



SCOTUS to Decide whether Biden Administration Must Continue Migrant Protection Protocols

By Lisa Sorenson, Executive Director, State & Local Legal Center (SLLC)

In [Biden v. Texas](#) the U.S. Supreme Court will decide whether a federal statute requires the Biden administration to implement the Migrant Protection Protocols (MPP). The Supreme Court will also decide whether the lower court erred in concluding that the Department of Homeland Security's (DHS) new decision to terminate MPP had no legal effect.

Per MPP, certain undocumented persons were removed to Mexico while awaiting removal proceedings. Before MPP, DHS release thousands of undocumented persons into the United States after instructing them to voluntarily appear for removal proceedings. On June 1, 2021, DHS terminated MPP.

A federal district court ruled that DHS's decision to terminate MPP was arbitrary and capricious in violation of the Administrative Procedures Act and that terminating it violated the Immigration and Nationality Act (INA). On October 29, 2021, the DHS Secretary issued a new "38-page memorandum exhaustively describing his evaluation process and the reasons for his decision to [again] terminate" MPP.

The Fifth Circuit held that terminating MPP violates the INA. [8 U.S.C. § 1225\(b\)\(2\)\(A\)](#) states that an undocumented person "who is an applicant for admission" "shall be detained" if the person "is not clearly and beyond a doubt entitled to be admitted." [Section 1225\(b\)\(2\)\(C\)](#) states that if such a person arrives



from Mexico or Canada the Attorney General “*may* return” the person to Mexico or Canada pending removal proceedings.

The Fifth Circuit read [8 U.S.C. § 1225\(b\)\(2\)\(A\)](#)’s “shall” language to require detention for undocumented persons seeking admissions. And it read [Section 1225\(b\)\(2\)\(C\)](#)’s “may” language as allowing “contiguous-territory return” (to Mexico or Canada) as a “permissible alternative to otherwise-mandatory detention.” According to the Fifth Circuit, because DHS lacks the resources to detain every undocumented person seeking admissions to the United States at the southern border it must return such persons to Mexico. It must therefore implement MPP.

Before the Fifth Circuit the United States argued that its October 29 memo cured the defects the district court identified in its June 1 decision, rendering the case moot. The Fifth Circuit rejected this argument concluding the October 29 memo has “*zero legal effect*.” According to the Fifth Circuit the district court vacated the June 1 decision rendering it void and meaning DHS couldn’t rescind it.

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