
*Immigration and Nationality Act — Administrative Law —
Review of Administrative Action — Biden v. Texas*

Across several areas of administrative law, the Roberts Court has made it harder for agencies to exercise power. *Chevron* deference has gone missing.¹ The major questions doctrine has been transformed into a powerful presumption against agency authority.² And arbitrariness review has become less deferential after *DHS v. Regents of the University of California*,³ decided just two Terms ago.⁴ In *Regents*, the Court not only invalidated as arbitrary President Trump’s effort to end an Obama-era immigration program,⁵ but it also refused to consider the additional justifications that the Administration offered when its initial reasons for rescission faltered in the lower courts.⁶ Although an agency can “elaborat[e] on its prior reasoning, or issue a new [action] bolstered by new reasons,” the *Regents* Court explained, it cannot offer new reasons without taking new action.⁷

Enter President Biden. Soon after his inauguration, the Department of Homeland Security (DHS) issued a memorandum rescinding a Trump-era immigration program. The Northern District of Texas promptly enjoined the rescission as arbitrary after engaging in an aggressive reading of *Regents*.⁸ At first, in *Biden v. Texas*⁹ (*Biden I*), the Supreme Court blessed this aggressive approach and denied the Administration’s request for a stay.¹⁰ But last Term, in *Biden v. Texas*¹¹ (*Biden II*), the Court held that DHS’s withdrawal and replacement of the memorandum — even in the midst of litigation — constituted new and separately reviewable action.¹² In so holding, the Court allowed agencies to take new action that reaches the same result as a prior action set aside as arbitrary while still appealing the invalidation of the prior action. In an era of muscular arbitrariness review, the ability of agencies to take such action without additional hurdles is an important, if small, consolation prize.

¹ See *infra* p. 480 (noting that last Term, in *American Hospital Ass’n v. Becerra*, 142 S. Ct. 1896 (2022), the Court “granted certiorari on a *Chevron* question” but “did not once mention *Chevron*” in its eventual decision).

² See Mila Sohoni, *The Supreme Court, 2021 Term — Comment: The Major Questions Quartet*, 136 HARV. L. REV. 262, 263–64 (2022).

³ 140 S. Ct. 1891 (2020).

⁴ See *id.* at 1910–16; *Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1136 (5th Cir. 2021) (reasoning that “after *Regents*,” arbitrariness review “has serious bite”).

⁵ *Regents*, 140 S. Ct. at 1913–15.

⁶ *Id.* at 1908–09.

⁷ *Id.* at 1908.

⁸ See *Texas v. Biden*, 554 F. Supp. 3d 818, 847–48 (N.D. Tex. 2021).

⁹ 142 S. Ct. 926 (2021) (mem.).

¹⁰ *Id.* at 926–27.

¹¹ 142 S. Ct. 2528 (2022).

¹² *Id.* at 2544–45.

The Immigration and Nationality Act¹³ (INA) states that certain noncitizens “shall be detained” pending removal proceedings.¹⁴ A separate INA provision authorizes DHS to “parole” these noncitizens into the United States, but “only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.”¹⁵ And yet another provision states that the DHS Secretary “may return” certain noncitizens “arriving on land” from Mexico or Canada to the country they arrived from pending a proceeding to determine their admissibility.¹⁶ Pursuant to this return authority, then–DHS Secretary Kirstjen Nielsen announced the Migrant Protection Protocols (MPP) in December 2018.¹⁷ Under MPP, tens of thousands of non-Mexican nationals encountered at the southern border were returned to Mexico to await further proceedings.¹⁸ The Mexican government, faced with President Trump’s threats to close ports of entry,¹⁹ initially agreed to MPP.²⁰ But Mexico soon became wary of the program’s human toll.²¹ MPP enrollees often lived in dangerous areas and squalid conditions; many were “preyed upon by criminal gangs, extortionists and kidnappers.”²²

Shortly after taking office, President Biden directed the new DHS Secretary, Alejandro Mayorkas, to decide whether to terminate or modify MPP.²³ In June 2021, Secretary Mayorkas issued a seven-page memorandum ending the program.²⁴ He explained that MPP’s benefits did not “justify [its] extensive operational burdens and other shortfalls.”²⁵ And he noted that “MPP played an outsized role” in U.S. diplomacy with Mexico, drawing “significant attention . . . away from other elements . . . more central to the bilateral relationship.”²⁶

¹³ Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

¹⁴ 8 U.S.C. § 1225(b)(2)(A).

