No. 19-1212

In the Supreme Court of the United States

ALEJANDRO N. MAYORKAS,
SECRETARY OF HOMELAND SECURITY, ET AL.,
PETITIONERS

v.

INNOVATION LAW LAB, ET AL.

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

PETITIONERS' RESPONSE IN OPPOSITION TO THE MOTION FOR LEAVE TO INTERVENE

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The Acting Solicitor General, on behalf of Secretary of Homeland Security Alejandro N. Mayorkas and the other petitioners, respectfully submits this response in opposition to the motion for leave to intervene as petitioners filed by the States of Texas, Missouri, and Arizona. The motion should be denied.

This case concerns the Migrant Protection Protocols (MPP), a former Department of Homeland Security (DHS) policy that was previously applied to certain nationals of foreign countries who had transited through Mexico from a third country to reach the United States land border. In promulgating MPP, DHS invoked the authority under 8 U.S.C. 1225(b)(2)(C)—part of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*—to return certain noncitizens temporarily to

Mexico during the pendency of their immigration proceedings.[1] After the court of appeals affirmed a preliminary injunction, without any geographical limits, barring DHS from continuing to implement or expand MPP, Pet. App. 1a-47a; see *id.* at 48a-83a, this Court stayed the district court's injunction pending the timely filing and disposition of a petition for a writ of certiorari, 140 S. Ct. 1564, and the Court issued a writ of certiorari on October 19, 2020.

On January 20, 2021, before merits briefing had been completed, the Acting Secretary of Homeland Security directed that DHS would "suspend new enrollments in [MPP], pending further review of the program." Gov't Abeyance Motion 3-4 (citation omitted; brackets in original). This Court thereafter granted the government's motion to hold further briefing in this case in abeyance and to remove the case from the argument calendar, pending DHS's review of MPP. 141 S. Ct. 1289. Nearly four months later, on May 18, 2021, the States moved to intervene as petitioners in this Court.

The States' motion to intervene should be denied because the questions presented in this Court—all of which ask whether the district court correctly entered a preliminary injunction against MPP—are now moot. On June 1, 2021, the Secretary of Homeland Security announced that he had terminated MPP. See App., *infra*, 1a-15a (reprinting the Secretary's memorandum). The government is therefore filing a separate motion to vacate the judgment of the court of appeals and remand with instructions to vacate the district court's preliminary injunction as moot. As a result of the termination

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[1] This response uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

of MPP, respondents no longer have any interest in defending the preliminary injunction, and the propriety of that injunction no longer presents a live case or controversy that the federal courts can resolve. The States should not be permitted to intervene in this Court to present arguments about a moot injunction. And there is no reasonable prospect that the now-moot injunction will affect any interests asserted by the States.

Even if this appeal were not moot, intervention should be denied because the States have not shown that they have any legally cognizable interest in the Secretary's decision whether to use an immigration-enforcement authority that is committed to his discretion by statute. This Court permits intervention only in "unusual circumstances" where "extraordinary factors" support the addition of new parties to protect "vitally affected" interests. Stephen M. Shapiro et al., *Supreme Court Practice* Ch. 6.16(c), at 6-62 (11th ed. 2019). The States have not come close to making the extraordinary showing that would be required for them to take over from the government responsibility for litigating a discretionary immigration program.

STATEMENT

1. The INA establishes procedures for DHS to process noncitizens who are "applicant[s] for admission" to the United States. 8 U.S.C. 1225(a)(1).

Section 1225(b)(2)(A) provides that, if an "immigration officer determines" upon inspecting "an applicant for admission" that he "is not clearly and beyond a doubt entitled to be admitted," then the applicant "shall be detained for a proceeding under [8 U.S.C.] 1229a" to determine whether he will be removed from the United States or is eligible to receive some form of relief or protection from removal, such as asylum. 8 U.S.C.

1225(b)(2)(A). As an alternative to a full removal proceeding under Section 1229a, the INA authorizes an immigration officer to determine that an applicant for admission is eligible for, and should be placed in, the expedited removal process described in Section 1225(b)(1). See *In re E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 521-524 (B.I.A. 2011); see also *Department of Homeland Sec.* v. *Thuraissigiam*, 140 S. Ct. 1959, 1964-1965 (2020) (describing when expedited removal is available). When DHS chooses to place a noncitizen in expedited removal instead of a full removal proceeding, the person is typically removed from the United States within days "without further hearing or review," "unless [he] indicates either an intention to apply for asylum" or a fear of torture or persecution on account of a protected ground in the country to which he will be removed. 8 U.S.C. 1225(b)(1)(A)(i); see 8 C.F.R. 235.3(b)(4). If a person expresses such an intention or fear and an immigration officer finds his fear "credible," then the person "shall be detained for further consideration" of his asylum request and placed in a full removal proceeding under Section 1229a. 8 U.S.C. 1225(b)(1)(B); see 8 U.S.C. 1225(b)(1)(A)(ii); 8 C.F.R. 208.30(f) and 235.3(b)(4).

In addition to DHS's authority to detain applicants for admission who are not clearly entitled to admission during their removal proceedings, the agency is authorized in certain circumstances to temporarily release applicants for admission on parole "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A); see also Gov't Br. 6 n.3.

