4th 538, 558 (5th Cir. 2021). If, as the motions panel acknowledged and Plaintiffs correctly concede, the INA gives DHS other options for processing applicants for admission besides detention or return, then the district court's ruling that the statute mandates return for any noncitizen not detained cannot stand.

Nothing in Section 1225 sets out any relationship between the return provision and the other options provided by the statute. Rather than set any standard for when DHS must use the return authority or in any way connect that decision to the detention provisions, Congress made clear that the return authority was entirely discretionary—the Secretary "*may*"—not *must*—return certain noncitizens. 8 U.S.C. § 1225(b)(2)(C) (emphasis added). Plaintiffs concede that "the word 'may' [] implies discretion," and that when a statute contains "both 'may' and 'shall,'" Congress's use of "may" indicates "duties that the executive has discretion whether to undertake." Pls' Br. 38 (quoting *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020)); *see also* Pls' Br. 39 (noting that "the States do not, and have never, contended that this scheme mandates MPP" and acknowledging that returning noncitizens "under Section 1225(b)(2)(C) [] is *optional*").

Rather than argue that the statute mandates MPP, Plaintiffs argue that "[w]hat the Government cannot do … is simply release every alien described in § 1225 *en masse* into the United States." Pls' Br. 39 (quoting *Texas*, 10 F.4th at 558). But there

is no evidence in the record that the government is releasing every noncitizen described in Section 1225 *en masse*—to the contrary, the evidence establishes that the government is detaining at or near its capacity limits. ROA.2988. And, even if Plaintiffs had raised a challenge to Defendants' parole practices, which they do not, Plaintiffs cannot leverage objections to the use of parole to invalidate the Secretary's separate decision with respect to his discretionary return authority. Nothing in the guidance implementing MPP or the Secretary's June 1 Memorandum ending the program purports to implement or in any way shape how DHS exercise its parole authority.

Plaintiffs argue that questions about use of the parole authority are properly before the Court because the complaint "alleges that '[d]iscontinuing MPP therefore violates 8 U.S.C. § 1225." Pls' Br. 39. But at trial, when pressed on whether Plaintiffs were challenging parole practices, Plaintiffs expressly waived any such claim:

THE COURT: Isn't Plaintiffs' case truly a challenge to the government's parole practices and not the termination of MPP?

MR. THOMPSON: No, Your Honor. We're not challenging, you know, any kind of individual grant of parole or even the parole policies.

ROA.3126.

Plaintiffs thus waived any challenges to DHS parole practices in this case, including those in their brief on appeal, *see* Pls' Br. 40. In ruling on challenges to parole practices that are not contained in the complaint, and granting relief to Plaintiffs based on that ruling, the district court improperly decided a claim that Plaintiffs did not raise and expressly waived at trial. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (courts should "rely on the parties to frame the issues for decision" and "normally decide only questions presented by the parties" (quotation marks and citation omitted)); *Francois v. Our Lady of the Lake Hosp., Inc.,* 8 F.4th 370, 379 n.7 (5th Cir. 2021) (explaining that courts must "follow the principle of party presentation").

In any case, "Congress has delegated remarkably broad discretion to executive officials under the INA, and these grants of statutory authority are particularly sweeping in the context of parole." *Jean v. Nelson*, 727 F.2d 957, 977 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985). This Court has previously held that the agency's "discretionary judgment regarding the application of parole" is not "subject to review" and explained that this limitation on review extends not just to individual parole decisions but more broadly to challenges to "whether the procedural apparatus" for making such decisions "satisfies regulatory, statutory, and constitutional constraints." *Loa-Herrera v. Trominski,* 231 F.3d 984, 991 & n.12 (5th Cir. 2000). DHS has long interpreted Section 1182(d)(5) to authorize parole of

noncitizens who "present neither a security risk or a risk of absconding" and "whose continued detention is not in the public interest," 8 C.F.R. § 212.5(b)(5). It is the agency, not the court, that determines what undefined statutory terms like "significant public benefit" mean. *See* 8 U.S.C. §§ 1103(a)(1), 1182(d)(5); *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984). That determination has always encompassed resource constraints, and every administration since the addition of Section 1225 to the INA in 1996 has implemented the parole statute this way. *See* Gov't Br. 35-36; ACLU Amicus Br. at 7-14.