¹⁵ *Id.* § 1182(d)(5)(A).

¹⁶ *Id.* § 1225(b)(2)(C).

¹⁷ *Biden II*, 142 S. Ct. at 2535.

¹⁸ *Id.*

¹⁹ Susan Heavey & Sofia Menchu, *Trump Threatens to Send Military, Shut Border as Migrants Head for Mexico*, REUTERS (Oct. 18, 2018, 8:08 AM), <https://www.reuters.com/article/us-usa-immigration-caravan-idUSKCN1MS1TS> [<https://perma.cc/X632-TZ8K>].

²⁰ Joshua Partlow & Nick Miroff, *Deal with Mexico Paves Way for Asylum Overhaul at U.S. Border*, WASH. POST (Nov. 24, 2018, 9:30 PM), https://www.washingtonpost.com/world/national-security/deal-with-mexico-paves-way-for-asylum-overhaul-at-us-border/2018/11/24/87b9570a-ef74-11e8-9236-bb94154151d2_story.html [<https://perma.cc/K6ZC-TJHH>].

²¹ See 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, 2:49 PM), 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 [<https://perma.cc/HP4W-3SVH>].

²² *Id.*

²³ Exec. Order No. 14,010, 86 Fed. Reg. 8267, 8269 (Feb. 5, 2021).

²⁴ Memorandum from Alejandro N. Mayorkas, Sec’y of Homeland Sec., to Troy A. Miller, Acting Cmm’r, U.S. Customs & Border Prot. et al. 7 (June 1, 2021), https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf [<https://perma.cc/JST3-Q3XZ>].

²⁵ *Id.* at 3.

²⁶ *Id.* at 6.

Texas and Missouri challenged MPP's rescission in the Northern District of Texas.²⁷ After a one-day bench trial, Judge Kacsmaryk entered judgment for the States.²⁸ He held that the June memorandum was arbitrary, in part because it failed to consider the States' reliance interests in MPP's continued enforcement per *Regents*.²⁹ And he concluded that MPP's termination would violate the INA.³⁰ He reasoned that the INA provision stating that certain noncitizens "shall be detained" — read alongside the Secretary's return authority — gives DHS "two options vis-à-vis aliens seeking asylum: (1) mandatory detention; or (2) return to a contiguous territory."³¹ Because DHS lacks the resources to "meet its detention obligations," "terminating MPP necessarily leads to the systemic violation of [the INA] as aliens are released into the United States."³² Judge Kacsmaryk issued an injunction requiring DHS to continue MPP "until . . . the federal government has sufficient . . . capacity to detain all aliens subject to mandatory detention."³³

DHS sought a stay of the district court's injunction pending appeal, which both the Fifth Circuit³⁴ and the Supreme Court³⁵ denied. The Supreme Court did so in a four-sentence order citing *Regents* and concluding that the Administration "failed to show a likelihood of success on the claim that the [June] memorandum . . . was not arbitrary and capricious."³⁶ With the injunction still in place, the U.S. government needed to negotiate MPP's reimplementaion with Mexico.³⁷ And Mexico, aware that U.S. officials were under a court order to restart MPP, extracted several concessions.³⁸

In October 2021, as the Administration pursued an appeal in the Fifth Circuit, Secretary Mayorkas issued a new memorandum "supersed[ing] and rescind[ing] the June 1 memorandum" and "hereby terminating MPP."³⁹ Secretary Mayorkas "examined considerations that the District Court determined were insufficiently addressed in the June

²⁷ *Biden II*, 142 S. Ct. 2528, 2536 (2022).

