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' SUGGESTION OF MOOTNESS AND MOTION TO VACATE THE JUDGMENT OF THE COURT OF APPEALS

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Pursuant to this Court's Rule 21.2(b), the Acting Solicitor General, on behalf of Secretary of Homeland Security Alejandro N. Mayorkas and the other petitioners, respectfully moves that the Court vacate the judgment of the court of appeals, remand the case to the court of appeals, and direct the court of appeals to vacate as moot the district court's April 8, 2019 preliminary injunction. Respondents' counsel, when asked for their views on this motion earlier today, informed us that they do not yet have a position on this motion.

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]

On March 11, 2020, this Court granted the government's application for a stay of a preliminary injunction entered by the district court that, without any geographical limits, barred DHS from continuing to implement or expand MPP. 140 S. Ct. 1564; see Pet. App. 83a. This Court subsequently granted the government's petition for a writ of certiorari to review the court of appeals' decision affirming that preliminary injunction. But before merits briefing was completed, DHS announced that it would "suspend new enrollments in [MPP] pending further review of the program." Gov't Abeyance Motion 3-4 (citation omitted; brackets in original). On the government's motion, this Court held further briefing in this case in abeyance and removed the case from the argument calendar while DHS undertook its review of MPP. 141 S. Ct. 1289.

On June 1, 2021, the Secretary of Homeland Security announced that DHS had completed its review and that he had terminated MPP. The Secretary exercised his statutory discretion to determine whether and when to use the contiguous-territory-return authority in Section 1225(b)(2)(C) and concluded that MPP is not the best strategy for achieving the government's immigration-policy objectives and DHS's operational needs. See

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[1] This motion 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)).

App, *infra*, 1a-15a (reprinting the Secretary's memorandum).

As a result of the Secretary's decision terminating MPP, no respondent continues to have any interest in defending the district court's preliminary injunction barring DHS from implementing MPP, and the propriety of that injunction no longer presents a live case or controversy. The government therefore respectfully submits that this Court should vacate the judgment below and remand with instructions to vacate as moot the district court's April 8, 2019 preliminary-injunction order. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

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 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

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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.

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 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

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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.

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.

ARGUMENT

A. The Appeal Of The Preliminary Injunction Is Moot

The Secretary's termination of MPP has mooted respondents' claim for the equitable relief that is the subject of the proceedings in this Court. Respondents sought the preliminary injunction at issue based on claims that they were harmed by DHS's implementation of MPP. See D. Ct. Doc. 20-1, at 1-3, 20-24 (Feb. 20, 2019) (Prelim. Inj. Motion). But those claimed harms have ceased now that the Secretary has decided, as an exercise of his statutory discretion, and after a review of MPP at the President's direction, 86 Fed. Reg. at 8269, that DHS will no longer exercise the contiguous-territory-return authority in Section 1225(b)(2)(C) on the wide-scale, programmatic basis that DHS employed under MPP. The district court enjoined "[MPP] as announced in the January 25, [2019] DHS policy memorandum and as explicated in further agency memoranda." Pet. App. 83a. The Secretary's decision to terminate that program and rescind the policy memoranda, along with his unequivocal statement that the agency has no intention of resuming MPP, means that respondents have no continuing interest in defending the preliminary injunction, the purpose of which was "merely to preserve the relative positions of the parties until a trial on the merits c[ould] be held." *University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981); see *id.* at 394 (When enjoined conduct has ceased, "the correctness of the decision to grant [the] preliminary injunction * * * is moot.").

In light of the Secretary's decision and other factual developments since the district court issued the preliminary injunction against MPP, no respondent continues

to have any personal stake in that injunction. The individual respondents claimed that they were harmed by being "forced to return to Mexico while their removal proceedings are pending," Prelim. Inj. Motion 1; see *id.* at 20-22, but none can assert that interest now. According to DHS's records, one individual respondent is deceased (Evan Doe); another was deemed exempt from MPP and permitted to pursue his asylum claim from inside the United States (Howard Doe); two withdrew their applications for admission (Bianca Doe, John Doe); three received final orders of removal in immigration proceedings and were removed to Honduras (Dennis Doe, Ian Doe, Frank Doe); three more received asylum and entered the United States (Alex Doe, Christopher Doe, Kevin Doe); and one was permitted in March 2021 to enter the United States and pursue his ongoing immigration proceedings (Gregory Doe), consistent with the President's direction to DHS to consider a phased strategy for the safe and orderly entry into the United States of persons previously subjected to MPP for further processing of their asylum claims, 86 Fed. Reg. at 8269.

