

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH R. BIDEN, JR.,)
PRESIDENT OF THE UNITED STATES,)
ET AL.,)
 Petitioners,)
 v.) No. 21-954
TEXAS, ET AL.,)
 Respondents.)

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 21-954, Biden against Texas.

General Prelogar.

ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

ON BEHALF OF THE PETITIONERS

GENERAL PRELOGAR: Mr. Chief Justice, and may it please the Court:

The Secretary of Homeland Security exercised his statutory discretion to make a policy judgment. He found that the benefits of MPP were outweighed by its domestic, humanitarian, and foreign policy costs. Yet, the lower courts ordered DHS to reinstate MPP in perpetuity, requiring ongoing negotiations with Mexico to send thousands of non-citizens into its territory. That was error.

On the first question, Section 1225 confers a discretionary return authority that the Secretary may use, not a mandate. Nothing in the statutory text or history compels DHS to use MPP whenever Congress fails to provide sufficient funds for universal detention.

1 Respondents identify no one who
2 interpreted Section 1225 this way before this
3 lawsuit, no member of Congress or executive
4 branch official or anyone else. And on this
5 reading, every presidential administration, in
6 an unbroken line for the past quarter century,
7 has been in open violation of the INA.

8 The courts' interpretation compels
9 sensitive foreign policy negotiations and would
10 require transformative changes to the
11 government's border operations. If Congress had
12 wanted to mandate those results, it would have
13 spoken clearly.

14 On the second question, Respondents
15 have abandoned virtually all of the district
16 court's reasons for -- and the Fifth Circuit's
17 reasons for finding that the October 29
18 termination decision has no legal effect. Texas
19 now concedes that DHS was permitted to respond
20 to the district court's remand by issuing a new
21 decision. That's just what the Secretary did
22 following a multi-week reconsideration process.

23 Respondents claim that the Secretary
24 didn't really have an open mind in that process.
25 But the APA doesn't impose an amorphous

1 open-mindedness requirement, and Respondents
2 have not carried their heavy burden to show that
3 the October 29 decision was pretextual.

4 This Court should reverse the judgment
5 below, and the Secretary should be allowed to
6 finally put his policy decision into effect.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: General, the --
9 below, you argued 1252(f)(1) and its limitation
10 on who could impose injunctions here. And it
11 seems as though you've abandoned that, but what
12 should we do with that provision in this case?

13 GENERAL PRELOGAR: Well, Justice
14 Thomas, we included a footnote in our opening
15 brief in this case to make clear that we were
16 continuing to press our Section 1252(f)(1)
17 argument. Of course, we recognize the Court is
18 considering that issue in the Aleman Gonzalez
19 case, but we continue to adhere to the position
20 that the district court in this case had no
21 authority to enter the injunction that it did
22 because that would enjoin or restrain the
23 operation of the INA, and only this Court has
24 jurisdiction to enter an injunction like that.

25 JUSTICE THOMAS: On -- you emphasized

1 the foreign relations concerns that arise in
2 this case, but we've said in previous cases that
3 Congress has plenary authority in this area.

4 Beyond that, what -- if -- if Congress
5 has already legislated in this area and
6 expressed those concerns, then what additional
7 concerns should we take into account?

8 GENERAL PRELOGAR: Well, Justice
9 Thomas, I think that the particular
10 interpretation of the statute that the district
11 court adopted here implicates grave and serious
12 foreign policy implications. Of course, the
13 executive branch has primary responsibility for
14 managing foreign relations and conducting those
15 kinds of negotiations.

16 And I think that if Congress had
17 intended to override the executive's ordinary
18 discretion that it enjoys with respect to that
19 kind of foreign policy relationship, then, at
20 the very least, it should have made that intent
21 express in the statute.