²⁸ *Id.*

²⁹ *Texas v. Biden*, 554 F. Supp. 3d 818, 848–49 (N.D. Tex. 2021).

³⁰ *Id.* at 852.

³¹ *Id.* (emphasis omitted).

³² *Id.*

³³ *Id.* at 857.

³⁴ *Texas v. Biden*, 10 F.4th 538, 543 (5th Cir. 2021).

³⁵ *Biden I*, 142 S. Ct. 926, 926 (2021) (mem.). Justices Breyer, Sotomayor, and Kagan would have stayed the district court's order. *Id.* at 927.

³⁶ *Id.* at 926–27.

³⁷ See Miroff & Sieff, *supra* note 21.

³⁸ See *id.*; Muzaffar Chishti & Jessica Bolter, *Court-Ordered Relaunch of Remain in Mexico Policy Tweaks Predecessor Program, But Faces Similar Challenges*, MIGRATION POL'Y INST. (Dec. 2, 2021), <https://www.migrationpolicy.org/article/court-order-relaunch-remain-in-mexico> [<https://perma.cc/9F87-JHAZ>].

³⁹ Memorandum from Alejandro N. Mayorkas, Sec'y of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't et al. 4 (Oct. 29, 2021), https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-memo.pdf [<https://perma.cc/6BY7-AVC4>].

1 memo” and concluded that while MPP “likely contributed to reduced migratory flows[,] . . . it did so by imposing substantial and unjustifiable human costs on” migrants.⁴⁰ He reiterated that MPP “put[s] a strain on U.S.-Mexico relations.”⁴¹ And he included a separate, thirty-eight-page memorandum offering additional explanations.⁴² On the same day, the Administration moved the Fifth Circuit to vacate the injunction, arguing that the October memoranda mooted the case.⁴³

The Fifth Circuit denied the motion and affirmed the district court.⁴⁴ Writing for a unanimous panel, Judge Oldham⁴⁵ held the October memoranda did not constitute “new and separately reviewable ‘final agency action.’”⁴⁶ Only the June 1 “Termination Decision” had any legal effect — the June and October memoranda “simply *explained*” that decision.⁴⁷ Secretary Mayorkas “never reopened [the] Termination Decision.”⁴⁸ The October memoranda only “further defended what [DHS] had previously decided,” “without a hint of an intention to put the Termination Decision back on the chopping block and rethink things.”⁴⁹ Judge Oldham then affirmed the district court’s conclusion that the “Termination Decision” was arbitrary and would violate the INA.⁵⁰

The Supreme Court reversed and remanded.⁵¹ Writing for the Court, Chief Justice Roberts⁵² started with jurisdiction — specifically, a provision of the INA that bars all federal courts, “other than the Supreme Court,” from “enjoin[ing] or restrain[ing] the operation” of the provision at issue in *Biden II* “other than with respect to . . . an individual alien against whom proceedings . . . have been initiated.”⁵³ He held that although this provision barred the district court from *issuing an injunction* (per the Court’s decision in *Garland v. Aleman Gonzalez*⁵⁴), it did not deprive the court of subject matter jurisdiction to *hear the case*.⁵⁵ After all, Congress could have crafted the provision to

⁴⁰ *Id.* at 2.

⁴¹ *Id.*

⁴² U.S. DEP’T OF HOMELAND SEC., EXPLANATION OF THE DECISION TO TERMINATE THE MIGRANT PROTECTION PROTOCOLS (2021).

⁴³ *Texas v. Biden*, 20 F.4th 928, 946 (5th Cir. 2021).

⁴⁴ *Id.* at 1004.

⁴⁵ Judge Oldham was joined by Judges Barksdale and Engelhardt.

⁴⁶ *Texas*, 20 F.4th at 951.

