Legal Sidebar

# Supreme Court Rules That Migrant Protection Protocols Rescission Was Not Unlawful

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On June 30, 2022, the Supreme Court in a 5-4 decision held in *Biden v. Texas* that the Department of Homeland Security's (DHS's) rescission of the Migrant Protection Protocols (MPP) did not violate federal immigration laws concerning the inspection and treatment of non-U.S. nationals ("aliens," as the term is used in the Immigration and Nationality Act [INA]) arriving in the United States. The MPP—also known as the "Remain in Mexico" policy—began during the Trump Administration and authorized the return of some asylum seekers arriving at the U.S. southern border to Mexico during the pendency of their formal removal proceedings. In 2021, DHS Secretary Alejandro Mayorkas terminated the MPP, concluding that the program's impact on reducing unlawful migration did not outweigh its costs, particularly the potential harm faced by asylum seekers in Mexico. At the time that DHS announced its intent to end the MPP, over 68,000 persons had been returned to Mexico under the program. Texas and Missouri sued to challenge the MPP rescission. A federal district court issued a nationwide injunction requiring DHS to resume the MPP, and the U.S. Court of Appeals for the Fifth Circuit affirmed.

The Supreme Court determined that DHS has the discretionary authority to rescind the MPP, and that nothing in federal statute mandates the agency's use of that policy. Following the Court's decision in *Biden v. Texas*, DHS announced plans to terminate the MPP as soon as legally permissible. The Court's ruling will likely enable DHS to terminate the MPP, though questions may remain about the extent to which the agency may release asylum seekers into the United States rather than detaining them while their claims are being adjudicated.

## Background

The INA establishes different avenues by which aliens can be denied entry or removed from the United States. INA § 235(b) concerns applicants for admission, which include aliens arriving in the United States (whether or not at a designated port of entry) and those apprehended after entering the country without inspection by immigration authorities. Under INA § 235(b)(1), arriving aliens and recent unlawful entrants who lack valid documentation or sought to procure their admission through fraud or misrepresentation are generally subject to an expedited removal process without any review of a determination that the alien should be removed from the United States. If the alien expresses an intent to seek asylum or a fear of persecution (among other exceptions), however, the alien may obtain

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administrative review of that claim. Following a screening interview, if the alien shows a "credible fear" of persecution or torture, the alien may apply for asylum and related protections.

Under INA § 235(b)(2)(A), applicants for admission who are not placed in expedited removal (e.g., because they do not meet the criteria or DHS otherwise decides not to put them in expedited removal) "shall be detained" during "formal" removal proceedings under INA § 240. The Supreme Court has construed § 235(b)(2)(A) as mandating detention during these proceedings. Unlike expedited removal, aliens placed directly into formal removal proceedings have more procedural protections, including the right to counsel at no expense to the government, and the ability to pursue relief from removal (e.g., asylum) in those proceedings without having to meet any threshold screening requirement.

As an alternative, INA § 235(b)(2)(C) states that the DHS Secretary "may return" applicants for admission covered by § 235(b)(2)(A) to "a foreign territory contiguous to the United States" pending the outcome of their formal removal proceedings if the alien is "arriving on land" from that territory. Before the MPP, DHS and its predecessor agency, the former Immigration and Naturalization Service, applied this authority on a fairly limited, ad-hoc basis to return certain Mexican and Canadian nationals arriving at U.S. ports of entry.

A separate statutory provision, INA § 212(d)(5)(A), authorizes another option. It permits the "parole" of applicants for admission—thus enabling them to be released from DHS custody during their removal proceedings—"only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." Implementing regulations allow parole in various circumstances, such as when "continued detention is not in the public interest." DHS has interpreted this to mean that parole is available when the alien does not pose a flight risk or danger to the community.

# Establishment and Termination of the MPP

In January 2019, during the Trump Administration, DHS implemented the MPP to address a "security and humanitarian crisis on the Southern border." With the cooperation of Mexican authorities, immigration officials were authorized to return some arriving asylum seekers to Mexico while U.S. immigration courts processed their cases in formal removal proceedings. Following a legal challenge, a federal district court in California issued a preliminary injunction barring implementation of the MPP. The U.S. Court of Appeals for the Ninth Circuit affirmed. The court ruled that INA § 235(b)(2)(C) did not authorize the MPP because most aliens returned to Mexico would meet the criteria for expedited removal under INA § 235(b)(1), and § 235(b)(2)(C)'s return authority applied only to applicants for admission covered by § 235(b)(2)(A). The Supreme Court stayed the injunction pending appeal, thereby allowing DHS to continue to enforce the MPP.