22 But, instead, if you look at the text
23 of Section 1225(b)(2)(C), this is the contiguous
24 territory return provision, what Congress said
25 is that the Secretary "may" return. Congress in

1 no sense indicated that it was actually imposing
2 on the executive a mandate to engage in those
3 kinds of ongoing negotiations with Mexico, not
4 just to obtain its consent at the outset, but
5 the enormous investment of diplomatic resources
6 that it takes to engage with Mexico on a
7 day-to-day basis to implement this policy, then
8 Congress should at least have said that clearly
9 in the statute and put it into self --

10 JUSTICE THOMAS: But I think their
11 argument is that it was -- I apologize for
12 interrupting you, but I think they suggest that
13 there's the underlying rule that Congress --
14 that you shall detain, and the "shall," I think,
15 they see as a baseline. And then the others are
16 there's limited discretion to parole or to send
17 -- to do other things. But the -- the -- it
18 seems as though they think that discretion is
19 consumed by the "shall."

20 GENERAL PRELOGAR: Well, Justice
21 Thomas, let me respond to that in a few
22 different ways. I want to emphasize at the
23 outset that we think that DHS is relying
24 permissibly on its express statutory release
25 authorities here. So it's the parole authority

1 you mentioned in 1182(d)(5). It's also the
2 authority to grant bond or conditional parole
3 under Section 1226(a), which is a provision that
4 Respondents largely ignore.

5 So we think that the releases are
6 consistent with those express authorities, and
7 we think that the language in 1225(b)(2)(A), the
8 "shall be detained" language that you
9 referenced, should be interpreted against the
10 backdrop of long-standing principles of
11 enforcement discretion, in recognition that this
12 is essentially a limited law enforcement
13 resource. No one disputes that DHS does not
14 have sufficient capacity to detain everyone who
15 could be subject to detention under that
16 provision.

17 But I should say also that if you
18 disagree with everything that I just said or
19 think that there is more room for doubt about
20 how DHS implements those detention and release
21 authorities, still I don't think that provides
22 any license to rewrite Section 1225(b)(2)(C) in
23 contravention of its plain language. Congress
24 said there "may return." It didn't create the
25 kind of mandate that Respondents are now reading

1 into the statute.

2 CHIEF JUSTICE ROBERTS: Well, I mean,
3 you say, if we disagree with you on the other
4 grounds, that's not a basis for adopting an
5 erroneous interpretation of the third provision.

6 But where does that leave us? I mean,
7 I -- I am sympathetic with your position, which
8 is that you can't detain enough people. You
9 don't think you have to send people back through
10 the return mechanism. And that's fine, I would
11 say. You're -- one way to look at it is you're
12 sort of taking away from yourself an option to
13 comply with the statute.

14 And then it gets to a question of the
15 parole -- interpretation of the parole provision
16 and whether or not, I think, significant public
17 benefit can accommodate as -- as far as you want
18 to stretch it.

19 So, if I get to the point of looking
20 at this and agreeing -- basically saying there's
21 nothing you can do, given the statutory
22 requirements, it's not -- you're -- you're in a
23 position where the facts have sort of overtaken
24 the law. But, in that situation, what are we
25 supposed to do? It's still our job to say what

1 the law is. And if we say what the law is and
2 you tell us we can't do anything about it, where
3 do you think that leaves us?

4 GENERAL PRELOGAR: Well, I would say
5 at the outset that to the extent that the Court
6 is inclined to say what the law is with respect
7 to the detention and release authorities that
8 you mentioned, 1225(b)(2)(A), parole, I think
9 that those should be challenged on their own
10 terms if Respondents disagree with how DHS is
11 implementing those provisions.

12 And, instead, Respondents said in the
13 district court that they weren't even
14 challenging our parole policies. Any judicial
15 relief that could be necessary in that context
16 should focus on those provisions, but, instead,
17 it collaterally --

18 CHIEF JUSTICE ROBERTS: Well, but, I
19 mean, let's go through them. You don't --
20 detention is not -- it is, what, a -- a
21 2 percent answer to the problem? So we can put
22 that to one side. I don't think they have to
23 challenge detention to -- for the reality to be
24 there, that that's not going to help you get to
25 where you need to get.

1 And with respect to the others, again,
2 assuming that I find significant public benefit
3 to be a more substantive restriction than --
4 than perhaps -- perhaps you do, I guess, again,
5 where does that leave us?