Another provision of Section 1225—the one most relevant here—provides DHS with a further option in certain instances: "In the case of an alien described in

[Section 1225(b)(2)(A)] who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the [Secretary of Homeland Security] may return the alien to that territory pending a proceeding under section 1229a of this title." 8 U.S.C. 1225(b)(2)(C).[2] Congress enacted Section 1225(b)(2)(C) in 1996 in order to codify the government's "long-standing practice" of requiring certain noncitizens arriving from Mexico or Canada to await immigration proceedings there. *In re M-D-C-V-*, 28 I. & N. Dec. 18, 25-26 & n.10 (B.I.A. 2020); see Gov't Br. 6-7. Following Section 1225(b)(2)(C)'s enactment, the government used that authority primarily on an ad-hoc basis to return certain Mexican or Canadian nationals or third-county nationals arriving at a land border port of entry, in circumstances where the government determined that the person should not be permitted to enter the United States pending removal proceedings. See App., *infra*, 4a.

2. In December 2018, then-Secretary Kirstjen Nielsen announced MPP, under which DHS would "begin implementation of" the contiguous-territory-return authority in Section 1225(b)(2)(C) "on a wide-scale basis" along the southern border. 84 Fed. Reg. 6811, 6811 (Feb. 28, 2019); see Pet. App. 179a-182a. Secretary Nielsen issued policy guidance for implementing MPP on January 25, 2019. Pet. App. 166a-172a.

Under MPP, it was DHS policy that certain "citizens and nationals of countries other than Mexico * * * arriving in the United States by land from Mexico—illegally or without proper documentation—[could] be

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[2] Section 1225 refers to the Attorney General, but those functions have been transferred to the Secretary of Homeland Security. See *Thuraissigiam*, 140 S. Ct. at 1965 n.3.

returned to Mexico pursuant to" Section 1225(b)(2)(C) "for the duration of their Section [1229a] removal proceedings." Pet. App. 167a. If a noncitizen was eligible for return to Mexico under MPP and an immigration officer determined that MPP should be applied, then the person would be "issued a[] Notice to Appear (NTA) and placed into Section [1229a] removal proceedings," and then transferred to Mexico to await those proceedings. *Id.* at 155a. Secretary Nielsen also instructed, however, based on non-refoulement principles, that a noncitizen "should not be involuntarily returned to Mexico pursuant to Section [1225(b)(2)(C)] * * * if the alien would more likely than not be" tortured or persecuted there on account of a protected ground (race, religion, nationality, membership in a particular social group, or political opinion). *Id.* at 171a. Secretary Nielsen explained that the government had adopted MPP after diplomatic engagement with the Government of Mexico. See *id.* at 168a-170a.

3. Respondents are 11 applicants for admission who were returned to Mexico under MPP and six organizations that provide legal services to migrants. Pet. App. 54a. In February 2019, respondents brought this suit in the Northern District of California challenging MPP on various grounds and seeking a preliminary injunction. See J.A. 425-476 (complaint).

In April 2019, the district court granted respondents' motion for a preliminary injunction, without any geographical limits, that barred DHS from "continuing to implement or expand" MPP and ordered that the individual respondents be allowed to enter the United States to pursue their applications for admission. Pet. App. 83a; see *id.* at 48a-83a. The court declined to enter

a stay pending appeal. *Id.* at 82a-83a. The government appealed and sought a stay from the court of appeals.

In May 2019, after issuing an administrative stay and holding oral argument, the court of appeals initially stayed the injunction pending appeal. Pet. App. 97a-107a. The court found, contrary to the district court's conclusions, that the INA authorized MPP and that MPP was a "general statement of policy" that did not require notice-and-comment rulemaking under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.* Pet. App. 101a-106a.

In February 2020, however, the court of appeals ruled on the merits of the government's appeal and affirmed the district court's preliminary injunction. Pet. App. 1a-43a. The merits panel majority rejected the stay panel's analysis and concluded that Section 1255(b)(2)(C) does not authorize contiguous-territory return for any noncitizen (such as each individual respondent here) who was eligible to be placed into expedited removal proceedings under Section 1225(b)(1). *Id.* at 12a-25a. The panel additionally held that MPP "does not comply with [the United States'] treaty-based nonrefoulement obligations codified at 8 U.S.C. § 1231(b)." *Id.* at 12a; see *id.* at 25a-38a. And the panel concluded that a geographically unlimited injunction was appropriate because this case was brought under the APA and "implicat[es] immigration policy." *Id.* at 39a-42a.[3]

The government filed an emergency motion in the court of appeals, renewing its request for a stay of the district court's injunction pending review by this Court. The merits panel majority stayed the injunction outside

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[3] The merits panel did not address the district court's conclusion that MPP should be enjoined because it was not promulgated through notice-and-comment rulemaking. See Pet. App. 12a.

the boundaries of the Ninth Circuit, but otherwise denied a stay. Pet. App. 84a-94a.

This Court then stayed the district court's injunction in full pending the timely filing and disposition of a petition for a writ of certiorari. 140 S. Ct. 1564. The government filed a timely petition, which this Court granted on October 19, 2020.

4. On January 20, 2021, after President Biden took office, the Acting Secretary of Homeland Security directed that DHS would "suspend new enrollments in [MPP], pending further review of the program." Gov't Abeyance Motion 3-4 (citation omitted; brackets in original). In light of that development, on February 1, 2021, the government moved this Court to hold further briefing in this case in abeyance and remove the case from the Court's argument calendar. *Id.* at 4. The government's motion stated that, if the motion were granted, the government would advise the Court of material developments that would support further action by the Court. *Id.* at 4-5. Respondents consented to the motion for abeyance. *Id.* at 4. This Court granted that motion on February 3, 2021. 141 S. Ct. 1289.