Plaintiffs do not acknowledge these limitations on review, or the longstanding agency practice of considering resource limitations, in exercising its parole authority. A finding that DHS violates the statute if it does not detain all noncitizens who are not returned would mean *every* administration since Congress enacted Section 1225(b)(2)(C) as a discretionary authority has violated that provision. No Congress, including the one that enacted Section 1225, has ever appropriated sufficient funds to satisfy this novel and incorrect reading of the statute. *See* Gov't Br. 34-35. Put simply, Plaintiffs' contrivance cannot be correct. Congress is well aware it would need to appropriate substantial additional funds to detain everyone potentially subject to detention under Section 1225, yet has never done so. *See* 8 U.S.C. § 1368(b) (providing for bi-annual reports to Congress on detention space, including estimates on "the amount of detention space that will be required" during

"the succeeding fiscal year"). Notably, although Congress has amended Section 1225 since 1996, *see* Pub. L. 110-229, 122 Stat. 754, 867 (2008), it has never amended Section 1225 (1) to add the kind of mandate Plaintiffs seek to read into the statute with respect to when the agency must use its return authority, or (2) to override the agency's longstanding interpretation permitting the use of bond and parole to address capacity limitations. *See Lorillard v. Pons,* 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative … interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

Nothing in Section 1225 mandates that DHS must use the return authority or initiate a particular type of proceeding against a noncitizen, and even if the statute did include some seemingly mandatory language on these points, it would not remove all agency discretion. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005). "Although the Secretary of DHS is charged with enforcement of the INA," the Supreme Court has held that "a principal feature of the removal system is the broad discretion exercised by immigration officials" and that "the concerns justifying criminal prosecutorial discretion are 'greatly magnified in the deportation context.'" *Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015) (citations omitted); *Texas v. United States*, No. 21-40618, 2021 WL 4188102, at *3-4 (5th Cir. Sept. 15, 2021) (holding decisions on who should face a particular type of "enforcement

action" are "committed" to agency's "enforcement discretion, including in the immigration arena").

The district court's imposition of a novel standard that it found "implicit[]" in the statute also violated 8 U.S.C. § 1252(f)(1), which bars courts, other than the Supreme Court, from enjoining the operation of Section 1225, including by restricting the discretion Congress left to the Secretary in the statute. Gov't Br. 37-40. Plaintiffs counter that Section 1252(f)(1) is inapplicable because they "do not seek to enjoin operation of those portions of the INA" but rather "seek to require DHS to follow [the] law." Pls' Br. 41. But as other courts, and two Justices, have explained, that reasoning is circular, and inconsistent with Section 1252(f)(1), which bars injunctive relief "[r]egardless of the nature of the action or claim." Gov't Br. 37-38. It also ignores the plain meaning of "enjoin," which encompasses injunctions that purport to enforce Section 1225 as well as those that prohibit its operation. *See, e.g.*, *Nken v. Holder*, 556 U.S. 418, 428 (2009) ("In a general sense, every order of a court which commands or forbids is an injunction."). Moreover, Plaintiffs' assertion that they are simply "seek[ing] enforcement of the INA's mandatory provisions," Pls' Br. 41, is inconsistent with their own brief which, again, concedes that "the States do not, and have never, contended that this scheme mandates MPP" and also that returning noncitizens "under Section 1225(b)(2)(C) [] is *optional*." *Id.* at 39.

