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

REPLY AND RESPONSE OF THE STATES OF TEXAS, MISSOURI, AND ARIZONA

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INTRODUCTION

Only three days before the Department of Justice's response to Texas and Missouri's motion for a preliminary injunction was due in district court, Scheduling Order, *Texas* v. *Biden,* No. 2:21-CV-00067-Z (N.D. Tex. May 21, 2021), ECF No. 37, and the day after it had produced an administrative record confirming DHS's entire rationale for suspending the MPP consisted of one publicly available, three-line document, Administrative Record, *Texas v. Biden*, No. 2:21-CV-0067-Z (N.D. Tex. May 31, 2021), ECF No. 45, DHS Secretary Mayorkas promulgated a new memorandum purporting to terminate the MPP. U.S. Suggestion of Mootness 1a-15a. That same day, the United States filed two documents in this Court: one opposing the Intervenor States' Motion to Intervene and another suggesting that this case is moot and requesting *Munsingwear* vacatur.

Texas and Missouri—two of the Intervenor States—have already renewed their motion for a preliminary injunction to challenge the June 1 Memorandum. And Arizona's challenge to suspension of the MPP remains pending as well.

The Intervenor States still have nearly all of the same interests they asserted when they sought to intervene in this case. Absent being allowed to intervene in this Court (or in the alternative an order requiring vacatur), the Intervenor States are still faced with the prospect of being unable to obtain full relief for their injuries: any order invalidating the termination of the MPP, and thus requiring its implementation again, will be frustrated by a conflicting preliminary injunction preventing enforcement of the MPP nationwide. And the Intervenor States and their citizens must still bear the brunt of responding

to the social ills arising from the Administration's abandonment of the MPP—including law-enforcement costs, social-service impacts, and other predictable effects.

As explained in the Intervenor States' Motion to Intervene and below, these concrete interests justify intervention in this case. This case may then remain in abeyance pending disposition of the Intervenor States' suits challenging the suspension and termination of the MPP. If the MPP was wrongfully rescinded, the Intervenor States' interests in this case remain as vital as ever; if not, this Court may safely dismiss this case at that point.

In the alternative, should this Court conclude that this case is now moot or that the Intervenor States are not entitled to intervene, the Intervenor States agree with the United States and urge vacatur of all lower-court decisions in this case.

ARGUMENT

I. This Court Should Grant the States' Motion to Intervene and Hold this Case in Abeyance.

The Intervenor States have multiple concrete interests that justify intervention. Indeed, the United States' suggestion of mootness focuses myopically on only one: the affect this litigation would have on the Intervenor States' pending suits challenging the Administration's suspension of the MPP program. These arguments are wrong, and they also ignore the States' concrete interests in combatting the numerous social ills that are presently resulting from the Administration's about-face on a policy that worked to stem the tide of illegal immigration. Those interests are still very much alive; they justify intervention as of right in this matter; and they suggest that the Court should hold the case in abeyance rather than dismiss the case as requested by the United States.

A. The June 1 Memorandum does not moot the States' interests in this litigation.

The States still have interests that are affected by this suit. Indeed, their interests are entirely unchanged: A decision by this Court that ends the MPP program would almost certainly affect both their ongoing litigation in the district court as well as their efforts to combat the social ills associated with the termination of the program.

1. The United States' decision to terminate, rather than merely suspend, the MPP program does not resolve the Intervenor States' litigation. If anything, the decision to terminate MPP aggravates the immigration-related costs the States must bear. The suit filed by Texas and Missouri now challenges *both* the Administration's initial suspension *and* DHS's June 1, 2021 Memorandum purporting to terminate the MPP. *See* Plaintiffs' Motion for Preliminary Injunction, *Texas* v. *Biden,* No. 2:21-CV-00067-Z (N.D. June 8, 2021), ECF No. 53. As Texas and Missouri explained there, DHS's June 1 Memorandum violates the Take Care Clause of the Constitution, the Administrative Procedure Act, and the Immigration and Nationality Act. *Id.* at 10-20. Parallel litigation filed by Arizona remains pending as well. *See* Complaint for Declaratory and Injunctive Relief, *Arizona* v. *Mayorkas*, No. 2:21-cv-00617 (D. Ariz. Apr. 11, 2021), ECF No. 1.

2. Nor does the United States' action address the fact that States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). As the Intervenor States identified in their Motion to Intervene (at 4-8, 11), those costs are myriad. Terminating, rather than merely suspending, the program does not stop the spikes in human smuggling and trafficking, fund the States' increased law-enforcement

costs, or prevent the follow-on effects on the States' social services. If anything, now that DHS's suspension of MPP has turned into a putative termination, those interests are more acutely affected.