⁴⁷ *Id.*; see also *id.* at 950–51.

⁴⁸ *Id.* at 955.

⁴⁹ *Id.*

⁵⁰ *Id.* at 988.

⁵¹ *Biden II*, 142 S. Ct. at 2548.

⁵² The Chief Justice was joined by Justices Breyer, Sotomayor, Kagan, and Kavanaugh.

⁵³ *Biden II*, 142 S. Ct. at 2538.

⁵⁴ 142 S. Ct. 2057 (2022).

⁵⁵ *Biden II*, 142 S. Ct. at 2538–39.

say “no court shall have jurisdiction to review” certain cases.⁵⁶ Instead, it styled the provision narrowly, as a “limit on injunctive relief.”⁵⁷

Turning to the merits, the Chief Justice held that the DHS Secretary is never required to use his return authority.⁵⁸ After all, the INA states that the Secretary “may return” noncitizens, and “the word ‘may’ *clearly* connotes discretion.”⁵⁹ Assuming that the INA mandates the detention of certain noncitizens, the lower courts were still wrong to conclude that “discretionary return authority . . . becomes mandatory” when DHS cannot detain those noncitizens.⁶⁰ “If Congress had intended” the Secretary’s return authority to act “as a mandatory cure of any non-compliance” with a detention mandate, then it would not have used the term “may.”⁶¹ Holding otherwise would “impose[] a significant burden upon the Executive’s ability to conduct diploma[cy]” with Mexico.⁶²

The Chief Justice then held that the October memoranda constituted new agency action.⁶³ As *Regents* explained, when an agency’s explanation for its action is deemed inadequate, the agency can either “‘elaborate’ on its initial reasons for . . . the action” or take new action.⁶⁴ Here, Secretary Mayorkas “selected the second option . . . and dealt with the problem afresh” — his October memoranda rescinded the June memorandum and stated he was “*hereby* terminating MPP.”⁶⁵ Because the Secretary took new action, the “prohibition on post hoc rationalization” did not apply and the Secretary was allowed to offer new justifications for ending MPP.⁶⁶ Chief Justice Roberts also rejected the Fifth Circuit’s conclusion that it was reviewing the “Termination Decision.”⁶⁷ Courts do not review abstract decisions, the Chief Justice explained; rather, they review legally binding action that often takes the form of memoranda.⁶⁸ And contrary to the Fifth Circuit’s view that the June memorandum and the October memoranda “simply *explained* DHS’s decision,” those memoranda “were themselves the operative agency actions.”⁶⁹ Finally, Chief Justice Roberts rejected the Fifth Circuit’s “charge that the Secretary failed to proceed with a sufficiently open mind.”⁷⁰ An agency taking “superseding action . . . is entitled to

⁵⁶ *Id.* at 2539 (emphasis omitted) (quoting 8 U.S.C. § 1252(a)(2)).

⁵⁷ *Id.* (quoting 8 U.S.C. § 1252(f)).

⁵⁸ *Id.* at 2541.

⁵⁹ *Id.* (quoting *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1609 (2020)).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 2543.

⁶³ *Id.* at 2544–45.

⁶⁴ *Id.* at 2544 (quoting *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1908 (2020)).

⁶⁵ *Id.* (emphasis added).

⁶⁶ *Id.* at 2546.

⁶⁷ *Id.* at 2545 (quoting *Texas v. Biden*, 20 F.4th 928, 950–51 (5th Cir. 2021)).

⁶⁸ *See id.*

⁶⁹ *Id.* (quoting *Texas*, 20 F.4th at 951).

⁷⁰ *Id.* at 2547 (quoting *Texas*, 20 F.4th at 955).