For all of these reasons, the Court should, at a minimum, vacate the portion of the injunction holding that Section 1225 mandates DHS continue MPP unless and until it can detain all "aliens subject to … Section 1225 without releasing any aliens *because of* a lack of detention resources." ROA.2970. Vacating this aspect of the injunction is critical because it effectively prevents the Secretary from *ever* discontinuing the use of the return authority. As long as this aspect of the injunction is in place, MPP cannot be terminated even if the Secretary issues a new termination memorandum that the courts conclude is not arbitrary and capricious. Whatever the merits of Plaintiffs' APA challenges, the courts plainly lack authority to effectively mandate the *permanent* use of MPP.

IV. The Secretary's Decision Satisfies the APA.

The Secretary's June 1 Memorandum ending MPP acknowledged and fully explained the reasons for the agency's change of position, and thus satisfied the APA's highly deferential standard of review. *See* Gov't Br. 41-52.[5]

Plaintiffs argue that the Secretary failed to consider the benefits DHS hoped MPP would achieve, and earlier assessments of those benefits. Pls' Br. 29-30. But the Secretary explicitly noted that he evaluated the goals and anticipated benefits of

[5] Although the June 1 Memorandum did not, as the district court held, violate the APA, DHS has nonetheless announced that it intends to issue a new memorandum terminating MPP. *See* DHS Announces Intention to Issue New Memo Terminating MPP (September 29, 2021), https://www.dhs.gov/news/2021/09/29/dhs-announces-intention-issue-new-memo-terminating-mpp/.

MPP, all prior assessments of the program and its challenges, and the evidence of MPP's performance against those anticipated benefits and goals. Gov't Br. 41-43. He also considered the extensive personnel and resource investments required to support the program. *Id*. The Secretary acknowledged that MPP potentially had some benefits, but he also evaluated and explained how MPP had failed to accomplish many of its goals effectively. *Id.* at 43-44. And he reasonably concluded that the resource and personnel investments necessary to address the problems he identified with MPP would be substantial and would come at the cost of other initiatives the Administration was undertaking to better manage migration. *Id.* at 48-49.

Plaintiffs argue that it is not enough for the agency to simply say it considered an issue. Pls' Br. 30. But they point to no basis to conclude that the Secretary did not consider the potential benefits of MPP. Plaintiffs quote a line from a prior assessment of MPP about deterring individuals with non-meritorious claims that they argue the Secretary's memorandum "does not expressly mention, let alone discuss." *Id.* at 29-30. But the Secretary addressed the evidence showing MPP had not sufficiently deterred non-meritorious claims or met its other goals to justify the resource investments necessary to maintain the program. Gov't Br. 43-44.[6] And the Secretary

[6] Plaintiffs argue that the district court made findings of fact on these issues that are reviewable only for clear error, Pls' Br. 29, but under the APA, a court must

noted that he had considered all prior assessments of the program, and the assessment Plaintiffs cite was included in the administrative record on which the memorandum was based. Plaintiffs put forth no authority for the argument that an agency decision is arbitrary and capricious if it does not expressly quote and specifically discuss each individual statement in a nearly 700-page administrative record, and such a standard would be impossible to meet.

Instead, the cases Plaintiffs cite deal with circumstances, far different than this case, where the relevant statute itself "require[d] agencies to consider particular factors," and the court "searched the extensive administrative record in vain for any" evidence related to those factors. *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, 104 (D.C. Cir. 2020) (finding Secretary disregarded primary purpose of statute set out in statute's text); *Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002) (addressing circumstance where "a statute requires an agency to make a finding as a prerequisite to action"). Plaintiffs do not identify any factor in Section 1225(b)(2)(C) that the

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determine whether the record permitted the agency to make the decision it reached and cannot substitute its assessment of the facts for that of the agency, *see* Gov't Br. 42. A determination that an agency action is arbitrary and capricious under the APA is a legal conclusion. Thus, this Court reviews the district court's ruling on Plaintiffs APA claims de novo. *See, e.g.*, *Hasie v. Off. of Comptroller of Currency of U.S.*, 633 F.3d 361, 365 (5th Cir. 2011).