5. On February 2, 2021, President Biden issued Executive Order 14,010, *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. 5, 2021). The order directed that "[t]he Secretary of Homeland Security shall promptly review and determine whether to terminate or modify" MPP, "including by considering whether to rescind" Secretary Nielsen's January 25, 2019 policy guidance and other "implementing guidance." *Id.* at 8269. The order

further directed that the Secretary "promptly consider a phased strategy for the safe and orderly entry into the United States, consistent with public health and safety and capacity constraints, of those individuals who have been subjected to MPP for further processing of their asylum claims." *Ibid.*

DHS's subsequent review of MPP gave thorough consideration to the significant policy questions implicated by MPP, including President Biden's policy objective to address the root causes of migration throughout North and Central America, the government's efforts to combat the spread of COVID-19, and the government's diplomatic engagements with the Government of Mexico. See App., *infra*, 6a-9a. Following the completion of that review, on June 1, 2021, Secretary Mayorkas announced his decision to terminate MPP and rescind the January 25, 2019 policy guidance and other MPP-implementation guidance. *Id.* at 1a-15a. The Secretary explained that his determination was based on several considerations, including the extent of agency personnel and resources required to implement the program, concerns regarding MPP's operation and effectiveness, the agency's plan to pursue alternative policy approaches designed to limit illegal immigration while adjudicating asylum claims in a fair and timely manner, the fact that immigration proceedings for persons enrolled in MPP have been suspended for more than 14 months due to COVID-19, and MPP's impact on the United States' bilateral relationship with the Government of Mexico. *Id.* at 6a-14a. The Secretary ultimately concluded that "MPP is no longer a necessary or viable tool for" DHS, and he explained that he has "no intention to resume MPP in any manner similar to the

program as outlined in the January 25, 2019 Memorandum." *Id.* at 14a.

6. On May 18, 2021—nearly four months after DHS suspended new enrollments in MPP and the President ordered DHS to consider whether to terminate MPP—the States moved to intervene in this Court.

ARGUMENT

The motion for leave to intervene should be denied for any of several reasons. First, this appeal—which concerns whether the district court correctly entered a preliminary injunction against MPP—is now moot. The injunction at issue was based on respondents' challenges to DHS's implementation of MPP. But the Secretary has now terminated MPP, and none of the individual respondents is still in Mexico under 8 U.S.C. 1225(b)(2)(C) pending a removal proceeding. Thus, the appropriate disposition in this Court—as explained further in the government's separate motion filed contemporaneously with this response—is vacatur of the judgment below under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), and remand with instructions to vacate the preliminary injunction. Because no live case or controversy remains over the preliminary injunction, there is no justiciable dispute about the legality of that injunction in which the States could intervene in this Court—and no need for the States to intervene to oppose that injunction. And even if an Article III case or controversy remained in this Court, the States have not come close to showing that this is the exceptional case that might warrant a nonparty's intervention to defend an application of the federal government's discretionary immigration authority.

A. The Appeal Of The Preliminary Injunction Is Moot

The States are not entitled to intervene in this Court because the appeal of the preliminary injunction is now moot, and new parties cannot intervene where no live case or controversy remains. Moreover, the States' purported interest in intervening is misguided, because the core premise of their intervention request was their speculation that the government would "seek to dismiss" the petition for a writ of certiorari "pursuant to [this Court's] Rule 46.1[,] * * * thus reviving the district court's nationwide injunction." Motion to Intervene (Motion) 3; see Motion 1, 4, 10-13. That premise was mistaken: the appropriate disposition of this case in light of mootness is *vacatur* of the preliminary injunction against MPP, and there is no reasonable prospect that the States' asserted interests will be adversely affected by the outcome of this case.

1. As explained at greater length in the government's contemporaneously filed suggestion of mootness and motion to vacate the judgment of the court of appeals, the Secretary's termination of MPP mooted respondents' claimed entitlement to the preliminary injunction that is at issue in this case. Gov't Suggestion of Mootness and Motion to Vacate the Judgment of the Court of Appeals 10-12; see *University of Texas* v. *Camenisch*, 451 U.S. 390, 394 (1981) (When enjoined conduct has ceased, "the correctness of the decision to grant [the] preliminary injunction * * * is moot."). None of the individual respondents or the respondent organizations would obtain redress even if this Court were to affirm the decision below and therefore reinstate the currently stayed injunction against MPP. Cf. *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 72 (2013) ("If an intervening circumstance deprives the

plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot.") (citation omitted).

2. This Court should deny the States' intervention motion, first, because there is no longer a live case or controversy in this Court, and thus no live action in which the States could intervene consistent with Article III. *Camenisch*, 451 U.S. at 394.

In addition, the mootness of respondents' claims to enjoin MPP undermines the States' asserted basis for intervention. The States' motion rests on their speculation that, if the petition for a writ of certiorari is dismissed under Rule 46.1 and the "nationwide injunction against the MPP" springs back into effect, or if this Court rules in respondents' favor on the merits in this case, then the States will have more difficulty obtaining relief in their separate lawsuits seeking to set aside the government's (now-superseded) suspension of new enrollments in MPP. Motion 4; see Motion 12 (referring to the "possibility of conflicting injunctions in this case and in Texas and Missouri's case" challenging the suspension); see also Motion 10-11, 13. The States are wrong in claiming that their lawsuits against the government ever supplied an interest that could justify intervention here. See pp. 13-19, *infra*. But regardless, the harms about which the States have speculated will not come to pass: the preliminary injunction should be dissolved as moot, not left in place; and this Court should not address respondents' claimed entitlement to an injunction barring MPP, which no longer presents a live case or controversy.