6 GENERAL PRELOGAR: Well, I think it
7 would leave the Court --

8 CHIEF JUSTICE ROBERTS: If you have a
9 situation where you're stuck because there's no
10 way you can comply with the law and deal with
11 the problem there, I just -- I'm just wondering
12 why that's our problem?

13 Our problem is to say what the law is.
14 And if you're in a position where you say, well,
15 we can't do anything about it, what do we do?

16 GENERAL PRELOGAR: Well, I agree that
17 it's not your problem in this case. I think
18 that to the extent the Court interpreted the
19 provisions along the lines you're suggesting,
20 that that could, at most, support a judicial
21 order that we need to detain more people or we
22 need to change how we're releasing people.

23 But, again, I would go back to the
24 central issue in this case, that the Court's
25 responsibility here is to look at how the

1 district court interpreted the contiguous
2 territory return provision. And none of those
3 concerns about detention and release could in
4 any sense justify transforming that position,
5 contrary to Congress's plain language, the "may
6 return" language, with all of the consequences
7 that would have for our foreign relations.

8 So I think the simplest route to
9 resolving this case is to say that. I don't
10 think the Court actually needs to say anything
11 more. It's not necessary to resolve any of
12 those questions about the meaning of
13 1225(b)(2)(A) or 1182(d)(5) or 1226(a).

14 All the Court needs to say in this
15 case is that the contiguous territory return
16 provision does not carry the meaning that
17 justify the district court's injunction in this
18 case.

19 JUSTICE SOTOMAYOR: General --

20 JUSTICE ALITO: May I -- may I ask you
21 about the jurisdictional question that Justice
22 Thomas raised? You argue that we lack
23 jurisdiction because the district court lacked
24 jurisdiction, and you devoted -- you devote two
25 sentences in a footnote to the question.

1 I want to see how far your
2 jurisdictional argument goes. So do you think
3 that 1252(f)(1) barred the district court from
4 vacating the Secretary's decision to stop using
5 8 U.S.C. 1225(b)(2)(C) authority to return
6 aliens to Mexico?

7 GENERAL PRELOGAR: Well, I think, you
8 know, we focused on the injunctive relief in
9 this case, and I think that there's an
10 additional question about vacatur. I -- I do
11 believe that our arguments would extend to that
12 as well. To the extent that -- that you're
13 worried about the extent of the briefing in this
14 case, I would, of course, refer back to our
15 briefing in Aleman Gonzalez. We also briefed
16 this issue at this --

17 JUSTICE ALITO: Oh, I'm very well
18 aware of the briefing in -- in that case. It
19 doesn't say anything about the APA, and that's
20 my principal concern right here.

21 So your answer is that it would
22 prevent a district court from reviewing
23 immigration rules dealing with the relevant
24 provisions of the INA under the APA? A district
25 court could not do that?

1 GENERAL PRELOGAR: Well, to the extent
2 that that would entail the district court in --
3 in setting aside the agency's action, I do think
4 that that would fall within the bounds of our
5 interpretation of (f)(1).

6 JUSTICE ALITO: Well, let me ask you
7 this -- to address this hypothetical. Suppose
8 DHS invoked that authority, the return
9 authority, to promulgate a policy where every
10 alien who arrives on land from a foreign country
11 contiguous to the United States was required to
12 return to Mexico or Canada pending the
13 initiation of a removal proceeding under 1220 --
14 1229(a).

15 And then suppose DHS also promulgated
16 a policy where neither 1229(a) removal
17 proceedings nor asylum proceedings could be
18 initiated for any of those aliens until 10 years
19 after their removal. Okay? You get the -- you
20 get the hypothetical?

21 Would any court besides this Court
22 have jurisdiction to hear a challenge seeking to
23 vacate that policy?

24 GENERAL PRELOGAR: Well, I think that,
25 of course, there would be jurisdiction in the

1 lower courts with respect to individual
2 non-citizens who are raising that challenge,
3 and that's, I think, the premise of
4 Section (f)(1), that Congress was trying to
5 channel those types of claims into individual
6 proceedings with respect to individual
7 non-citizens. So there would be jurisdiction in
8 that circumstance.