Secretary was required to and failed to consider, or anything he was required to consider that is not included in the administrative record.

Plaintiffs next assert that the June 1 Memorandum reached "arbitrary conclusions" by relying on the "high percentage of cases completed through the entry of *in absentia* removal orders" under MPP and by considering issues related to the COVID-19 pandemic. Pls' Br. 31-32. As to *in absentia* orders, Plaintiffs argue that the Secretary "fail[ed] 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." *Id*. But the record shows that this rate was substantially higher than the *in absentia* rate for non-MPP cases over the same time period. Gov't Br. 49-50. And the Secretary explained that this high rate raised questions "about the design and operation of the program, whether the process provided enrollees an adequate opportunity to appear for proceedings to present their claims for relief, and whether conditions faced by some MPP enrollees in Mexico, including the lack of stable access to housing, income, and safety, resulted in the abandonment of potentially meritorious protection claims." ROA.1687. Plaintiffs concede—as they must, *see* Gov't Br. 49-50—that "the Secretary was not required to perform an in-depth empirical analysis," Pls' Br. 31. As to the Secretary's discussion of COVID-19, it was not arbitrary or capricious for the Secretary to consider the ways in which a "number of the challenges faced

by MPP have been compounded by the COVID-19 pandemic," ROA.1687, particularly while the pandemic remains ongoing, *see* Gov't Br. 50, n.12.

The States next argue that the Secretary failed to consider their reliance interests. Pls' Br. 32-34. But as previously explained, Plaintiffs have never identified any particular actions they took in reliance on MPP. Gov't Br. 46. Plaintiffs respond not by citing actions they took in reliance on MPP, but rather by asserting that the agency should have considered unspecified "costs of ending the MPP to the States," and the prior Administration's use of MPP as a "tool in bilateral efforts to address" migration. Pls. Br. 34. But the Supreme Court has not categorically held, as Plaintiffs assert, that costs to States necessarily represent reliance interests, or must always be considered. Gov't Br. 46. Further, the States have submitted no evidence of additional costs since April 2020, when MPP enrollments significantly declined or since January 2021, when new enrollments were suspended. *Id*. at 45. In any event, the Secretary did consider the potential "impact such a decision could have on border management and border communities." *Id*. at 46. Plaintiffs' assertion that the Secretary failed to consider the use of MPP to achieve various bilateral goals with respect to migration is both false and unrelated to any argument about reliance interests.

Plaintiffs next argue that the Secretary failed to consider possible alternatives to terminating MPP that were within the ambit of the prior policy. Pls' Br. 34-35.

But Plaintiffs, like the district court, never identify any possible alternatives within that ambit that should have been considered. Nor can they argue that MPP, unlike DACA, contained multiple sub-policies that "are legally distinct and can be decoupled," such that the Secretary could have considered whether DHS should maintain one portion even if it had good reasons for rescinding the other. *Regents*, 140 S. Ct. at 1913. To the extent Plaintiffs believe the Secretary should have considered keeping MPP in a modified form and applying it to some smaller category of noncitizens, the Secretary "considered whether the program could be modified in some fashion" but explained that doing so would not address the deficiencies he had identified without the investment of significant resources that were better devoted to the agency's other efforts to advance the Executive's goals for migration management. ROA.1688; Gov't Br. 48-49.

Plaintiffs argue that the Secretary failed to consider the effect of MPP's termination "on DHS's obligations to detain certain aliens under Section 1225," Pls' Br. 35, but rest their entire argument on this point on the incorrect argument that Section 1225 sets out a binary detain-or-return mandate, *see supra* 12-18; Gov't Br. 31-37, 50-51.