B. Even If The Preliminary-Injunction Appeal Still Presented A Live Case Or Controversy, Intervention Would Not Be Warranted

Even if the Secretary had not terminated MPP and the controversy before the Court remained live, intervention by the States would still be unwarranted. To the extent the States claim (Motion 13) that they are entitled to "intervention as of right," that assertion is plainly incorrect: Congress has authorized mandatory intervention in this Court by state officials in cases involving challenges to *state* laws, see 28 U.S.C. 2403(b), but it has not given state officials any similar rights with respect to *federal* laws. And while the States also argue (Motion 15-16) that this Court should grant permissive intervention, they have failed to show that this is the sort of "extraordinary" case in which allowing intervention in this Court would be appropriate. *Supreme Court Practice* Ch. 6.16(c), at 6-62. That is true for multiple reasons. First, the legal questions at issue here do not implicate any substantive legal rights of the States; the "defense for which intervention is sought," Fed. R. Civ. P. 24(c), is instead a legal defense of the *federal government's* exercise of a discretionary authority under the INA. Second, the States have not shown inadequate representation that could warrant intervention. Fed. R. Civ. P. 24(a)(2). And last, the States' delay in seeking intervention further weighs against granting their motion here.

1. Intervention is the "legal procedure by which . . . a third party is allowed to become a party to the litigation." *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 933 (2009) (quoting *Black's Law Dictionary* 840 (8th ed. 2004)). And like any other "'party' to litigation," a person who intervenes in a case

becomes "'[o]ne by or against whom [the] lawsuit is brought,'" *i.e.*, a plaintiff who brings, or a defendant against whom is brought, one or more claims for relief in the case. *Ibid.* (citation omitted; first set of brackets in original).

Where a litigant seeks only to assert legal arguments in support of a claim or defense belonging to an existing party to the case, intervention is inappropriate. Such a litigant may participate in the case as an *amicus curiae*, filing a brief that describes "the interest of the *amicus curiae*" as well as its argument on the merits. Sup. Ct. R. 37.5. But a litigant that does not assert its own legal claims or defenses has no entitlement to intervene as a party in this Court merely because it disagrees with the manner in which the existing petitioners or respondents have asserted their respective claims or defenses.

Federal Rule of Civil Procedure 24, on which the States rely by analogy (Motion 13-16), strongly supports that understanding of intervention. Rule 24 provides that a putative intervenor's "motion to intervene * * * must * * * be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). "The words 'claim[ ] or defense[ ]'" in Rule 24 "'manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit.'" *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 n.18 (1997) (quoting *Diamond* v. *Charles*, 476 U.S. 54, 76 (1986) (O'Connor, J., concurring in part and concurring in the judgment)). And under Rule 8, a pleader that submits a responsive pleading "must" state "*its* defenses" to "each claim *asserted against it*." Fed. R. Civ. P. 8(b)(1)(A) (emphases added); see *Black's Law Dictionary* 419 (6th ed. 1990) ("Defense" means "[t]hat which

is offered and alleged *by the party proceeded against* in an action or suit, as a reason in law or fact why the plaintiff should not recover or establish what he seeks.") (emphasis added); *Black's Law Dictionary* 345 (1st ed. 1891) (same). The requirement of Rule 24 that a putative intervenor submit a "pleading" setting out the "defense" it would assert if allowed to become a party defendant accordingly limits intervention to circumstances where the intervenor seeks to defend its own substantive legal rights in opposition to a claim in the pending action that could have been asserted against it. Fed. R. Civ. P. 24(c).

This Court's decision in *Donaldson* v. *United States*, 400 U.S. 517 (1971), confirms that conclusion. In *Donaldson*, the government petitioned a district court to enforce administrative summonses that the IRS had issued to Donaldson's former employer (Acme) and its accountant (Mercurio) to acquire testimony and documentary evidence about Donaldson's tax liability. *Id.* at 518-520. The employer and accountant, as the witness-respondents against whom the government sought judicial relief, had the right to "challenge the summons[es] on any appropriate ground," including the "defense[]" that they were issued for an "improper purpose." *Id.* at 526. But neither opposed enforcement, as both were willing to comply with any court order. *Id.* at 521 n.5, 531. This Court rejected Donaldson's claim that he was entitled to intervene because he "possesse[d] 'an interest relating to the property or transaction which is the subject of the [enforcement] action'" and sought to assert a defense that the witness-respondents themselves could have raised, *i.e.*, that the summonses were allegedly invalid because they "were not issued for any

[proper] purpose." *Id.* at 521, 527 (second set of brackets in original); see *id.* at 530-531. The Court observed that Donaldson lacked either a "proprietary interest" in his employer's records or any legally recognized "privilege"; his "only interest" lay in the fact that the records at issue "presumably contain[ed] details" bearing on his tax situation. *Id.* at 530-531. But Donaldson's interest in "counter[ing] and overcom[ing] Mercurio's and Acme's willingness, under summons, to comply and to produce records" notwithstanding the potential availability of a defense to production, the Court held, "cannot be the kind contemplated by Rule 24(a)(2)." *Id.* at 531.