‘reexamine[] the problem, recast its rationale and reach[] the same result.’”⁷¹

Justice Kavanaugh concurred.⁷² In his view, when DHS lacks sufficient detention capacity, it has two options: to grant noncitizens parole on a case-by-case basis or to use its return authority.⁷³ While the INA affords the Executive “substantial discretion” to parole noncitizens, that “exercise of discretion” must “be reasonable.”⁷⁴ However, courts must be especially deferential when “the President chooses the parole option because he determines that returning noncitizens to Mexico is not feasible for foreign-policy reasons.”⁷⁵

Justice Barrett dissented.⁷⁶ Although she agreed with “the Court’s analysis of the merits,” she would not have reached them.⁷⁷ Instead, she would have remanded to the district court so it could reconsider in light of *Aleman Gonzalez* whether the INA provision at issue deprived it of subject matter jurisdiction.⁷⁸ She also implied that the majority’s answer to that question was wrong.⁷⁹ Given that Congress is “free to link a court’s subject matter jurisdiction to its remedial authority,” it seemed “quite possible” that the INA *did* withdraw the lower courts’ subject matter jurisdiction.⁸⁰

Justice Alito dissented as to jurisdiction and merits.⁸¹ He faulted the majority for reading the INA’s “may return” provision “in isolation.”⁸² In his view, the INA, “[r]ead as a whole,” requires DHS to use its return or parole authority when DHS cannot fulfill its detention mandate.⁸³ And DHS’s parole authority “cannot justify the release of tens of thousands of apparently inadmissible aliens each month”⁸⁴ because “the number of aliens paroled” strongly suggests “that [DHS] is not really making” the case-by-case determinations required by law.⁸⁵ That leaves DHS “with only one lawful option:” continuing MPP.⁸⁶ Justice Alito also would have affirmed “that the October 29 Memoranda . . . did

⁷¹ *Id.* (alterations in original) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

⁷² *Id.* at 2548 (Kavanaugh, J., concurring).

⁷³ *Id.*

⁷⁴ *Id.* at 2548–49.

⁷⁵ *Id.* at 2549.

⁷⁶ *Id.* at 2559 (Barrett, J., dissenting). Justice Barrett was joined by Justices Thomas, Alito, and Gorsuch as to all but her statement that she “agree[d] with the Court’s analysis of the merits.” *Id.* at 2560; *see also id.* at 2559.

⁷⁷ *Id.* at 2560.

⁷⁸ *Id.*

⁷⁹ *See id.* at 2561.

⁸⁰ *Id.*

⁸¹ *Id.* at 2549 (Alito, J., dissenting). Justice Alito was joined by Justices Thomas and Gorsuch.

⁸² *Id.* at 2555.

⁸³ *Id.* at 2555–56.

⁸⁴ *Id.* at 2555.

⁸⁵ *Id.* at 2554.

⁸⁶ *Id.* at 2555.

not . . . affect the merits of the appeal . . . before” the Fifth Circuit.⁸⁷ To hold otherwise would allow an agency to appeal a district court’s decision setting aside its action, “take a purportedly ‘new’ action that achieves the same result,” and have the court of appeals vacate the district court’s decision as moot without first reviewing the lawfulness of the second action,⁸⁸ thus “derail[ing] the ordinary appellate process.”⁸⁹

Biden I and *Biden II* arrive at a tumultuous time in administrative law — with an anti-administrativist Court fully enthroned⁹⁰ and making dramatic changes to doctrine.⁹¹ In the wake of *Regents*, some scholars feared another major change in administrative law: the end of deferential arbitrariness review⁹² — at least whenever the Court is skeptical of the administration in power.⁹³ *Biden I* confirmed these fears: lower courts had read *Regents* to justify aggressive review,⁹⁴ and the Court greenlit their approach.⁹⁵ But *Biden II* might calm the waters. While the Court’s ultimate merits decision did not clarify the scope of arbitrariness review, the majority did at least refuse to make it harder for an agency to take superseding action when its prior action falters in the face of judicial scrutiny.⁹⁶ In an era where polarized courts are prone to engage in more aggressive forms of review, this is an important, if small, consolation prize for proponents of administrative flexibility.