Finally, Plaintiffs argue that the district court correctly determined that vacatur of the June 1 Memorandum was the appropriate remedy for their APA

claims. Pls' Br. 35-36.[7] Here, Plaintiffs first argue merely that the decision was arbitrary and capricious, and that DHS cannot fix the alleged flaws with the memorandum with a supplemental memorandum by someone other than "the relevant decisionmaker" asserting reasons "not relied upon" by the decisionmaker. *Id*. at 36. This argument is irrelevant because, as Plaintiffs acknowledge two paragraphs later, *id*., the Secretary has announced that he intends to issue a *new* memorandum terminating MPP. *See Regents*, 140 S. Ct. at 1907-1908 (noting "a court may remand for the agency to … 'deal with the problem afresh' by taking new agency action") (citation omitted).

Plaintiffs next argue that vacatur is not disruptive because DHS is not required to re-implement "overnight." Pls' Br. 36. But restarting MPP required Defendants to immediately negotiate with Mexico about MPP (disrupting ongoing negotiations on other bilateral efforts to manage migration), to shift limited resources away from other priorities, and to rebuild necessary infrastructure at a cost of millions of dollars per month. Gov't Br. 52-56. Given the likelihood that the Secretary can address the district court's concerns with the June 1 Memorandum on remand, and the significant disruptive consequences of requiring MPP to restart in the interim,

[7] Plaintiffs do not argue that an injunction was an appropriate remedy for their APA claims.

remand without vacatur and without an injunction was the only appropriate remedy for the APA claims. *Id*. at 51-52.

V. Equitable Factors Do Not Support An Injunction.

The balance of equities also strongly weighs against an injunction that significantly restricts the Secretary's discretion, interferes with foreign affairs, and requires DHS to rebuild MPP infrastructure. *See* Gov't Br. 52-56.[8] Plaintiffs falsely assert that Defendants do not "dispute the district court's conclusions that the States" are "suffering ongoing and future injuries." Pls' Br. 42; *see supra* 3-7. They further assert the government has no interests here because Plaintiffs are merely seeking to have DHS "comply with the law," *id*. at 42-43—but that argument is premised entirely on their erroneous reading of Section 1225. Plaintiffs argue "there is no public interest in abdicating statutory obligations," Pls' Br. 43, but acknowledge the statute does *not* obligate DHS to continue MPP, *id*. at 39 ("[T]he States do not, and have never, contended that this scheme mandates MPP."). Further, Plaintiffs cannot reasonably argue that the United States could send non-Mexicans into Mexico, even if Mexico objects, without implicating and greatly affecting foreign affairs. *Contra* Pls' Br. 43-46. DHS could not, and did not, initially implement MPP until after

[8] Restarting MPP has been a massive and disruptive undertaking, as set out in subsequent filings in the district court, of which this Court can take judicial notice. *See* D. Ct. Dkt. Nos. 105, 105-1, 110-1, 111.

Mexico independently made certain commitments that were essential to the program. ROA.1832-36.[9]

Finally, Plaintiffs incorrectly argue that any harm to the government is self-inflicted because the government could simply refrain from exercising its discretion until all litigation challenging DHS's actions has concluded. Pls' Br. 47-48. To do so would effectively require the government to treat thousands of lawsuits as de facto injunctions, thereby severely limiting the Executive's statutory and constitutional authority. Indeed, Plaintiffs' theory would have prevented MPP from ever taking effect, since litigation challenging MPP has still not concluded. *See, e.g.*, *Innovation Law Lab v. Nielsen*, No. 19-cv-807 (N.D. Cal.).

CONCLUSION

The Court should reverse and vacate the district court's decision.

[9] Plaintiffs' arguments are also inconsistent with Texas' acknowledgment in other cases that Mexico's involvement is required for MPP to operate. *See supra* n.4.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2021, I electronically filed this reply brief 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 the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding parts of the document exempted by Fed. R. App. P. 32(f) and Fifth Cir. R. 32.1, it contains 6,497 words.

This brief complies with the typeface and the type style requirements of Fed. R. App. P. 35(a)(5)-(6), and Fifth Cir. R. 32.1 because it has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

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