Donaldson thus makes clear that a party seeking intervention under Rule 24(a)(2) must assert a "legally protectible" interest in the suit in which intervention is sought, not simply a more abstract interest in the potential consequences of that suit. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 315 (1985) (summarizing the holding in *Donaldson*). Applying that principle here, the States plainly do not assert a "legally protectible" interest sufficient to support intervention in this Court. *Ibid.* The preliminary injunction at issue here rests on respondents' arguments that DHS lacked authority under the INA and APA to carry out MPP, and accordingly that the government would violate the INA or APA if it continued to implement MPP. See Pet. App. 63a-80a. The States do not identify any defense of their own to those claims that they would assert if permitted to intervene. Instead, they merely seek to assert a defense *for the government* that the challenged federal actions represented a lawful exercise of DHS's authority. See Motion 15-16 (explaining the States' desire to present arguments on behalf of the federal government's authority to use MPP). The States have no

right to intervene in this case merely to ensure that the existing defendants assert their own defenses in the way the States would like. See *Donaldson*, 400 U.S. at 530-531; see also Fed. R. Civ. P. 24(b) (authorizing district courts to allow permissive intervention as a party-defendant only where the putative intervenor "*has a* * * * *defense* that shares with the main action a common question of law or fact") (emphases added).

The States assert (Motion 11) general interests in the continuation of MPP, arguing that the policy has helped to reduce their "social-service" and "law-enforcement costs." But as in *Donaldson*, those arguments about the future downstream effects of the outcome of this litigation do not provide the States with a basis for intervening as a defendant. That is particularly true because the government explained from the start that MPP was a discretionary exercise of the Secretary's INA authority, subject to "case-by-case" exceptions. Pet. App. 156a; see Gov't Br. 39 ("DHS could modify the approach specified in MPP at any time if it determined that would be appropriate.").

The States do not contend otherwise; their motion does not assert that they have a right under the INA to insist on continuation of the MPP program, and any such assertion would be untenable in light of the statutory text making clear that the Secretary has discretion whether and how to use contiguous-territory-return authority, which directly implicates foreign-policy decisions. See 8 U.S.C. 1225(b)(2)(C) (providing that the Secretary "*may* return" applicants for admission not clearly entitled to admission to their contiguous foreign territory of arrival pending a removal proceeding) (emphasis added); see also *Arizona* v. *United States*, 567 U.S. 387, 396-397 (2012) ("Some discretionary decisions

involve policy choices that bear on this Nation's international relations. * * * The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy[.]"); *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984) (observing that private parties "have no judicially cognizable interest in procuring enforcement of the immigration laws"). Accordingly, there is no risk that the disposition of this case will interfere with any "legally protectible" interest of the States that could provide a basis for intervention. *Tiffany Fine Arts*, 469 U.S. at 315.[4]

That conclusion is not altered by the States' recently filed suits challenging the January 20, 2021 suspension of new enrollments in MPP and seeking a preliminary injunction of that suspension. See Motion 11, 13. As the States observe (Motion 11), those suits rely primarily on the States' contention that DHS's decision failed to consider certain alleged effects of suspending new enrollments in MPP "and was thus arbitrary and capricious." But that claim is now moot in light of the Secretary's decision terminating MPP, and rescinding the January 20 temporary suspension, based on DHS's comprehensive review of the program. See App., *infra*,

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[4] In some circumstances where the government has granted legal rights to third parties, those third parties may be able to intervene as defendants in an APA action asserting that the government acted unlawfully in granting them those rights (and that the plaintiff was harmed as a result). Cf. *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 918 (2020) (granting petition for a writ of certiorari filed by a religious employer that intervened in the lower courts to defend interim final rules exempting it from certain otherwise-applicable legal requirements). Here, however, the agency action at issue did not confer any legal rights on the States that the States may intervene to defend.

14a-15a. And more generally, the States' request for an injunction in another case does not give them a "defense" in this case that they may intervene in order to defend. Fed. R. Civ. P. 24(c). In *Donaldson*, the putative intervenor (Donaldson) had sought *and obtained* injunctive relief in separate suits to prevent his employer and accountant from providing the government with the records it sought. See 400 U.S. at 527. But those distinct, "self-instituted actions," *ibid.*, did not give Donaldson a protectable interest in the government's action against the employer and accountant that he could intervene to defend. The same is true here: the States cannot bootstrap their way into party-defendant status alongside the government in this case by becoming party plaintiffs *against* the government in another case.

2. For related reasons, the States have not shown that the government "will not represent the States' interests." Motion 13 (citing Fed. R. Civ. P. 24(a)(2)). At the outset, the "interests" asserted by the States in their motion concern issues that have never been part of this case. This Court granted the petition for a writ of certiorari to address four questions concerning whether the district court correctly entered a preliminary injunction barring DHS from implementing or expanding MPP. See Pet. I. The States identify no way in which the government's advocacy on those legal questions has been inadequate, especially in light of the Secretary's decision to no longer use MPP. The States speculate (Motion 14) that the government will "take advantage" of the district court's preliminary injunction here by seeking to retain it. But as explained above and in the government's contemporaneously filed motion for vacatur, that speculation has not been borne out. The

government has not sought to be bound by the lower courts' rulings in this case; rather, the government seeks vacatur of both the court of appeals' judgment and the district court's preliminary injunction. The Secretary has simply made a policy determination that the MPP program's wide-scale use of contiguous-territory-return authority no longer offers the best strategy for enforcing federal immigration laws and achieving important foreign-relations objectives.

The States may well object to the government's policy decision to terminate MPP. See Motion 13-14. But intervention in this Court is not an appropriate way for the States to press that objection, especially when the States' arguments—that the government's "suspension of" new enrollments in MPP was "unlawful" and "had spillover effects in the States," Motion 11—have only a tangential relationship to the issues that would be before the Court in this case if it remained live. See Motion 15 (acknowledging that permissive intervention would require the non-party to "ha[ve] a claim or defense that shares with the main action a common question of law or fact") (quoting Fed. R. Civ. P. 24(b)(1)(B)). The States do not identify any case where this Court has allowed nonparties to intervene based on asserted interests so dissimilar to the questions that were actually at issue in this case before it became moot.