Did the *Regents* decision usher in a new era of muscular arbitrariness review?⁹⁷ Or was it merely a narrow reaction to the “unique incompetence of the Trump DHS”?⁹⁸ *Biden I* seems to indicate the former. It endorsed the aggressive reading of *Regents* adopted by the lower

⁸⁷ *Id.* at 2557.

⁸⁸ *Id.* at 2559.

⁸⁹ *Id.* at 2550.

⁹⁰ See generally Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

⁹¹ See Sohoni, *supra* note 2, at 263–64.

⁹² Writing as recently as 2016, Professors Jacob Gersen and Adrian Vermeule declared that “the days of systematically aggressive hard look review . . . are mostly behind us.” Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1367 (2016). That may no longer be the case. See Cristina M. Rodríguez, *The Supreme Court, 2020 Term — Foreword: Regime Change*, 135 HARV. L. REV. 1, 104 (2021).

⁹³ Cf. Rodríguez, *supra* note 92, at 100 n.373 (observing that the frequent invalidation of Trump Administration actions may have been driven by suspicion of the regime).

⁹⁴ See Cristina Rodríguez & Adam Cox, *The Fifth Circuit’s Interventionist Administrative Law and the Misguided Reinstatement of Remain in Mexico*, JUST SEC. (Dec. 21, 2021), <https://www.justsecurity.org/79617/the-fifth-circuits-interventionist-administrative-law-and-the-misguided-reinstatement-of-remain-in-mexico> [https://perma.cc/Q7U4-S27F].

⁹⁵ *Biden I*, 142 S. Ct. 926, 926–27 (2021) (mem.).

⁹⁶ See *Biden II*, 142 S. Ct. at 2544.

⁹⁷ See Zachary Price, *Paying the Piper in the Remain-in-Mexico Case*, YALE J. ON REG.: NOTICE & COMMENT (Sept. 1, 2021), <https://www.yalejreg.com/nc/paying-the-piper-in-the-remain-in-mexico-case-by-zachary-price> [https://perma.cc/XW8Q-3AC3] (arguing that *Biden I* “follows logically, if not inevitably, from” *Regents*).

⁹⁸ Rodríguez, *supra* note 92, at 100.

courts, despite the meaningful differences between the rescissions of Deferred Action for Childhood Arrivals (DACA) and MPP. When the Trump Administration terminated DACA, it sought to disclaim responsibility for that unpopular decision by initially asserting that DACA was an illegal program, leaving DHS with no choice but to end it.⁹⁹ As Professor Benjamin Eidelson explains, by faulting the Trump Administration’s failure to consider the reliance benefits of DACA beneficiaries and alternatives to termination, the *Regents* Court was really demanding that President Trump accept political responsibility for ending DACA.¹⁰⁰ Here, by contrast, Secretary Mayorkas did not pass the buck; he acknowledged the benefits of MPP and framed his decision as a discretionary policy choice.¹⁰¹ The Court, and the lower courts it affirmed, failed to appreciate this distinction.¹⁰² Instead, they seemed to read *Regents* as authorization to “demand without end” that DHS exhaustively consider alternatives,¹⁰³ even though arbitrariness review does not “broadly require an agency to consider all policy alternatives” and “every . . . thought conceivable by the mind of man.”¹⁰⁴

Although unfortunate, this needlessly aggressive interpretation of *Regents* was predicted. Indeed, *Biden I* confirms Professor Cristina Rodríguez’s fear that after *Regents* “[p]artisan litigants may well find partisan courts to use arbitrary and capricious review to demand ever clearer and more elaborate explanations” from agencies.¹⁰⁵ Following a trend that has become familiar,¹⁰⁶ two Republican state attorneys general went forum shopping for a judge sympathetic to their case. And by filing in the Amarillo Division of the Northern District of Texas, those partisan actors “all but guaranteed” that their challenge to MPP’s rescission would be heard by Judge Kacsmyrak,¹⁰⁷ a controversial Trump

⁹⁹ See Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1762–63 (2021).