These are concrete interests of the type that support intervention. In addition to straightforward monetary costs, States also have sovereign interests, subject only to the Constitution, in controlling who enters their borders and for what purposes. *See*, *e.g.*, *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982); *Mayor, Alderman & Commonalty of N.Y.C. v. Miln*, 36 U.S. (11 Pet.) 102, 132 (1837); *see also Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 391 (1902). Thus, for the reasons stated in the Intervenor States' Motion to Intervene (Mot. 12-16) the States have a straightforward entitlement to intervene in this matter, which has only grown more urgent since the United States' June 1 Memorandum.

B. The United States and respondents' contrary arguments are unavailing.

Now united in their goal to end the MPP Program, the United States and respondents offer at least five primary arguments about why the interests of the Intervenor States do not justify intervention.[1] None are availing.

1. The United States first contends (at 10-12) that intervention is unjustified because this challenge to the MPP is moot by DHS Secretary Mayorkas's statement

[1] Respondents, who filed their response first, also assert that the States are speculating that the United States will not adequately represent their interests. Innov. Lab. Resp. 11-16. The Intervenor States will not burden this Court by replying to this argument—the United States' subsequent capitulation is rebuttal enough.

that he "ha[s] no intention to resume MPP." U.S. Suggestion of Mootness 14a. This argument ignores the larger context of this litigation and is incorrect as a matter of doctrine.

First, as discussed above, this analysis ignores that Texas and Missouri have already filed a motion seeking a preliminary injunction that would enjoin enforcement of the June 1 Memorandum. *See* Plaintiffs' Motion for Preliminary Injunction, *supra.* The June 1 Memorandum "rescind[ed], effective immediately" the January 20, 2021 Memorandum suspending the MPP. U.S. Suggestion of Mootness 14a-15a. If Texas and Missouri are successful in seeking that injunction, it would prevent the enforcement of *either* the June 1 Memorandum or the January 20 Memorandum, which reached the same result with effectively no reasoning. MPP would then remain in effect absent some further administrative action effectuated through valid administrative procedures.

Second, this argument misapplies precedent regarding alleged mootness that arises from the government's voluntary cessation of challenged conduct. "Voluntary cessation does not moot a case or controversy unless subsequent events make it absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (cleaned up) (quoting *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)); *see also Knox v. SEIU Local 1000*, 567 U.S. 298, 307 (2012). The "voluntary cessation" doctrine is not properly applied in this posture at all: the Intervenor States have sued to establish that the federal government has *wrongfully* voluntarily ceased its conduct—namely, the MPP. The United States cannot moot a case between those who think their conduct

was unlawful, respondents here, and those who believe it continues to be required, intervenors here, by throwing up its hands and promising to do nothing.

The Intervenor States firmly believe that the courts will declare *both* the June 1 and January 20 memoranda unlawful, but it is possible that they will invalidate the June 1 Memorandum and not the January 20 Memorandum. Because it is not "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," voluntary cessation of the MPP by way of the June 1 Memorandum does not moot this case. *Parents Involved*, 551 U.S. at 719.

The United States' authority is not to the contrary because there "the terms of the injunction" were "fully and irrevocably carried out." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 398 (1981); *see also Honig v. Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985) (per curiam). Not so here. If the Intervenor States are successful in their litigation, MPP is likely to apply once more.

2. The United States is similarly without support in claiming (at 15) that intervention is proper only when the putative intervenor has its own unique claims or defenses but simply was not. This Court has recognized that intervention may be appropriate even when the intervenor lacks a cause of action—indeed, even where the statute expressly prevented that intervenor from bringing a claim on their own. *See Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 530-31, 537 (1972); *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 135 (1967). The courts of appeals agree.[2]

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[2] *See, e.g.*, *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011); *Jones v. Prince George's County*, 348 F.3d 1014, 1018-19 (D.C. Cir. 2003); *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003); *Georgia v. U.S. Army*

Contrary to the United States' assertion (at 14), intervention here is entirely consistent with the Federal Rules of Civil Procedure. Rule 24 requires only that the intervenor "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2). Only by tying Rule 24 to Rule 8 and then focusing on the word "its" can the United States conjure a requirement (at 14) that an intervenor-defendant must propose unique defenses. That is more weight than one three-letter word can bear: an intervenor's defenses may be "its" defenses even if those defenses overlap in whole or in part with those of the original defendants. That is a separate question from whether the existing defendant will adequately the intervenor's interests. Fed. R. Civ. P. 24(a)(2).