3. Finally, the States are wrong to claim (Motion 14-16) that their request for intervention is timely.

The States had ample opportunity to participate in this case at an early point, well before the Secretary reached a final decision to terminate MPP. As an initial matter, the States never even declared their support for MPP as amici curiae in this case, either in this Court or the lower courts. Cf. States of Texas et al. Amici Br.,

Department of Homeland Sec. v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (No. 18-587) (asserting injury from implementation of a discretionary immigration program, and defending lawfulness of DHS's attempt to terminate that program). Even after the January 20, 2021 announcement that the government would suspend new enrollments in MPP and the February 2, 2021 Executive Order directing DHS to evaluate whether to terminate MPP—the events the States point to (Motion 13-14) as evidence of the government's supposedly inadequate representation—the States did not act promptly to intervene. Instead, they waited for months to file their intervention motion.

That delay was not immaterial. In those intervening months, DHS was working on the review of MPP publicly directed by the President, including the development of "a phased strategy for the safe and orderly entry into the United States, consistent with public health and safety and capacity constraints, of those individuals who have been subjected to MPP for further processing of their asylum claims." 86 Fed. Reg. at 8269. Had the States sought intervention sooner, DHS would have had additional time to consider their asserted interests. In any event, to allow the States' intervention now, after the Secretary has made a final termination decision, could complicate the Executive Branch's ability to engage with foreign partners—including Mexico, the cooperation of which was always critical to DHS's ability to implement MPP, see Pet. App. 168a-170a—about moving from MPP to the alternative strategies that the Secretary has determined will better advance the government's immigration-policy objectives. See App., *infra*, 13a (explaining that termination of MPP will help "expand the focus of the relationship with the

Government of Mexico to address broader issues related to migration to and through Mexico").

CONCLUSION

The motion for leave to intervene should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

JUNE 2021

APPENDIX

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

June 1, 2021

MEMORANDUM FOR: Troy A. Miller
Acting Commissioner
U.S. Customs and
Border Protection

Tae D. Johnson
Acting Director
U.S. Immigration and
Customs Enforcement

Tracy L. Renaud
Acting Director
U.S. Citizenship and
Immigration Services

FROM: Alejandro N. Mayorkas
Secretary

SUBJECT: **Termination of the Migrant Protection Protocols Program**

On January 25, 2019, Secretary of Homeland Security Kirstjen Nielsen issued a memorandum entitled "Policy Guidance for Implementation of the Migrant Protection Protocols." Over the course of the Migrant Protection Protocols (MPP) program, the Department of Homeland Security and its components issued further policy guidance relating to its implementation. In total, approximately 68,000 individuals were returned to Mexico following their enrollment in MPP.[1]

On January 20, 2021, then-Acting Secretary David Pekoske issued a memorandum suspending new enrollments in MPP, effective the following day.[2] On February 2, 2021, President Biden issued 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.* In this Executive Order, President Biden directed me, in coordination with the Secretary of State, the Attorney General, and the Director of the Centers for Disease Control and Prevention, to "promptly consider a phased strategy for the safe and orderly entry into the

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[1] *See* "Migrant Protection Protocols Metrics and Measures," Jan. 21, 2021, available at https://www.dhs.gov/publication/metrics-and-measures.

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

United States, consistent with public health and safety and capacity constraints, of those individuals who have been subjected to MPP for further processing of their asylum claims," and "to promptly review and determine whether to terminate or modify the program known as the Migrant Protection Protocols."[3]

On February 11, the Department announced that it would begin the first phase of a program to restore safe and orderly processing at the Southwest Border of certain individuals enrolled in MPP whose immigration proceedings remained pending before the Department of Justice's Executive Office for Immigration Review (EOIR).[4] According to Department of State data, between February 19 and May 25, 2021, through this program's first phase approximately 11,200 individuals were processed into the United States. The Department is continuing to work with interagency partners to carry out this phased effort and to consider expansion to additional populations enrolled in MPP.

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[3] 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.

[4] U.S. Department of Homeland Security, *DHS Announces Process to Address Individuals in Mexico with Active MPP Cases*, Feb. 11, 2021, available at https://www.dhs.gov/news/2021/02/11/dhs-announces-process- address-individuals-mexico-active-mpp-cases.

Having now completed the further review undertaken pursuant to Executive Order 14010 to determine whether to terminate or modify MPP, and for the reasons outlined below, I am by this memorandum terminating the MPP program. I direct 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.

Background

Section 235(b)(2)(C) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1225(b)(2)(C), authorizes DHS to return to Mexico or Canada certain noncitizens who are arriving on land from those contiguous countries pending their removal proceedings before an immigration judge under Section 240 of the INA, 8 U.S.C. § 1229a. Historically, DHS and the legacy Immigration and Naturalization Service primarily used this authority on an ad-hoc basis to return certain Mexican and Canadian nationals who were arriving at land border ports of entry, though the provision was occasionally used for third country nationals under certain circumstances provided they did not have a fear of persecution or torture related to return to Canada or Mexico.

On December 20, 2018, the Department announced the initiation of a novel program, the Migrant Protection Protocols, to implement the contiguous-territory-return authority under Section 235(b)(2)(C) on a wide-scale basis along the Southwest Border. On January 25, 2019, DHS issued policy guidance for implementing MPP, which was subsequently augmented a few days later by guidance from U.S. Customs and Border Protection,

U.S. Immigration and Customs Enforcement, and U.S. Citizenship and Immigration Services. During the course of MPP, DHS and its components continued to update and supplement the policy, including through the "Supplemental Policy Guidance for Implementation of the Migrant Protection Protocols" issued on December 7, 2020 by the Senior Official Performing the Duties of the Under Secretary for Strategy, Policy, and Plans.

