

conference in September, governments and other donors pledged \$1.2 billion in humanitarian funding.⁷²

The humanitarian situation remains precarious. The United Nations estimates that since the start of 2021, over half a million Afghans have been internally displaced, and “a potential worst-case scenario envisages over 515,000 newly displaced refugees fleeing across the borders” through the end of 2021.⁷³ These totals would add to the 2.6 million existing Afghan refugees across the world, 2.2 million of whom reside in Iran and Pakistan.⁷⁴

IMMIGRATION AND MIGRATION

Biden Administration Continues Efforts to Change Immigration Policy Amidst Surges of Migrants and Court Losses

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After quickly reversing a number of Trump-era policies related to immigration, the Biden administration has struggled to deal with large numbers of migrants arriving at the border and has faced legal challenges and setbacks. The administration’s continued use of a public health law to expel migrants prompted particular outcry when used to return thousands of migrants to Haiti, which is struggling with political instability and natural disasters. The administration also lost and has appealed cases related to the establishment of the Deferred Action for Childhood Arrivals (DACA) program and to its termination of the Migrant Protection Protocols (MPP). Nonetheless, the administration has succeeded in making some changes, including doubling the 2022 refugee cap, expanding a program to allow certain children from Northern Triangle countries to apply for refugee status, and reopening U.S. borders to most vaccinated travelers. Biden’s more fundamental proposal for overhauling the U.S. immigration system remains stalled in Congress.

Upon taking office, the Biden administration immediately reversed a number of Trump administration border and immigration-related policies, including revoking travel bans imposed disproportionately on Muslim-majority countries and halting construction of the border wall.¹ Biden also ordered the attorney general and secretary of homeland security to “preserve and fortify” DACA—an Obama-era initiative that “deferred the removal of certain undocumented immigrants who were brought to the United States as children.”² In 2020,

⁷² Jamey Keaten & Edith M. Lederer, *Donors Pledge \$1.2 Billion in Emergency Funds for Afghans*, ASSOC. PRESS (Sept. 13, 2021), at <https://apnews.com/article/europe-afghanistan-geneva-united-nations-taliban-e719ed118ce0bdc4fe31aeb1bf3d8047>.

⁷³ UN High Commissioner for Refugees, *Afghan Situation Regional Refugee Preparedness and Response Plan: Summary & Inter-Agency Funding Requirements July–Dec. 2021*, at 1, at <https://data2.unhcr.org/en/documents/details/88385>.

⁷⁴ UN High Commissioner for Refugees, *Afghanistan*, at <https://www.unhcr.org/en-us/afghanistan.html>.

¹ Kristen E. Eichensehr, *Contemporary Practices of the United States*, 115 AJIL 340, 340–43 (2021).

² Presidential Mem., 86 Fed. Reg. 7,053 (Jan. 20, 2021).

the Supreme Court blocked the Trump administration's efforts to rescind DACA, but the Trump administration nonetheless refused to accept new applicants.³

After these initial actions, the Biden administration then embarked on more fundamental efforts to revise the U.S. approach to immigration and migration. On February 2, Biden issued Executive Order 14,010 on "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."⁴ In the order, Biden pledged to

work closely with civil society, international organizations, and the governments in the region to: establish a comprehensive strategy for addressing the causes of migration in the region; build, strengthen, and expand Central and North American countries' asylum systems and resettlement capacity; and increase opportunities for vulnerable populations to apply for protection closer to home. At the same time, the United States will enhance lawful pathways for migration to this country and will restore and strengthen our own asylum system, which has been badly damaged by policies enacted over the last 4 years that contravened our values and caused needless human suffering.⁵

The order directed the secretary of homeland security to "review and determine whether to terminate or modify" the MPP, a program whereby asylum seekers from third countries arriving at the U.S. border remained in Mexico during the processing of their asylum claims.⁶ On June 1, 2021, Secretary of Homeland Security Alejandro N. Mayorkas issued a memo terminating the MPP.⁷

Despite these efforts, the Biden administration has faced a number of challenges and setbacks in implementing reforms. Surges of migrants arriving at the U.S. border with Mexico reached an all-time high, with U.S. authorities detaining 1.7 million people during the fiscal year ending in September 2021.⁸ Of these individuals, more than 655,000 are from Mexico, and another 700,000 are from El Salvador, Guatemala, and Honduras—collectively known as the "Northern Triangle."⁹ In that time, the Border Patrol expelled over one million migrants, often relying on a public health rule known as Title 42.¹⁰

Title 42 of the 1944 Public Health Services Law permits the surgeon general to suspend the entry into the United States of persons from certain countries when he "determines that by reason of the existence of any communicable disease in a foreign country there is a serious

³ See Eichensehr, *supra* note 1, at 345–46.