In June 2021, under the Biden Administration, DHS Secretary Alejandro Mayorkas issued a memorandum rescinding the MPP. The States of Texas and Missouri challenged the rescission in a Texas federal district court, arguing that the MPP had been effective in controlling unlawful migration, and that its rescission would force states to expend more money and resources for arriving migrants. The district court ruled that the MPP rescission was unlawful under INA § 235(b)(2), and that DHS ignored certain factors in rescinding the MPP, including the program's benefits and the implications of terminating it. The court issued a nationwide injunction ordering DHS to resume the MPP until it was lawfully rescinded and DHS had sufficient detention space for arriving migrants placed in removal proceedings.

While the government's appeal was pending, Secretary Mayorkas in October 2021 issued a new memorandum terminating the MPP and superseding the June 2021 memorandum, along with a supplemental "explanation" addressing factors found to be inadequately considered in the earlier rescission. Secretary Mayorkas acknowledged that the MPP "likely contributed to reduced migratory flows," but concluded that its benefits were outweighed by the program's costs, including the "substantial

and unjustifiable human costs on the individuals who were exposed to harm while waiting in Mexico." Secretary Mayorkas stated that termination of the MPP would occur only after there was a final court decision vacating the district court's injunction.

In December 2021, the Fifth Circuit affirmed the district court's ruling, holding that the June 2021 MPP rescission violated INA § 235(b)(2). The court construed that provision as mandating the detention of an alien seeking admission pending the outcome of formal removal proceedings, and allowing only two alternatives to detention: (1) the alien's return to contiguous territory; *or* (2) the alien's release on parole on a limited, case-by-case basis. Citing evidence that the MPP's rescission considerably increased the number of aliens being paroled given DHS's limited detention resources, the court held that the rescission violated § 235(b)(2)'s statutory scheme because it resulted in the release of aliens "en masse" into the United States. For that reason, the court determined, § 235(b)(2) required the agency to apply its discretionary return authority. The Fifth Circuit also agreed with the district court that DHS had inadequately considered the MPP's benefits and other factors when deciding to rescind that program.

Additionally, the Fifth Circuit rejected the government's argument that the October 2021 memorandum was the final agency action rescinding the MPP, and that it thus mooted the states' legal challenge to the prior June 2021 memorandum. The court explained that the termination decision itself, and not any particular memorandum explaining that decision, constituted the final agency action subject to judicial review. Further, the Court noted, the October memorandum merely continued, rather than reopened, the termination decision.

The government petitioned for review before the Supreme Court. The Supreme Court granted the petition and expedited review of the case.

# The Supreme Court's Decision in *Biden v. Texas*

In a 5-4 decision, the Supreme Court reversed the Fifth Circuit's decision. In the majority opinion written by Chief Justice Roberts (joined by Justices Breyer, Sotomayor, Kagan, and Kavanaugh), the Court held that DHS's rescission of the MPP did not violate INA § 235(b)(2), and that the October 2021 memorandum was the final agency action ending the program.

The Court first considered whether it had jurisdiction in light of INA § 242(f)(1), which provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of" certain INA provisions concerning the inspection, apprehension, detention, and removal of aliens, including INA § 235(b)(2)(C), "other than with respect to the application of such provisions to an individual alien" in formal removal proceedings. In *Garland v. Gonzalez*, the Court had recently held that § 242(f)(1) prohibits class-wide injunctions by lower courts requiring the government "to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." Applying *Gonzalez* here, the Court determined that the district court acted outside of its authority in violation of § 242(f)(1) when it issued a nationwide injunction requiring DHS to continue the MPP. Nonetheless, the Court determined that § 242(f)(1)'s limitations on injunctive relief does not constrain lower courts from adjudicating the merits of a case. Thus, because § 242(f)(1) did not remove the lower courts' subject matter jurisdiction, the Supreme Court was not barred from reaching the merits. The Court also noted it had jurisdiction because the statute preserves the Supreme Court's power to enter injunctive relief.

Turning to the merits, the Court held that DHS's decision to rescind the MPP did not violate INA § 235(b)(2). Noting that § 235(b)(2)(C) states that the DHS Secretary "may" return aliens seeking admission, the Court held that this provision "plainly confers a *discretionary* authority to return aliens to Mexico during the pendency of their removal proceedings," but does not mandate the use of that authority. The Court rejected the Fifth Circuit's reasoning that, because § 235(b)(2)(A) states that aliens

"shall be detained," the otherwise-discretionary return authority in § 235(b)(2)(C) becomes mandatory when DHS fails to detain them. According to the Court, § 235(b)(2)(C)'s statutorily unambiguous grant of discretion was inconsistent with any mandatory return requirement. The Court also observed that § 235(b)(2)(C) has historically been construed as discretionary.