Under MPP, it was DHS policy that certain non-Mexican applicants for admission who arrived on land at the Southwest Border could be returned to Mexico to await their removal proceedings under INA Section 240. To attend removal proceedings, which were prioritized by EOIR on the non-detained docket, DHS facilitated program participants' entry into and exit from the United States. Due to public health measures necessitated by the ongoing COVID-19 pandemic, however, DHS and EOIR stopped being able to facilitate and conduct immigration court hearings for individuals enrolled in MPP beginning in March 2020.[5]

Following the Department's suspension of new enrollments in MPP, and in accordance with the President's direction in Executive Order 14010, DHS has worked with interagency partners and facilitating organizations to implement a phased process for the safe and orderly entry into the United States of certain individuals who had been enrolled in MPP.

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[5] *See* "Joint DHS/EOIR Statement on MPP Rescheduling," Mar. 23, 2020, available at https://www.dhs.gov/news/2020/03/23/joint-statement-mpp-rescheduling.

Determination

In conducting my review of MPP, I have carefully evaluated the program's implementation guidance and programmatic elements; prior DHS assessments of the program, including a top-down review conducted in 2019 by senior leaders across the Department, and the effectiveness of related efforts by DHS to address identified challenges; the personnel and resource investments required of DHS to implement the program; and MPP's performance against the anticipated benefits and goals articulated at the outset of the program and over the course of the program. I have additionally considered the Department's experience to date carrying out its phased strategy for the safe and orderly entry into the United States of certain individuals enrolled in MPP. In weighing whether to terminate or modify the program, I considered whether and to what extent MPP is consistent with the Administration's broader strategy and policy objectives for creating a comprehensive regional framework to address the root causes of migration, managing migration throughout North and Central America, providing alternative protection solutions in the region, enhancing lawful pathways for migration to the United States, and—importantly—processing asylum seekers at the United States border in a safe and orderly manner consistent with the Nation's highest values.

As an initial matter, my review confirmed that MPP had mixed effectiveness in achieving several of its central goals and that the program experienced significant challenges.

- I have determined that MPP does not adequately or sustainably enhance border management in such a way as to justify the program's extensive operational burdens and other shortfalls. Over the course of the program, border encounters increased during certain periods and decreased during others. Moreover, in making my assessment, I share the belief that we can only manage migration in an effective, responsible, and durable manner if we approach the issue comprehendsively, looking well beyond our own borders.

- Based on Department policy documents, DHS originally intended the program to more quickly adjudicate legitimate asylum claims and clear asylum backlogs. It is certainly true that some removal proceedings conducted pursuant to MPP were completed more expeditiously than is typical for non-detained cases, but this came with certain significant drawbacks that are cause for concern. The focus on speed was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their immigration proceedings. In particular, the high percentage of cases completed through the entry of *in absentia* removal orders (approximately 44 percent, based on DHS data) raises questions for me 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. I am also mindful of the fact that, rather than helping to clear asylum backlogs, over the course of the program backlogs increased before both the USCIS Asylum Offices and EOIR.

- MPP was also intended to reduce burdens on border security personnel and resources, but over time the program imposed additional responsibilities that detracted from the Department's critically important mission sets. The Department devoted resources and personnel to building, managing, staffing, and securing specialized immigration hearing facilities to support EOIR; facilitating the parole of individuals into and out of the United States multiple times in order to attend immigration court hearings; and providing transportation to and from ports of entry in certain locations related to such hearings. Additionally, as more than one-quarter of individuals enrolled in MPP were subsequently re-encountered attempting to enter the United States between ports of entry, substantial border security resources were still devoted to these encounters.

A number of the challenges faced by MPP have been compounded by the COVID-19 pandemic. As immigration courts designated to hear MPP cases were closed for public health reasons between March 2020 and April 2021, DHS spent millions of dollars each month to maintain facilities incapable of serving their intended purpose. Throughout this time, of course, tens of thousands of MPP enrollees were living with uncertainty in

Mexico as court hearings were postponed indefinitely. As a result, any benefits the program may have offered are now far outweighed by the challenges, risks, and costs that it presents.

In deciding whether to maintain, modify, or terminate MPP, I have reflected on my own deeply held belief, which is shared throughout this Administration, that the United States is both a nation of laws and a nation of immigrants, committed to increasing access to justice and offering protection to people fleeing persecution and torture through an asylum system that reaches decisions in a fair and timely manner. To that end, the Department is currently considering ways to implement long-needed reforms to our asylum system that are designed to shorten the amount of time it takes for migrants, including those seeking asylum, to have their cases adjudicated, while still ensuring adequate procedural safeguards and increasing access to counsel. One such initiative that DHS recently announced together with the Department of Justice is the creation of a Dedicated Docket to process the cases of certain families arriving between ports of entry at the Southwest Border.[6] This process, which will take place in ten cities that have well-established communities of legal service providers, will aim to complete removal proceedings within 300 days—a marked improvement over the current case completion rate for non-detained cases. To ensure that

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[6] *See* U.S. Department of Homeland Security, "DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings," May 28, 2011, available at https://www.dhs.gov/news/2021/05/28/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings.

fairness is not compromised, noncitizens placed on the Dedicated Docket will receive access to legal orientation and other supports, including potential referrals for pro bono legal services. By enrolling individuals placed on the Dedicated Docket in Alternatives to Detention programs, this initiative is designed to promote compliance and increase appearances throughout proceedings. I believe these reforms will improve border management and reduce migration surges more effectively and more sustainably than MPP, while better ensuring procedural safeguards and enhancing migrants' access to counsel. We will closely monitor the outcomes of these reforms, and make adjustments, as needed, to ensure they deliver justice as intended: fairly and expeditiously.