⁴ Exec. Order 14,010, 86 Fed Reg. 8,267 (Feb. 2, 2021).

⁵ *Id.* at 8,267.

⁶ *Id.* at 8269; see Eichensehr, *supra* note 1, at 344.

⁷ U.S. Dep't of Homeland Security Mem., Termination of the Migrant Protection Protocols (June 1, 2021), available at https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf [<https://perma.cc/KF7S-28M9>].

⁸ Nick Miroff, *Border Arrests Have Soared to an All-Time High, New CBP Data Shows*, WASH. POST (Oct. 20, 2021), at https://www.washingtonpost.com/national/border-arrests-record-levels-2021/2021/10/19/289dce64-3115-11ec-a880-a9d8c009a0b1_story.html.

⁹ Eileen Sullivan & Miriam Jordan, *Illegal Border Crossings, Driven by Pandemic and Natural Disasters, Soar to Record High*, N.Y. TIMES (Oct. 22, 2021), at <https://www.nytimes.com/2021/10/22/us/politics/border-crossings-immigration-record-high.html>.

¹⁰ *Id.*

danger of the introduction of such disease into the United States” and the suspension is “required in the interest of the public health.”¹¹ The Trump administration pioneered the use of Title 42 at the start of the pandemic amidst criticism from immigration rights advocates,¹² and the Biden administration reportedly planned to end its reliance on Title 42, before changing course over the summer due to surging arrivals and the COVID Delta variant.¹³ DHS has repeatedly emphasized that “Title 42 is not an immigration authority, but a public health authority, and its continued use is dictated by CDC and governed by the CDC’s analysis of public health factors.”¹⁴ Secretary Mayorkas said in September, “Title 42 is . . . a public health authority to protect the American public, to protect the communities along the border, and to protect the migrants themselves.”¹⁵

The use of Title 42 to deport Haitian migrants has sparked particular criticism. Although Haiti has long suffered from political instability and natural disasters,¹⁶ conditions have worsened in recent months with the assassination of President Jovenel Moïse in July and a 7.2 magnitude earthquake and flooding in August spurring departures from the country.¹⁷ In mid-September, thousands of Haitian migrants arrived at the U.S. border near Del Rio, Texas, overwhelming U.S. authorities’ ability to process them.¹⁸ The U.S. Border Patrol detained thousands in “a temporary staging area under the Del Rio International Bridge” for processing, prompting the mayor of Del Rio to describe “squalid conditions” that “resembled a shantytown, with little access to clean water and food and just a few portable toilets.”¹⁹ Video released by media outlets showing Customs and Border Patrol agents on horseback swinging reins and charging to confront migrants crossing the river prompted widespread

¹¹ 42 U.S.C. § 265 (2018).

¹² Jean Galbraith, *Contemporary Practice of the United States*, 114 AJIL 494, 510 (2020).

¹³ Nick Miroff, *Along Mexico Border, Covid Spike and More Migrant Families Stall Plans to End Title 42 Expulsions*, WASH. POST (July 28, 2021), at https://www.washingtonpost.com/immigration/title-42-biden-border-covid/2021/07/28/aeeca526-efa7-11eb-ab6f-b41a066381df_story.html.

¹⁴ U.S. Dep’t of Homeland Sec. Press Release, *DHS Statement on Updated CDC Order* (Aug. 2, 2021), at <https://www.dhs.gov/news/2021/08/02/dhs-statement-updated-cdc-order> [<https://perma.cc/WLZ6-S359>].