¹⁰⁰ *Id.* at 1767. Eidelson argues that *Regents* should be understood to give “relatively broad substantive deference” to the Executive’s policy choices, *id.* at 1752, but *Biden I* indicates that may not be the case, see *Biden I*, 142 S. Ct. at 926–27.

¹⁰¹ See Benjamin Eidelson, “Pay[ing] Our Precedents No Respect”: Why the DACA and Remain-in-Mexico Rescissions Are Worlds Apart, YALE J. ON REG.: NOTICE & COMMENT (Sept. 2, 2021), <https://www.yalejreg.com/nc/paying-our-precedents-no-respect-why-the-daca-and-remain-in-mexico-rescissions-are-worlds-apart-by-benjamin-eidelson> [<https://perma.cc/YN5N-XAPC>].

¹⁰² See *id.*

¹⁰³ Rodríguez & Cox, *supra* note 94.

¹⁰⁴ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978)).

¹⁰⁵ Cristina M. Rodríguez, *Reading Regents and the Political Significance of Law*, 2020 SUP. CT. REV. 1, 31–32 (2021).

¹⁰⁶ Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 2 (2020).

¹⁰⁷ Tierney Sneed, *Why Texas Is a Legal Graveyard for Biden Policies*, CNN (Mar. 3, 2022, 5:01 AM), <https://www.cnn.com/2022/03/03/politics/texas-biden-court-losses-paxton-bush/index> [<https://perma.cc/7EF2-9GUX>].

appointee.¹⁰⁸ Judge Kacsmaryk was game,¹⁰⁹ and the Supreme Court signed off.¹¹⁰ This “deliberate strategy of judge-shopping” by partisan actors to stymie a new administration’s efforts to implement its mandate “undermines public faith in the independence of the judiciary.”¹¹¹ And while the Court’s shadow docket order in *Biden I* is difficult to parse given its brevity, the order will surely empower lower courts to double down on more aggressive forms of arbitrariness review.¹¹² And so too will the Chief Justice’s not-so-subtle remark in *Biden II* that Secretary Mayorkas “reasonably chose to accede to the District Court’s APA analysis of the June” memorandum.¹¹³

Even if it had not been so partisan, the lower courts’ application of arbitrariness review — and *Biden I*’s endorsement of it — would still be deeply concerning for at least two reasons. First, it forced the U.S. government to negotiate with a foreign government¹¹⁴ despite the courts’ typical aversion to meddling in international affairs.¹¹⁵ Second, it prevented a democratically elected President from making a discretionary, value-laden decision about a cruel immigration program he campaigned to end.¹¹⁶ In an era of congressional gridlock, the ability of a President to implement his agenda through administrative action is crucial to making national policy responsive to democratic pressures.¹¹⁷

But *Biden II* offers at least some cause for relief. One could have easily imagined the Court expanding the prohibition on post hoc rationalizations and holding that the October memoranda were not new and separately reviewable agency action. Texas and Missouri argued that just as the Trump Administration had offered post hoc rationalizations in *Regents*, so too did Secretary Mayorkas with the October memoranda.¹¹⁸ They were incredulous that Secretary Mayorkas could simply call the October memoranda new action and have it be so.¹¹⁹ Indeed,

¹⁰⁸ See Ruth Marcus, Opinion, *Thanks to the Supreme Court, A Federal Judge in Texas Is Making Foreign Policy Decisions*, WASH. POST (Aug. 25, 2021, 7:01 PM), <https://www.washingtonpost.com/opinions/2021/08/25/supreme-court-matthew-kacsmaryk-remain-in-mexico-policy> [https://perma.cc/9CWD-JELL].

¹⁰⁹ *Texas v. Biden*, 554 F. Supp. 3d 818, 851 (N.D. Tex. 2021).

¹¹⁰ *Biden I*, 142 S. Ct. 926, 926–27 (2021) (mem.).