The Court also held that mandating the return of aliens to Mexico interferes with the Executive's authority to conduct foreign affairs. The Court explained that ordering DHS to continue the MPP "imposed a significant burden upon the Executive's ability to conduct diplomatic relations with Mexico" by requiring a U.S.-Mexico agreement over a policy neither country intends to continue. The Court declared that "Congress did not intend [§ 235(b)(2)(C)] to tie the hands of the Executive in this manner."

The Court also noted that, apart from detaining applicants for admission or returning them to Mexico, the INA authorized a third option of paroling applicants for admission on a case-by-case basis. The Court recognized that every presidential administration "has utilized this authority to some extent." In the majority's view, the availability of parole undercut the Fifth Circuit's conclusion that, absent detention, DHS had to return arriving migrants to Mexico. (The Court, however, did not consider whether DHS was lawfully exercising its parole authority under INA § 212(d)(5)(A).)

Finally, the Court held that the October 2021 memorandum constituted a new and separately reviewable final agency action. Instead of merely supplementing the original June 2021 memorandum, the October 2021 memorandum was "a new rescission" supported by its own reasons. The Court determined that the fact that DHS proceeded with the October 2021 decision with a preference for ending the MPP did not mean it was not final agency action. Accordingly, the Court reversed the Fifth Circuit's decision and remanded the case to the district court to review, in the first instance, the October 2021 rescission memorandum.

In a concurring opinion, Justice Kavanaugh suggested that, on remand, the district court should also consider whether, in the absence of the MPP, DHS's decision to release aliens on parole rather than detain them would provide a "significant public benefit" under INA § 212(d)(5)(A)'s parole standard.

In a dissenting opinion, Justice Alito (joined by Justices Thomas and Gorsuch) agreed with the majority that INA § 242(f)(1) barred the district court's injunction, but argued that the Court should not have decided whether the statute permitted review of the merits of the case. Justice Alito argued that the parties had insufficient opportunity to address that issue during the Court's expedited review. On the merits, Justice Alito recognized that INA § 235(b)(2)(A) states that covered aliens "*shall be detained*" during their removal proceedings. According to Justice Alito, DHS's only statutory alternatives to this mandate are either to return aliens to contiguous territory or to parole them "on an individualized, case-by-case basis." Justice Alito argued that DHS's policy of paroling arriving migrants "en masse" due to a shortage of detention facilities, rather than returning them to Mexico, "violates the clear terms of the law." Additionally, Justice Alito disagreed with the majority's conclusion that the October 2021 memorandum was a new, final agency action, particularly because it had no legal effect while DHS remained bound by the district court's injunction.

In a separate dissent, Justice Barrett (joined in part by Justices Thomas, Alito, and Gorsuch) contended that, because INA § 242(f)(1) barred the district court from issuing injunctive relief, the lower court arguably lacked subject matter jurisdiction to decide the merits of the case. Justice Barrett argued that the Court should have remanded the case to the lower courts to address that issue in the first instance, rather than "plow ahead" and review the MPP rescission. Justice Barrett otherwise agreed with the majority's analysis of the merits of the case.

# Impact of the Court's Ruling

The Supreme Court's decision clarifies that DHS's authority to return aliens to Mexico pending the outcome of their removal proceedings is discretionary. Although the Court's decision likely allows DHS to rescind the MPP, the district court has not yet decided whether the October 2021 memorandum newly terminating the MPP and superseding the June 2021 memorandum complies with federal law. The court may decide, for instance, whether the newer rescission and accompanying "explanation" adequately consider the MPP's benefits and other factors. The court may also decide whether, in the absence of the MPP, DHS's release of most asylum seekers rather than detaining them complies with INA § 212(d)(5)(A), which authorizes parole "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." In separate litigation, Indiana recently sued to challenge DHS's parole policy, arguing that the agency is "systematically violating" federal law by releasing aliens without "case-by-case" review. DHS argues, however, that the INA affords the agency "broad authority" to parole aliens, and that detention capacity constraints justify releasing those who pose little risk of flight or danger to the community.

In the meantime, some commentators argue that the MPP should remain in place, contending that it has effectively stemmed the flow of unlawful migration. Others argue that it should be permanently rescinded given the dangers faced by those returned to Mexico. Over the past few years, there have been legislative proposals concerning DHS's return authority under INA § 235(b)(2)(C). For example, in the 117th Congress, the Solving the Border Crisis Act (S. 4518) would require immigration authorities to either detain applicants for admission or return them to contiguous territory (or a "safe third country") throughout their formal removal proceedings. On the other hand, in the 116th Congress, the End the Migrant Protection Protocols Act of 2019 (H.R. 5207) would have repealed DHS's ability to return aliens to contiguous territory under § 235(b)(2)(C).

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