¹⁵ U.S. Dep’t of Homeland Sec. Press Release, *Secretary Mayorkas Delivers Remarks in Del Rio, Texas* (Sept. 20, 2021), at <https://www.dhs.gov/news/2021/09/20/secretary-mayorkas-delivers-remarks-del-rio-tx> [<https://perma.cc/7PDS-CTNG>].

¹⁶ See, e.g., Julia Preston, *In Quake Aftermath, US Suspends Deportations to Haiti*, N.Y. TIMES (Jan. 13, 2010), at <https://www.nytimes.com/2010/01/14/world/americas/14deport.html>.

¹⁷ Anatoly Kurmanaev, *Floods, Hunger, Violence: A Power Struggle Is the Least of Haiti’s Worries*, N.Y. TIMES (Sept. 16, 2021), at <https://www.nytimes.com/2021/09/16/world/americas/haiti-president-politics.html>; Anatoly Kurmanaev & Andre Paultre, *“We’re On Our Own”: Many Earthquake Survivors Expect No Help from Haitian Officials*, N.Y. TIMES (Aug. 18, 2021), at <https://www.nytimes.com/2021/08/18/world/americas/haiti-quake-aid.html>; Catherine Porter, Michael Crowley & Constant Méheut, *Haiti’s President Assassinated in Nighttime Raid, Shaking a Fragile Nation* (July 7, 2021), at <https://www.nytimes.com/2021/07/07/world/americas/haiti-president-assassinated-killed.html>.

¹⁸ James Dobbins, Eileen Sullivan & Edgar Sandoval, *Thousands of Migrants Huddle in Squalid Conditions Under Texas Bridge*, N.Y. TIMES (Sept. 16, 2021), at <https://www.nytimes.com/2021/09/16/us/texas-migrants-del-rio.html>.

¹⁹ *Id.* (reporting comments from Del Rio mayor Bruno Lozano); see also White House Press Release, *Press Briefing by Press Secretary Jen Psaki and Secretary of Homeland Security Alejandro Mayorkas*, September 24, 2021 (Sept. 24, 2021), at <https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/24/press-briefing-by-press-secretary-jen-psaki-and-secretary-of-homeland-security-alejandro-mayorkas-september-24-2021> [<https://perma.cc/2367-43XC>] (reporting that the number of migrants in Del Rio reached approximately 15,000 at one time).

outrage, including from congressional Democrats.²⁰ Biden called the actions “horrible,” “outrageous,” and “wrong,”²¹ and DHS launched an investigation and suspended the use of horses to patrol the southern border.²²

Mayorkas reported that between September 9 and 24, U.S. authorities “encountered” “[n]early 30,000 migrants” near Del Rio.²³ Of those, Mayorkas said that through September 24, the United States returned “approximately 2,000 individuals” to Haiti on “expulsion flights” pursuant to Title 42, while thousands returned to Mexico voluntarily, more than 12,000 entered U.S. immigration proceedings, and thousands more awaited processing “to determine whether they will be expelled or placed in immigration removal proceedings.”²⁴ White House Press Secretary Jen Psaki explained that “officials had aimed to rapidly turn away single adults and migrant families,” but “pregnant women and families with young children . . . have been allowed to remain in the United States.”²⁵ The International Organization on Migration cited a higher figure for expulsions, estimating that the United States deported more than 6,000 people to Haiti between September 19 and October 1.²⁶

The use of Title 42 authority to return migrants to Haiti prompted significant pushback within the executive branch. Daniel Foote, the State Department’s special envoy for Haiti resigned in protest, stating in a letter to Secretary of State Antony Blinken:

I will not be associated with the United States['] inhumane, counterproductive decision to deport thousands of Haitian refugees and illegal immigrants to Haiti, a country where American officials are confined to secure compounds because of the danger posed by armed gangs in control of daily life. . . .