In arriving at my decision to now terminate MPP, I also considered various alternatives, including maintaining the status quo or resuming new enrollments in the program. For the reasons articulated in this memorandum, however, preserving MPP in this manner would not be consistent with this Administration's vision and values and would be a poor use of the Department's resources. 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. Perhaps more importantly, that approach would come at tremendous opportunity cost, detracting from the work taking place to advance the vision for migration management and humanitarian protection articulated in Executive Order 14010.

Moreover, I carefully considered and weighed the possible impacts of my decision to terminate MPP as well as steps that are underway to mitigate any potential negative consequences.

- In considering the impact such a decision could have on border management and border communities, among other potential stakeholders, I 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. Throughout this effort, the Department has innovated and achieved greater efficiencies that will enhance port processing operations in other contexts. The Department has also worked in close partnership with nongovernmental organizations and local officials in border communities to connect migrants with short-term supports that have facilitated their onward movement to final destinations away from the border. The Department's partnership with the Government of Mexico has been an integral part of the phased process's success. To maintain the integrity of this safe and orderly entry process for individuals enrolled in MPP and to encourage its use, the Department has communicated the terms of the process clearly to all stakeholders and has continued to use, on occasion and where appropriate, the return-to-contiguous-territory authority in INA Section 235(b)(2)(C) for MPP enrollees who nevertheless attempt to

enter between ports of entry instead of through the government's process.

- In the absence of MPP, I have additionally considered other tools the Department may utilize to address future migration flows in a manner that is consistent with the Administration's values and goals. I have further considered the potential impact to DHS operations in the event that current entry restrictions imposed pursuant to the Centers for Disease Control and Prevention's Title 42 Order are no longer required as a public health measure. At the outset, the Administration has been—and will continue to be—unambiguous that the immigration laws of the United States will be enforced. The Department has at its disposal various options that can be tailored to the needs of individuals and circumstances, including detention, alternatives to detention, and case management programs that provide sophisticated wrap-around stabilization services. Many of these detention alternatives have been shown to be successful in promoting compliance with immigration requirements. This Administration's broader strategy for managing border processing and adjudicating claims for immigration relief—which includes the Dedicated Docket and additional anticipated regulatory and policy changes—will further address multifaceted border dynamics by facilitating both timely and fair final determinations.

- I additionally considered the Administration's important bilateral relationship with the Government of Mexico, our neighbor to the south and a key foreign policy partner. Over the past two-and-a-half years, MPP played an outsized role in the Department's engagement with the Government of Mexico. Given the mixed results produced by the program, it is my belief that MPP cannot deliver adequate return for the significant attention that it draws away from other elements that necessarily must be more central to the bilateral relationship. During my tenure, for instance, a significant amount of DHS and U.S. diplomatic engagement with the Government of Mexico has focused on port processing programs and plans, including MPP. The Government of Mexico was a critically important partner in the first phase of our efforts to permit certain MPP participants to enter the United States in a safe and orderly fashion and will be an important partner in any future conversations regarding such efforts. But the Department is eager to expand the focus of the relationship with the Government of Mexico to address broader issues related to migration to and through Mexico. This would include collaboratively addressing the root causes of migration from Central America; improving regional migration management; enhancing protection and asylum systems throughout North and Central America; and expanding cooperative efforts to combat smuggling and trafficking networks, and more. Terminating MPP will, over time, help to broaden our engagement

> with the Government of Mexico, which we expect will improve collaborative efforts that produce more effective and sustainable results than what we achieved through MPP.

Given the analysis set forth in this memorandum, and having reviewed all relevant evidence and weighed the costs and benefits of either continuing MPP, modifying it in certain respects, or terminating it altogether, I have determined that, on balance, any benefits of maintaining or now modifying MPP are far outweighed by the benefits of terminating the program. Furthermore, termination is most consistent with the Administration's broader policy objectives and the Department's operational needs. Alternative options would not sufficiently address either consideration.

Therefore, in accordance with the strategy and direction in Executive Order 14010, following my review, and informed by the current phased strategy for the safe and orderly entry into the United States of certain individuals enrolled in MPP, I have concluded that, on balance, MPP is no longer a necessary or viable tool for the Department. Because my decision is informed by my assessment that MPP is not the best strategy for implementing the goals and objectives of the Biden-Harris Administration, I have no intention to resume MPP in any manner similar to the program as outlined in the January 25, 2019 Memorandum and supplemental guidance.

Accordingly, for the reasons outlined above, I hereby rescind, effective immediately, the Memorandum issued by Secretary Nielsen dated January 25, 2019 entitled "Policy Guidance for Implementation of the Migrant

Protection Protocols," and the Memorandum issued by Acting Secretary Pekoske dated January 20, 2021 entitled "Suspension of Enrollment in the Migrant Protection Protocols Program." I further direct DHS personnel, effective immediately, to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives issued to carry out MPP. Furthermore, DHS personnel should continue to participate in the ongoing phased strategy for the safe and orderly entry into the United States of individuals enrolled in MPP.

The termination of MPP does not impact the status of individuals who were enrolled in MPP at any stage of their proceedings before EOIR or the phased entry process describe above.

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This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

CC: Kelli Ann Burriesci
Acting Under Secretary
Office of Strategy, Policy, and Plans