The respondent organizations also now lack any legally cognizable interest in the preliminary injunction. They can no longer claim to be forced to "meet the needs of asylum seekers who are now stranded outside the country" under MPP, or to "divert[] resources that would otherwise be spent on serving clients inside the United States." Prelim. Inj. Motion 2; see *id.* at 23. In other words, the organizations would obtain no redress even if this Court were to affirm the decision below and therefore reinstate the currently stayed injunction against MPP.

Because respondents no longer have any live stake in preventing the government from implementing MPP after its termination, no federal court has authority under Article III to adjudicate respondents' entitlement to that injunction, and the injunction must be dissolved. See *Camenisch*, 451 U.S. at 396 ("[W]hen the injunctive aspects of a case become moot on appeal of a preliminary injunction," the issues in the case "can generally not be resolved on appeal, but must be resolved in a trial on the merits."); 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).[4]

B. The Court Should Vacate The Court Of Appeals' Decision

Because the mootness of respondents' claimed entitlement to a preliminary injunction will prevent this Court from reviewing the court of appeals' decision affirming the district court's injunction, this Court should vacate the court of appeals' judgment and remand with

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[4] Respondents' complaint asserted that being returned to Mexico pending removal proceedings adversely affected the ability of some individual respondents to prepare for those proceedings and apply for asylum. See J.A. 450-451, 468-469. The district court lacks jurisdiction to hear such claims in this APA action; those claims must instead be raised in petitions for review of final orders of removal. See 8 U.S.C. 1252(b)(9). And regardless, even if the district court had jurisdiction to consider some respondents' entitlement to retrospective relief in this case, the "significantly different" question before this Court of "whether the preliminary injunction should have issued" is moot. *Camenisch*, 451 U.S. at 393-394.

directions to vacate as moot the district court's preliminary injunction.

1. When a case that would otherwise merit this Court's review becomes moot "while on its way [to this Court] or pending [a] decision on the merits," the Court's "established practice" is to "vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). That practice ensures that no party is "prejudiced by a decision which in the statutory scheme was only preliminary," and "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 40-41; see *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 21 (1994) ("If a judgment has become moot [while awaiting review], this Court may not consider its merits, but may make such disposition of the whole case as justice may require.") (quoting *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944)) (brackets in original).

Of particular relevance here, this Court has recognized that vacatur is appropriate where the government has sought review of a lower-court decision but intervening changes in federal law render further review of that decision moot. See *United States* v. *Microsoft Corp.*, 138 S. Ct. 1186 (2018) (per curiam). Indeed, *Munsingwear* itself involved a case that "became moot on appeal because the regulations sought to be enforced by the United States were annulled by Executive Order," *U.S. Bancorp Mortgage*, 513 U.S. at 25 n.3, and the Court indicated that vacatur could have been an appropriate disposition if the United States had sought that remedy. *Munsingwear*, 340 U.S. at 40 (observing that the United States "did not avail itself of the remedy

it had to preserve its rights"); see *U.S. Bancorp Mortgage*, 513 U.S. at 25 n.3 (expressing no view on "*Munsingwear*'s implicit conclusion that repeal of administration regulations" may provide a basis for vacating a lower court's decision even when that decision was adverse to the Executive Branch).

2. Vacatur is the appropriate disposition in the circumstances of this case, where the court of appeals' decision affirming the now-moot preliminary injunction interpreted the INA and APA in ways that could have important "legal consequences" in the future if the decision were allowed to remain in place. *Munsingwear*, 340 U.S. at 41.

First, the Ninth Circuit held that, if an applicant for admission was eligible for the expedited-removal procedure under Section 1225(b)(1)—even if that person was never placed in expedited removal (as the individual respondents here were not)—then the person is exclusively a "§ (b)(1) applicant" who may not "be subjected to a procedure specified for a § (b)(2) applicant," including contiguous-territory return. Pet. App. 18a; see *id.* at 12a-25a. If that statutory analysis were left in place, it could restrict the scope of DHS's contiguous-territory-return authority, calling into question not only MPP but also the ways in which DHS and the Immigration and Naturalization Service used Section 1225(b)(2)(C) before MPP—on an ad-hoc basis to return to Mexico or Canada particular foreign nationals who the government determined should not be permitted to pursue their immigration proceedings from within the United States. See App., *infra*, 4a. The Ninth Circuit's statutory analysis could also be invoked to cast doubt on DHS's longstanding discretion not to apply the expedited-removal procedure under Section 1225(b)(1)

in any particular case, even if DHS *could have* used expedited removal in that case. See *In re E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 521-524 (B.I.A. 2011).