The people of Haiti . . . simply cannot support the forced infusion of thousands of returned migrants lacking food, shelter, and money without additional, avoidable

²⁰ Daniella Diaz, Betsy Klein, Jasmine Wright & Kevin Liptak, *Democrats Blast Biden Administration on Handling of Haitian Immigrants at the Border*, CNN (Sept. 23, 2021), at <https://www.cnn.com/2021/09/23/politics/democratic-reaction-haitian-immigrants-border/index.html>; Alexandra Petri, *Homeland Security Investigates Border Patrol’s Treatment of Haitian Immigrants*, N.Y. TIMES (Sept. 20, 2021), at <https://www.nytimes.com/2021/09/20/us/politics/haitians-border.html>; Marianne Levine, *Schumer Whacks Biden Administration Over Handling of Haitian Migrants*, POLITICO (Sept. 21, 2021), at <https://www.politico.com/news/2021/09/21/schumer-biden-haitian-migrants-513412>.

²¹ White House Press Release, *Remarks by President Biden on the COVID-19 Response and the Vaccination Program* (Sept. 24, 2021), at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/24/remarks-by-president-biden-on-the-covid-19-response-and-the-vaccination-program-8> [<https://perma.cc/PKY3-7WZ7>].

²² Nick Miroff, *Biden Administration Directs Border Officials to Suspend Horse Patrols in Del Rio Migrant Camp*, WASH. POST (Sept. 23, 2021), at https://www.washingtonpost.com/national/biden-administration-directs-border-officials-to-suspend-horse-patrols-in-del-rio-migrant-camp/2021/09/23/dcfb30c2-1c93-11ec-914a-99d701398e5a_story.html.

²³ White House Press Release, *supra* note 19.

²⁴ *Id.*

²⁵ Edgar Sandoval, Simon Romero & Miriam Jordan, *Thousands of Haitians Allowed to Stay in U.S. as Texas Camp Clears Out*, N.Y. TIMES (Sept. 23, 2021), at <https://www.nytimes.com/2021/09/23/us/haitian-migrants-texas-camp.html>.

²⁶ Jasmine Aguilera, *The Biden Administration Promised Immediate Aid to Haitian Deportees. It Has Yet to Arrive*, TIME (Oct. 4, 2021), at <https://time.com/6103725/haiti-deported-biden-aid>.

human tragedy. The collapsed state is unable to provide security or basic services, and more refugees will fuel further desperation and crime.²⁷

In departing his role as a senior advisor in the State Department's Legal Adviser's Office, Harold Hongju Koh wrote a memo, obtained by *Politico*, challenging the legality of the administration's continued use of Title 42 authority to expel migrants, particularly to Haiti.²⁸ Citing U.S. obligations pursuant to international treaties on torture and refugees, Koh explained:

I write first, because I believe this Administration's current implementation of the Title 42 authority continues to violate our legal obligation not to expel or return ("refouler") individuals who fear persecution, death, or torture, especially migrants fleeing from Haiti. Second, my concerns have only been heightened by recent tragic events in Haiti, which had led this Administration wisely to extend temporary protected status (TPS) to Haitians already in the United States. Third, lawful, more humane alternatives plainly exist, and there are approaching opportunities in the near future to substitute those alternatives in place of the current, badly flawed policy.²⁹

The administration has received bipartisan criticism for its handling of the Haitian migrants and the border situation more generally. Fifteen Democratic senators along with Senator Bernie Sanders (I-VT) wrote to Blinken and Mayorkas expressing disappointment over the deportations and asking them to find an alternative solution working with governments in the region.³⁰ Twenty-six Republican governors, on the other hand, wrote a letter requesting to meet with Biden to discuss "the national security crisis created by eight months of unenforced borders."³¹

In addition to the political backlash, the Biden administration is also facing legal challenges to its use of Title 42. In January 2021, the American Civil Liberties Union filed a class action lawsuit on behalf of families seeking asylum, and on September 16, U.S. District Judge Emmet Sullivan issued an opinion certifying the class and granting a preliminary injunction against enforcement of the policy.³² Sullivan held that the plaintiffs are likely to succeed on the merits because he determined at *Chevron* step one that the statute does not authorize

²⁷ Letter from Daniel Foote, U.S. Special Envoy for Haiti, to Antony Blinken, U.S. Sec'y of State (Sept. 22, 2021), available at <https://www.washingtonpost.com/context/read-resignation-letter-from-u-s-special-envoy-for-haiti-daniel-foote/3136ae0e-96e5-448e-9d12-0e0cabfb3c0b>.