Donaldson v. United States, 400 U.S. 517 (1971), is not to the contrary. *Donaldson* stands for the unremarkable proposition that a taxpayer cannot intervene in a tax case to protect "routine business records in which the taxpayer has no proprietary interest of any kind." 400 U.S. at 530-31. Unlike the taxpayer in *Donaldson*, the Intervenor States have legally protectable interests—monetary interests, sovereign interests, and interests of their citizens as *parens patriae*—that justify their intervention in this case. *See Supra* I.A.

3. Respondents contend (at 16-20) that intervention would be futile because the Intervenor States' interests cannot be vindicated through this lawsuit. As this argument relies (at 17, 20) on the allegedly temporary nature

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Corps of Eng'rs, 302 F.3d 1242, 1251 (11th Cir. 2002); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998).

of the suspension, events may have overtaken this argument. But it is also wrong. Respondents' position depends on the notion that "the relief the States have requested in the district court actions is unavailable" because the MPP was an exercise in discretion. Innov. Lab. Resp. 17. The Intervenor States have explained in detail elsewhere that this is incorrect. *See* Complaint, *Texas* v. *Biden,* No. 2:21-CV-00067-Z (N.D. Tex. Apr. 13, 2021), ECF No. 1; Plaintiffs' Motion for Preliminary Injunction, *supra*; Complaint for Declaratory and Injunctive Relief, *Arizona* v. *Mayorkas*, No. 2:21-cv-00617 (D. Ariz. Apr. 11, 2021), ECF No. 1.

But whatever the degree of discretion DHS may have to create or rescind the MPP, DHS must exercise that discretion that complies with the Constitution, the Administrative Procedures Act, other applicable federal law, and any binding agreements. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910-11 (2020). That the Secretary may exercise his discretion differently does not mean he is entitled to do so through any procedures he likes. The States retain numerous monetary and practical interests in the enforcement of MPP pending a valid rescission, and retain a distinct additional interest in the opportunity to participate in a proper regulatory process by which the Secretary decides how to exercise whatever discretion he lawfully has regarding MPP.

4. The United States errs by arguing (at 20-22) that the States waited too long to intervene to protect their rights because they did not seek to intervene after the DHS issued the January 20 Memorandum suspending MPP.[3] The United States cannot seem to make up its

[3] The United States also notes (at 20-21) that the Intervenor States did not file a brief as amicus curiae in support of the MPP.

mind about when States are to intervene to protect their interests. The United States has argued that States may not intervene in district court before a new Administration determines whether it will defend its predecessor's policies because it is speculative whether the Administration will adequately represent the intervenor's interests. *See* Defs.' Br. in Opposition to Texas's Mot. to Intervene, *Pennsylvania v. Rosenfelt*, No. 1:20-cv-01468-CJN (D.D.C. Feb. 2, 2021), ECF No. 141. The United States has also argued that States may not intervene in a court of appeals (or here) after the Administration has changed its mind because they should have intervened after a tentative decision had been announced but before the final decision was made. *See* Application for Leave to Intervene, *Texas v. Cook County*, No. 20A150 (March 19, 2021). Now the United States argues that States were required to intervene after it announced a *suspension* of the MPP but before the Administration had announced the *termination of* the MPP. Such "your claim isn't ripe until it is moot" arguments should be rejected.

Indeed, the United States seems to admit as much: It asserts that it would be improper to allow the States to intervene now that the Secretary has made a final decision terminating the MPP. *See* U.S. Resp. 21. Of course, this ignores that the Intervenor States sought to intervene nearly a month *before* that decision took place, leaving DHS at a minimum several weeks to consider the Intervenor States interests.

The United States cites no authority for the notion that a party must file an amicus brief to intervene as a party, and the Intervenor States are aware of none.

5. Finally, Intervenor States are not required to intervene in the trial court before seeking relief here. *Contra* Innov. Lab. Resp. 8-11. Though admittedly uncommon, this Court has allowed petitioners to intervene in this Court. *See*, *e.g.*, *BNSF Ry. Co. v. EEOC*, 140 S. Ct. 109 (2019); *Gonzales v. Oregon*, 546 U.S. 807 (2005); *Ins. Co. of State of Pa. v. Ben Cooper, Inc.*, 498 U.S. 894 (1990); *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969); *Banks v. Chi. Grain Trimmers Ass'n*, 389 U.S. 813 (1967). Such intervention is entirely appropriate where, as here, the intervenor's rights would be "vitally affected by the lower court's decision" and where the party who had previously supported the intervenor's position no longer does so. *See* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 427 (10th ed. 2013).