¹¹¹ Motion for Leave to File Amicus Curiae Brief and Brief of Stephen I. Vladeck as Amicus Curiae in Support of Applicants at 2, *United States v. Texas*, No. 22A17 (July 21, 2022) [hereinafter Vladeck Brief].

¹¹² See Brief of Professor Benjamin Eidelson as Amicus Curiae in Support of Reversal at 16–17, *Biden II*, 142 S. Ct. 2528 (No. 21-954).

¹¹³ *Biden II*, 142 S. Ct. at 2548; see also *id.* at 2559 (Alito, J., dissenting).

¹¹⁴ Miroff & Sieff, *supra* note 21; see also Chishti & Bolter, *supra* note 38.

¹¹⁵ See *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 116 (2013).

¹¹⁶ See Diana Roy, *Why Biden Is Restarting the Trump-Era “Remain in Mexico” Program*, COUNCIL ON FOREIGN RELS. (Jan. 27, 2022, 11:15 AM), <https://www.cfr.org/in-brief/why-biden-restarting-trump-era-remain-mexico-program> [https://perma.cc/6XBP-JH3Z].

¹¹⁷ See *Rodríguez*, *supra* note 92, at 65; see also *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part).

¹¹⁸ Brief for Respondents at 40–41, *Biden II* (No. 21-954).

¹¹⁹ *Id.* at 41.

even though the Court ultimately concluded that “*Regents* involved the exact opposite situation,”¹²⁰ the difference between *Biden II* and *Regents* seemed to boil down to label. While Secretary Mayorkas labeled the October memoranda new action,¹²¹ Secretary Nielsen failed to package her new explanations accordingly.¹²² The Court could have easily accepted Texas and Missouri’s argument that it should disregard Secretary Mayorkas’s “self-serving label.”¹²³ And it could have reasoned that the October memoranda were a “convenient litigating position” that disrupted “the orderly . . . process of review.”¹²⁴

But such a ruling would have “profoundly hinder[ed]” flexible policymaking.¹²⁵ Thus, *Biden II*’s rejection of any new standard that would make it harder for agencies to take new action that reaches the same result as a prior action comes as a welcome consolation prize. In this new era of muscular arbitrariness review, administrations will often want to appeal adverse decisions while also pursuing new action to make sure they can implement their policies in the limited time they have in office.¹²⁶ *Biden II* ensures that agencies can pursue this dual strategy, thus preserving at least some administrative flexibility.¹²⁷ And with anti-administrativist federal judges across the country empowered by the Supreme Court,¹²⁸ a little flexibility may go a long way.

¹²⁰ *Biden II*, 142 S. Ct. at 2545.

¹²¹ *Id.* at 2537.

¹²² *Id.* at 2546. Some have argued that requiring an agency to take new action before giving new reasons is a pointless formalism. See Rodríguez, *supra* note 92, at 102–03; DHS v. Regents of Univ. of Cal., 140 S. Ct. 1891, 1935 (2019) (Kavanaugh, J., concurring in the judgment in part and dissenting in part). For a persuasive account of the opposite view, see Eidelson, *supra* note 99, at 1769–73.

¹²³ Brief for Respondents, *supra* note 118, at 41 (emphasis omitted) (quoting Azar v. Allina Health Servs., 139 S. Ct. 1804, 1812 (2019)).

¹²⁴ *Regents*, 140 S. Ct. at 1909 (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012); SEC v. Chenery Corp., 318 U.S. 80, 94 (1943)).

¹²⁵ Brief of Administrative Law Professors as Amici Curiae in Support of Petitioners at 22, *Biden II* (No. 21-954); see also *id.* at 22–26.

¹²⁶ *Id.*; see also Rodríguez & Cox, *supra* note 94.

¹²⁷ *Biden II*, 142 S. Ct. at 2548 (“Nothing prevents an agency from undertaking new agency action while simultaneously appealing an adverse judgment against its original action.”).

¹²⁸ See Vladeck Brief, *supra* note 111, at 2.