²⁸ Alex Thompson & Alexander Ward, *Top State Adviser Leaves Post, Rips Biden's Use of Trump-era Title 42*, POLITICO (Oct. 4, 2021), at <https://www.politico.com/news/2021/10/04/top-state-adviser-leaves-post-title-42-515029>; Mem. from Harold Hongju Koh, Ending Title 42 Return Flights to Countries of Origin, Particularly Haiti (Oct. 2, 2021), available at <https://www.politico.com/f/?id=0000017c-4c4a-dddc-a77e-4ddb3ae0000>.

²⁹ Mem. from Harold Hongju Koh, *supra* note 28.

³⁰ U.S. S. Comm. on Foreign Rel. Press Release, Menendez, Senate Democrats Blast Mistreatment of Haitian Migrants at Border; Urge Administration to Support Long-Term Stability in Haiti (Oct. 8, 2021), at <https://www.foreign.senate.gov/press/chair/release/menendez-senate-democrats-blast-mistreatment-of-haitian-migrants-at-border-urge-administration-to-support-long-term-stability-in-haiti> [<https://perma.cc/2BKL-5TJE>].

³¹ *26 GOP Governors Demand Biden End the Border Crisis*, REPUBLICAN GOVERNORS ASS'N (Sept. 20, 2021), at <https://www.rga.org/26-gop-governors-demand-biden-end-border-crisis-2>.

³² Mem. Op. at 58, *Huisha-Huisha et al. v. Mayorkas*, No. 1:21-cv-00100-EGS (D.D.C. Sept. 16, 2021) (Doc. 123).

expulsions for public health purposes.³³ He stayed the injunction for fourteen days to allow the government time to appeal,³⁴ and the D.C. Circuit then stayed the injunction pending appeal.³⁵

Human Rights First and other immigration rights groups have also filed a challenge to the Title 42 policy with the Inter-American Commission on Human Rights on behalf of individuals expelled or who could be expelled under the policy.³⁶ They filed a request for precautionary measures, arguing that U.S. expulsions *refoul* asylum seekers and put them at risk of immediate harm.³⁷

In addition to litigation over Title 42, the Biden administration has appealed adverse court decisions on both its continuation of DACA and its termination of the MPP.

In 2018, Texas and eight other states filed suit against the United States in the Southern District of Texas, arguing, among other claims, that the establishment of DACA violated both procedural and substantive provisions of the Administrative Procedure Act (APA).³⁸ The states alleged that DHS violated the APA by failing to engage in notice and comment rulemaking to establish the program and that DACA violates congressional statutes and thus is “in excess of” statutory authority.³⁹ On July 16, 2021, U.S. District Court Judge Andrew S. Hanen granted summary judgment to the states, holding that “DHS violated the APA with the creation of DACA and its continued operation.”⁴⁰ The district court agreed with the states that DHS erred in failing to use notice and comment rulemaking to promulgate DACA.⁴¹ On the substantive APA claim, the court held at *Chevron* step one that “DACA is ‘in excess of statutory jurisdiction’ and ‘short of statutory right’” because Congress has specified “laws for removal, lawful presence, and work authorization,” and “[a]gainst the backdrop of Congress’s ‘careful plan,’ DHS may not award lawful presence and work authorization to approximately 1.5 million aliens for whom Congress has made no provision.”⁴² In issuing a permanent injunction, the court noted current DACA recipients’ significant reliance interests and accordingly emphasized that the injunction neither requires that the government terminate DACA status for those who have already received it nor “take any immigration, deportation, or criminal action against any DACA recipient, applicant, or any other individual that” it “would not otherwise take.”⁴³ The injunction

³³ *Id.* at 32–43. He further determined that the plaintiffs would suffer irreparable harm if expelled without an opportunity to apply for asylum and that the balance of the equities favor an injunction because there is no public interest in continuing an unlawful policy. *Id.* at 43–57.

³⁴ *Id.* at 58.

³⁵ Order at 1, *Huisha-Huisha et al. v. Mayorkas et al.*, No. 21-5200 (D.C. Cir. Sept. 30, 2021).