9 JUSTICE ALITO: But it would have to
10 be done on an individual basis? There could be
11 no -- no request under the APA to vacate that
12 order, that -- that policy saying everybody
13 covered has to stay in Mexico for 10 years?

14 GENERAL PRELOGAR: Well, obviously,
15 that policy could be challenged in the
16 individual case, and so I think it could be
17 taken on on its own terms there.

18 JUSTICE SOTOMAYOR: Then --

19 JUSTICE ALITO: I mean, don't you
20 think that that's a -- I mean, you might be
21 right, but don't you think that's a far-reaching
22 argument? Don't you think that goes well beyond
23 anything that would come to our -- that we would
24 have thought about in -- in Garland versus
25 Gonzalez? Don't you think that deserved

1 briefing?

2 GENERAL PRELOGAR: Well, certainly,
3 Justice Alito, I defer to this Court and how
4 it's choosing to resolve those issues in Aleman
5 Gonzalez. With respect to additional briefing,
6 we did include briefing on this issue at the
7 stay stage in this case as well, so I would
8 refer to our -- our briefing.

9 JUSTICE ALITO: Well, did you say
10 anything about the APA in -- in the Gonzalez
11 case?

12 GENERAL PRELOGAR: I'm sorry that I
13 can't recall right now whether we -- we briefed
14 that issue there. If you're telling me we
15 didn't, I assume we did not.

16 JUSTICE ALITO: On the jurisdictional
17 question, you think that we should go back and
18 read what you've submitted below? It wasn't
19 important enough for you to submit it to us
20 directly?

21 GENERAL PRELOGAR: We did brief this
22 issue at the stay stage in this case, and -- and
23 this Court, we understand, issued the -- denied
24 the stay nevertheless and found a likelihood of
25 success on the merits with respect to the

1 procedural APA claim on the June 1 memorandum.
2 So that's why we didn't renew our briefing on
3 this issue at the merits stage.

4 JUSTICE SOTOMAYOR: Counsel --

5 JUSTICE KAGAN: General --

6 JUSTICE SOTOMAYOR: -- are you taking
7 the position that 1252(f)(1) also eliminates
8 declaratory judgment rulings?

9 GENERAL PRELOGAR: We --

10 JUSTICE SOTOMAYOR: I mean, there is a
11 difference between issuing an injunction
12 vacating an agency action and issuing a
13 declaratory judgment that agency action is
14 unauthorized and letting that come to this Court
15 to decide what remedy is appropriate, whether an
16 injunction is appropriate or not if you decide
17 not to follow the statement, correct? There's
18 nothing in a declaratory judgment rule that
19 forces you to.

20 You might be subjecting yourself to
21 contempt, but you can stay that pending review
22 by this Court, couldn't you?

23 GENERAL PRELOGAR: That's right,
24 Justice Sotomayor. So I think that it would be
25 possible for the Court to draw that distinction

1 and distinguish between declaratory relief and
2 injunctive relief.

3 Of course, here we're under --

4 JUSTICE SOTOMAYOR: You don't see
5 anything in 12 -- in the language of 1252(f)(1)
6 that stops declaratory relief. It says --

7 GENERAL PRELOGAR: I believe, when
8 Aleman Gonzalez was argued, we -- we suggested
9 that that was an open question, and I recognize
10 that it's a more difficult question. Here, I
11 think that it's clear that our (f)(1) argument
12 applies because we're facing a nationwide
13 permanent injunction in this case.

14 JUSTICE GORSUCH: I -- I --

15 JUSTICE SOTOMAYOR: Now what do we --

16 JUSTICE GORSUCH: Hold on. I'm sorry.
17 I'm sorry.

18 JUSTICE SOTOMAYOR: I'm sorry. Go
19 ahead.

20 JUSTICE GORSUCH: I just wanted to
21 follow up on that.

22 JUSTICE SOTOMAYOR: Oh, go ahead.

23 JUSTICE GORSUCH: Okay. I -- I --
24 I -- I would just appreciate an answer to
25 Justice Sotomayor's question about declaratory

1 relief and the government's position with
2 respect to 1252(f).