This Court's decisions in *American Medical Association v. Becerra*, Nos. 20-429, 20-454, 20-539, and *Texas v. Cook County*, No. 20A150, are distinguishable. In *American Medical Association*, the Solicitor General "filed a letter brief representing that it will continue enforcing the challenged rule and regulations" and will oppose any litigation challenging the rule "on threshold grounds or seek to hold the litigation in abeyance." Order, *Am. Medical Association v. Becerra*, Nos. 20-429, 20-454, 20-539 (May 17, 2021). Only if the Government failed to do so would any "aggrieved party" need to "seek relief in the appropriate" court. *Id.* But here, the Administration has already purported to terminate the MPP. By its own terms, intervention is appropriate.

Respondents' reliance on *Cook County* is particularly ill-founded. There, the United States criticized a coalition of States requesting intervention for not anticipating that it might abandon its defense of a prior administration's policy and enter into a collusive settlement.

See Federal Respondents' Response in Opposition to Application for Leave to Intervene and for a Stay of the Judgment Entered by the United States District Court for the Northern District of Illinois at 27-28, *Texas v. Cook County*, No. 20A150 (U.S. Apr. 9, 2019). The United States insisted that the coalition of intervenors should have sought to intervene before the Administration received its final decision. *See id.* at 19. So the Intervenor States took the United States at its word and filed their motion to intervene when they did to prevent this case from becoming another *Cook County.* If accepted, Respondents' assertion is that interested parties must intervene in the trial court regardless of the status of the litigation. That is not the law. SHAPIRO, *supra*, at 427.

C. The Court should hold this case in abeyance pending resolution of the States' litigation.

The Intervenor States acknowledge that it may not be appropriate for the Court to hear merits arguments at this time. Nevertheless, their challenges to the June 1 Memorandum may lead to an injunction prohibiting enforcement of that Memorandum. And that memorandum is the basis for the United States' notice of potential mootness. Thus, an injunction in the Intervenor States' lawsuit would eliminate the government's basis for asserting this case is moot. Under those circumstances, it is appropriate for the Court to hold this case in abeyance pending the resolution of the Intervening States' challenges. *Cf. Knox*, 567 U.S. at 307. And if the Intervening States prevail and obtain an injunction reinstating MPP, it may be appropriate for the Court to reinstate the briefing and argument schedule to resolve this case.

II. In the Alternative, this Court Should Vacate the Decisions of the District Court and the Court of Appeals.

In the alternative, if this Court concludes that this case is moot, the Intervenor States agree with the United States that the lower courts' decisions should be vacated under the *Munsingwear* doctrine. The injunction issued by the Northern District of California enjoins implementation of the MPP on a nationwide basis. The Intervenor States have sought—and are likely to obtain—an order setting aside the rescission of the MPP. In the absence of intervention in this Court, these conflicting orders will leave the status of the MPP in substantial doubt. The real-world consequences of conflicting orders counsel in favor of vacatur.

Assuming this case is moot, "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). As the United States observes, such relief may be appropriate based on intervening changes in federal law. *See* U.S. Suggestion of Mootness 13 (citing *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (per curiam)).[4]

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[4] In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 n.3 (1994), this Court raised a question regarding whether "*Munsigwear's* implicit conclusion that repeal of administrative regulations can[] fairly be attributed to the Executive Branch when it litigates in the name of the United States," but ultimately "express[ed] no view" on the question. *Id.* The Court should do the same here for the reasons outlined in *U.S. Bancorp.*

Such relief is appropriate here. As the Intervenor States explained when seeking to intervene in *Cook County*, this Administration has abandoned the standard practice of defending that which is defensible. Application for Leave, *supra*, at 9-10. That, as Judge VanDyke noted, this has created a jurisprudential mess. *City & County of San Francisco v. U.S. Citizenship & Immigration Servs.*, 992 F.3d 742, 754 (9th Cir. 2021) (VanDyke, J., dissenting). Assuming that the Court concludes that the June 1 Memorandum moots this litigation, it should "make[] clear that our dirty slate must be wiped clean under *Munsingwear*." *Id.* at 755. That "would have . . . salutary effects," by clearing "the thicket of suspect lower-court precedents" which this Court "seemed poised to correct" before the United States' change in position. *Id.* at 754.

CONCLUSION

The Court should grant the Intervenor States motion to intervene and hold this case in abeyance. In the alternative, the Intervenor States join the United States' request that this Court vacate the judgment of the court of appeals and remand this case to the court of appeals with instructions to vacate the district court's preliminary injunction.

Respectfully submitted,

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