³⁶ Emergency Request for Precautionary Measures Pursuant to Article 25 of the Rules of Procedure of the Inter-American Commission on Human Rights on Behalf of Asylum Seekers Who Have Been or Would Be Expelled from the United States Under the Title 42 Policy, Inter-Am. Comm’n H.R. (2021), available at <https://www.humanrightsfirst.org/sites/default/files/PrecautionaryMeasuresRequestUnitedStatesTitle42.pdf>.

³⁷ *Id.* at 12–16.

³⁸ Complaint at 61–66, *Texas et al. v. United States*, No. 1:18-CV-00068 (S.D. Tex. May 1, 2018) (Doc. 1).

³⁹ *Id.*

⁴⁰ Mem. and Order at 76, *Texas et al. v. United States*, No. 1:18-CV-00068 (S.D. Tex. July 16, 2021) (Doc. 575); Miriam Jordan, *Judge Rules DACA Is Unlawful and Suspends Applications*, N.Y. TIMES (July 16, 2021), at <https://www.nytimes.com/2021/07/16/us/court-daca-dreamers.html>.

⁴¹ Mem. and Order at 43–44, *Texas et al. v. United States*, No. 1:18-CV-00068 (S.D. Tex. July 16, 2021) (Doc. 575).

⁴² *Id.* at 61.

⁴³ Order of Permanent Injunction at 4–5, *Texas et al. v. United States*, No. 1:18-CV-00068 (S.D. Tex. July 16, 2021) (Doc. 576).

prohibits DHS from granting new applications, but stays the injunction with respect to current DACA recipients.⁴⁴ The United States and twenty-two DACA recipients who had intervened in the case as defendants have appealed to the Fifth Circuit.⁴⁵ In the meantime, in response to the district court decision and in furtherance of Biden's directive to "preserve and fortify" DACA, DHS issued a Notice of Proposed Rulemaking on September 28 to reestablish DACA, engaging in the notice and comment process the district court previously found to be lacking.⁴⁶

The Biden administration also appealed a district court decision holding unlawful its attempt to terminate the MPP. Texas and Missouri filed suit to challenge the Biden administration's initial pause and then termination of the MPP, arguing, among other claims, that the termination was arbitrary and capricious for failing to consider factors such as the program's effect in deterring migrants from attempting to reach the United States, the costs to states of terminating the program, and alternatives that would have allowed some continued use of the MPP.⁴⁷ U.S. District Court Judge Matthew J. Kacsmaryk agreed with the states and held that the MPP termination was arbitrary and capricious because, among other reasons, DHS "failed to consider several critical factors," including both "benefits of MPP," such as "detering meritless asylum applications," and consequences of termination, including increased migration to the border and costs to states.⁴⁸ The district court also held that because the government declined to return asylum seekers to Mexico and admittedly lacks capacity to detain such persons, the government systematically violated a statutory provision, Section 1225, that "provides the government two options vis-à-vis aliens seeking asylum: (1) mandatory detention; or (2) return to a contiguous territory."⁴⁹ The court rejected the Biden administration's argument that vacatur of the termination memo would cause "chaos" and undermine the government's ability to negotiate and conduct foreign policy related to migration.⁵⁰ The court imposed a nationwide injunction against the termination and ordered the government "to enforce and implement MPP *in good faith*."⁵¹

The Fifth Circuit denied the government's motion to stay the injunction.⁵² Largely endorsing the district court's holdings, the court concluded that the government had shown neither a strong likelihood of success on the merits nor that it would suffer irreparable harm absent a stay.⁵³ The Supreme Court also denied a stay, stating that the government "failed to show a likelihood of success on the claim that the memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious."⁵⁴

⁴⁴ *Id.* at 5.

⁴⁵ See Docket, *Texas v. United States*, No. 21-40680 (5th Cir. 2021).

⁴⁶ Notice of Proposed Rulemaking, Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53,736, 53,736 (Sept. 28, 2021).

⁴⁷ Amended Complaint at 34–46, *Texas v. Biden*, No. 2:21-cv-00067-Z (N.D. Tex. June 3, 2021) (Doc. 48).

⁴⁸ Mem. and Order at 36–37, *Texas v. Biden*, No. 2:21-CV-00067-Z (N.D. Tex. Aug. 13, 2021) (Doc. 94).