3 GENERAL PRELOGAR: I'm sorry, a
4 clarification?

5 JUSTICE GORSUCH: Yeah. Just --

6 GENERAL PRELOGAR: So I'll do my best
7 --

8 JUSTICE GORSUCH: -- does -- does --
9 does --

10 GENERAL PRELOGAR: -- and I should
11 confess that I didn't go back to review the oral
12 argument transcript in Aleman Gonzalez.

13 JUSTICE GORSUCH: No, no, no.

14 GENERAL PRELOGAR: But I think we took
15 the position there that it's an unsettled
16 question, how this would apply in the context of
17 declaratory relief.

18 And so, you know, I -- I want to be
19 consistent with that position, but I recognize
20 it's a harder issue for us, and I think that
21 there would be a path for the Court to determine
22 that there's a distinction between declaratory
23 relief and injunctive relief, which is, of
24 course, the primary focus of that provision.

25 JUSTICE GORSUCH: No, I understand

1 it's an open question and a difficult one. I
2 just wonder whether the government has a view on
3 it one way or the other.

4 GENERAL PRELOGAR: Our view is that
5 it -- that it also could foreclose review of
6 declaratory relief, but I recognize the Court
7 could conclude otherwise.

8 JUSTICE GORSUCH: Why would it
9 foreclose declaratory relief?

10 GENERAL PRELOGAR: I'm sorry, Justice
11 Gorsuch, I'm -- I don't have further information
12 at this time. If you'd like us to submit
13 supplemental briefing on this issue, we would be
14 happy to do so to try to clarify that position.

15 JUSTICE GORSUCH: But it is the
16 government's position that it -- it does
17 foreclose declaratory relief too?

18 GENERAL PRELOGAR: I believe that's
19 the position we took at oral argument in Aleman
20 Gonzalez, recognizing it was a tougher issue.

21 JUSTICE GORSUCH: Thank you.

22 GENERAL PRELOGAR: If I could turn to
23 the -- the various textual clues and textual
24 clues that we think fortify our interpretation
25 of the contiguous territory return provision in

1 this case, there are really four key things that
2 I want to focus on that I think demonstrate that
3 the district court's interpretation here went
4 seriously awry.

5 And the first thing, of course, is the
6 text which was emphasized, that Congress used
7 the "may return" language, which is clearly
8 discretionary. On Respondents' interpretation,
9 what Congress really meant is the Secretary may
10 return, unless detention capacity is lacking, in
11 which case he must return.

12 But Congress nowhere put that
13 condition precedent into the statute, and I
14 think it's really significant that Congress
15 failed to do so because, on Respondents'
16 reading, this would have been mandatory from the
17 outset and at all times thereafter.

18 In 1996, when Congress enacted this
19 provision, there was not sufficient detention
20 capacity at that time, and Respondents don't
21 dispute that that has remained continuously the
22 case. So I think it's particularly notable that
23 their interpretation of the statute would have
24 run counter to the text all along.

25 I would point as well --

1 JUSTICE KAVANAUGH: Is there any
2 indication in connection with the '96 Act that
3 anyone in Congress expected that if there
4 were -- was not sufficient detention capacity,
5 that hundreds of thousands of people would be
6 just paroled into the United States without
7 being lawfully admitted?

8 Did anyone say that in Congress?

9 GENERAL PRELOGAR: I don't think that
10 there was express history on that point, but
11 Congress was focused on the detention issue, and
12 it thought that the new expedited removal
13 provisions that it had added to the statute at
14 the same time would function to alleviate part
15 of the strain on detention resources.

16 So I think that history actually shows
17 that Congress here wasn't thinking that
18 contiguous territory return would -- would be
19 the solution to this issue. Instead, they were
20 focused on expedited removal to do so.