The Ninth Court next interpreted 8 U.S.C. 1231(b)(3) as a judicially enforceable codification of the United States' non-refoulement commitments under international law, and it concluded that MPP had violated Section 1231(b)(3) because noncitizens were returned to Mexico without each being affirmatively asked whether he feared return to Mexico. See Pet. App. 25a-38a. Those holdings could have implications for other circumstances where noncitizens are removed from, or not permitted to enter, the United States.

Finally, the court of appeals held that a geographically limitless preliminary injunction was permissible and appropriate here because this case was brought under the APA and implicates immigration. See Pet. App. 39a-42a. The decision below thus contributes to "[t]he rise of nationwide injunctions" that "direct how the defendant must act toward persons who are not parties to the case," even as members of this Court have highlighted the serious "equitable and constitutional questions raised" by that practice. *Department of Homeland Sec.* v. *New York*, 140 S. Ct. 599, 600-601 (2020) (Gorsuch, J., concurring in the grant of stay); see *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2428-2429 (2018) (Thomas, J., concurring).

3. This Court has observed that vacatur may be unwarranted where "the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari." *U.S. Bancorp Mortgage*, 513 U.S. at 25; see *Karcher* v. *May*, 484 U.S. 72, 83 (1987). But that exception to this Court's general *Munsingwear* practice has no application here, where the government

has not dismissed its appeal and the Secretary has simply determined that MPP is no longer the best strategy for achieving the Executive's immigration-policy and foreign-relations objectives. See App., *infra*, 14a.

Instead, this case is similar in relevant respects to *Munsingwear* itself. As noted above, the claim for injunctive relief asserted in *Munsingwear* became moot while the government's appeal was pending as a result of the President's issuance of an Executive Order annulling the maximum-price regulation at issue. See 340 U.S. at 39. Nevertheless, the Court indicated that vacatur would have been available had the government requested it. See *id.* at 40.

This Court's decision in *Board of Regents of the University of Texas System* v. *New Left Education Project*, 414 U.S. 807 (1973) (Mem.), is likewise instructive. In that case, a state university's appeal of an injunction against the enforcement of two university rules became moot after the university repealed the challenged rules. See *New Left Educ. Project* v. *Board of Regents of the Univ. of Texas Sys.*, 472 F.2d 218, 219-220 (5th Cir.), rev'd, 414 U.S. 807 (1973). The court of appeals refused to vacate the district court's judgment because the case had "become moot * * * through action of the appellant," *id.* at 221, but this Court summarily reversed, directing vacatur of the judgment. See 414 U.S. at 218. As a leading treatise has explained, vacatur was necessary to ensure that governmental and other parties would not be "deterred" from taking "good faith" actions that would moot a case by "the prospect that," if they do so, "an erroneous district court decision may have untoward consequences in the unforeseen future." 13C Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.10.1, at 583 (3d ed. 2008).

Ultimately, this Court's determination whether to vacate a lower-court decision in light of mootness "is an equitable one," *U.S. Bancorp Mortgage*, 513 U.S. at 29, that depends on what disposition would be "'most consonant to justice' . . . in view of the nature and character of the conditions which have caused the case to become moot," *id.* at 24 (quoting *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916)). Here, that equitable inquiry calls for vacatur. In no sense does "justice * * * require" that DHS continue to deploy an entirely discretionary statutory authority in a manner that the Secretary has determined is not in the best interest of the United States, merely to avoid the future legal consequences of the decision entered by the court of appeals at the preliminary-injunction stage. *Id.* at 21 (citation omitted); see 8 U.S.C. 1225(b)(2)(C) (providing that the Secretary "*may* return [an] alien" to the contiguous foreign territory of his arrival pending a Section 1229a removal proceeding) (emphasis added). Accordingly, the Court should vacate the decision below and remand with instructions to vacate the April 8, 2019 order preliminarily enjoining DHS from implementing or expanding the now-terminated MPP policy.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded with instructions to vacate the district court's April 8, 2019 order.

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