⁴⁹ *Id.* at 42–43 (discussing 8 U.S.C. § 1225).

⁵⁰ *Id.* at 46–47.

⁵¹ *Id.* at 52–53.

⁵² *Texas v. Biden*, 10 F.4th 538, 543 (5th Cir. 2021).

⁵³ *Id.* at 552–58.

⁵⁴ Order, *Biden et al. v. Texas et al.*, 594 U.S. ___, No. 21A21 (Aug. 24, 2021), available at https://www.supremecourt.gov/orders/courtorders/082421zr_2d9g.pdf.

The Biden administration simultaneously created a new administrative record to terminate the MPP and also worked to restart the program to comply with the district court order. On October 29, DHS issued a memo from Mayorkas again terminating the MPP and released a thirty-nine-page explanation of the termination decision attempting to address the concerns identified by the district court.⁵⁵ While explaining that DHS will implement the termination after a judicial decision to vacate the nationwide injunction, DHS announced on December 2 that it had reached agreement with Mexico to restart the MPP, subject to some changes to address humanitarian concerns.⁵⁶ On December 13, the Fifth Circuit affirmed the district court's decision on the merits, leaving in place the nationwide injunction requiring the administration to restart the MPP.⁵⁷ On December 29, the Biden administration filed a petition for certiorari with the Supreme Court, requesting that the Court hear the case this term.⁵⁸

While it continues to litigate some of its signature policy decisions and fundamental revisions to the immigration system remain stalled in Congress,⁵⁹ the Biden administration has made a number of other immigration-related policy changes. Reversing a Trump administration policy, DHS announced an end to workplace immigration raids,⁶⁰ and the administration has continued its efforts to reunite children separated from their families at the border.⁶¹ In addition, the administration has expanded pathways for lawful migration, including

⁵⁵ U.S. Dep't of Homeland Sec. Mem., Termination of the Migrant Protection Protocols (Oct. 29, 2021), at https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-memo.pdf [<https://perma.cc/L78K-RALD>]; U.S. Dep't of Homeland Sec., Explanation of the Decision to Terminate the Migrant Protection Protocols (Oct. 29, 2021), available at https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-justification-memo.pdf [<https://perma.cc/ZNG9-GZGD>].

⁵⁶ U.S. Dep't of Homeland Sec. Press Release, DHS, Justice, and State Prepare for Court-Ordered Reimplementation of MPP (Dec. 2, 2021), at <https://www.dhs.gov/news/2021/12/02/dhs-justice-and-state-prepare-court-ordered-reimplementation-mpp> [<https://perma.cc/V4QV-N2YU>]; see also Mem. for U.S. Customs & Border Protection, et al., from Robert Silvers, Under Sec'y, Office of Strategy, Policy, and Plans, U.S. Dep't of Homeland Sec., Guidance Regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols (Dec. 2, 2021), available at https://www.dhs.gov/sites/default/files/publications/21_1202_plcy_mpp-policy-guidance_508.pdf [<https://perma.cc/58PK-ESW2>]; Nick Miroff & Kevin Sieff, *U.S. and Mexico Reach Deal to Restart Trump-Era "Remain in Mexico" Program Along Border*, WASH. POST (Dec. 2, 2021), at https://www.washingtonpost.com/national/us-and-mexico-reach-deal-to-restart-trump-era-remain-in-mexico-program-along-border/2021/12/01/381a4190-5318-11ec-8ad5-b5c50c1fb4d9_story.html.

⁵⁷ *Texas v. Biden*, 2021 WL 5882670 (5th Cir. Dec. 13, 2021); see also Brent Kendall & Michelle Hackman, *Biden Administration Loses Another Ruling on Ending "Remain in Mexico" Policy*, WALL ST. J. (Dec. 14, 2021), at <https://www.wsj.com/articles/biden-administration-loses-another-ruling-on-ending-remain-in-mexico-policy-11639501985>.

⁵⁸ Petn. for a Writ of Certiorari at 15, *Biden v. Texas*, No. 21-954 (Dec. 29, 2021), available at https://www.supremecourt.gov/DocketPDF/21/21-954/206810/20211229162636127_Biden%20v.%20Texas%20-%20Cert%20Petition.pdf.

⁵⁹ See, e.g., Luke Broadwater, *An Immigration Overhaul Is Part of Biden's \$1.85 Trillion Plan.*, N.Y. TIMES (Oct. 28, 2021), at <https://www.nytimes.com/2021/10/28/us/politics/biden-immigration.html>.

⁶⁰ U.S. Dep't of Homeland Sec. Mem., Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual (Oct. 12, 2021), available at https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf [<https://perma.cc/YS4A-YU2S>]; Eileen Sullivan, *Biden Ends Workplace Immigration Raids, Reversing Trump Policy*, N.Y. TIMES (Oct. 12, 2021), at <https://www.nytimes.com/2021/10/12/us/politics/biden-workplace-immigration-raids.html>.

⁶¹ See U.S. Dep't of Homeland Sec., Interagency Task Force on the Reunification of Families, Interim Progress Report (Nov. 29, 2021), available at https://www.dhs.gov/sites/default/files/publications/21_1129_s1_interim-progress-report-family-reunification-task-force.pdf [<https://perma.cc/UCK9-SZ8Q>].

doubling the refugee admissions cap from 62,500 in 2021 to 125,000 in 2022,⁶² and reopening and expanding eligibility for the Central American Minors program, which allows certain children from El Salvador, Guatemala, and Honduras who have parents and now legal guardians in the United States to apply for refugee status.⁶³ In early November, the administration also reversed pandemic-related travel restrictions and reopened U.S. borders to allow entry by those who are fully vaccinated, subject to a negative COVID test within three days of entry.⁶⁴ Soon thereafter, however, the emergence of the Omicron COVID variant prompted the administration to tighten testing requirements for all incoming travelers and to restrict travel from countries in southern Africa.⁶⁵ The administration revoked the travel restrictions several weeks later as the Omicron variant spread worldwide, including in the United States.⁶⁶

⁶² Pres. Determination No. 2022-02 of Oct. 8, 2021, Presidential Determination on Refugee Admissions for Fiscal Year 2022, 86 Fed. Reg. 57,527, 57,527 (Oct. 18, 2021); Seung Min Kim & Felicia Sonmez, *Biden to Raise Refugee Admissions Cap to 125,000 in the Fiscal Year Beginning Oct. 1* (Sept. 20, 2021), at https://www.washingtonpost.com/politics/refugees-biden-administration-trump/2021/09/20/55d4e448-1a50-11ec-8380-5fbadb-c43ef8_story.html.

⁶³ U.S. Dep't of State Press Release, Joint Department of State and Department of Homeland Security Rollout of the Application Process for the Central American Minors Program (Sept. 13, 2021), at <https://www.state.gov/joint-department-of-state-and-department-of-homeland-security-rollout-of-the-application-process-for-the-central-american-minors-cam-program> [<https://perma.cc/E5KG-6ZT9>]; see also Central American Minors (CAM) Refugee and Parole Program, U.S. Citizenship & Immigration Servs., at <https://www.uscis.gov/CAM> [<https://perma.cc/7ZPQ-3D9L>].

⁶⁴ Ceylan Yeginsu, Heather Murphy & Concepción de León, *With Tears, Hugs and Balloons, U.S. Allows Vaccinated Foreign Travelers to Enter*, N.Y. TIMES (Nov. 8, 2021), at <https://www.nytimes.com/2021/11/08/travel/usa-travel-restrictions.html>.

⁶⁵ See Proclamation 10,315 of Nov. 26, 2021, Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019, 86 Fed. Reg. 68,385 (Dec. 1, 2021); Ctrs. for Disease Control & Prevention, COVID-19 Testing Requirements for International Travel to the United States, at <https://www.cdc.gov/coronavirus/2019-ncov/travelers/testing-international-air-travelers.html> [<https://perma.cc/J3FD-QTP8>] (requiring negative COVID-19 test within one day of air travel into the United States).

⁶⁶ Proclamation 10329 of December 28, 2021, 87 Fed. Reg. 149, 150 (Jan. 3, 2022).