21 And it's no mystery about where this
22 provision came from, contiguous territory
23 return. It was a much narrower and more
24 discrete problem, which was that the Board of
25 Immigration Appeals in the Sanchez-Avila case

1 had just concluded in 1996 that the executive's
2 prior discretionary practice of sometimes
3 returning some non-citizens to contiguous
4 territory required express statutory
5 authorization if it was going to continue. And
6 Congress provided that express statutory
7 authorization in 1225(b)(2)(C).

8 But there is no indication that it
9 meant to go further and actually transform that
10 -- that prior practice and turn it into an
11 ongoing mandate that DHS must implement this on
12 a border-wide basis consistently based on a lack
13 of detention appropriations.

14 JUSTICE KAVANAUGH: I think that's --

15 JUSTICE ALITO: Well, the Fifth --

16 JUSTICE KAVANAUGH: Go ahead.

17 JUSTICE ALITO: The -- the Fifth
18 Circuit reasoned that -- it didn't -- it didn't
19 deny that the -- that the provision you're
20 talking about uses the term "may," but it said
21 that if you read the relevant statutory
22 provisions, they give DHS three options.

23 One is to return these individuals to
24 Mexico or Canada. The second is to detain them.
25 Third is to have case-by-case determinations

1 regarding humanitarian issues and -- and public
2 benefit. And 1220 -- a cornerstone of that is
3 that 1220 -- 1225(b)(2)(A) says "the alien shall
4 be detained." Right?

5 GENERAL PRELOGAR: That's correct.

6 JUSTICE ALITO: And you now read that
7 to be discretionary in light of Castle Rock, is
8 that correct?

9 GENERAL PRELOGAR: No. To be clear,
10 Justice Alito -- and I appreciate the
11 opportunity to offer clarification on this
12 point -- we are not suggesting that that
13 language in (b)(2)(A) is -- essentially
14 functions as a "may," that Congress didn't
15 express a preference on this issue.

16 What we think, though, is that against
17 the background of Castle Rock, it's appropriate
18 for DHS to take account of its limited detention
19 capacity for purposes of exercising its various
20 authorities, and that includes the express
21 release authorities.

22 So there's parole you mentioned it.
23 You left off the list Section 1226(a). We think
24 that's another important source of authority for
25 DHS here.

1 JUSTICE ALITO: Well, that -- that
2 sound -- what you just said sounded to me like a
3 lot of words that means that we have discretion,
4 we have prosecutorial discretion, to decide
5 whether to detain. "Shall be detained" doesn't
6 literally mean shall be detained.

7 GENERAL PRELOGAR: I think what it
8 means --

9 JUSTICE ALITO: Is that correct?

10 GENERAL PRELOGAR: Well, I think, in
11 this context, what "shall be detained" means is
12 that Congress expected us to use the detention
13 capacity that we have. And that's what we're
14 doing. DHS detains tens of thousands of
15 individuals on any given day. Respondents'
16 interpretation that would remove any discretion
17 would mean that DHS can't take account of that
18 limited capacity in making prioritization
19 decisions.

20 So, if they're really right and if DHS
21 has to fill up those beds on a first come basis,
22 then the upshot is that it's going to run out of
23 space and not have capacity to detain those with
24 criminal histories or who represent a national
25 security threat or have final orders of removal

1 and might be particularly likely to abscond.
2 And I don't think that's a reasonable
3 interpretation of --

4 JUSTICE SOTOMAYOR: Is there --

5 JUSTICE ALITO: Well, I'll tell you,
6 when -- when -- excuse me, if I just ask one
7 more follow-up. I'll tell you, when I read your
8 brief on this point, I said: Wow, this is exact
9 -- I remember the Jennings case, where I had the
10 -- the pleasure of writing the opinion for the
11 Court, and I said: Boy, my recollection is that
12 the government's brief in that case took exactly
13 the opposite position from what the -- the
14 government is taking here.

15 And I went back and looked at it, and
16 that is exactly the case. You stressed that
17 "shall be detained" means shall be detained. I
18 have it right before me. You emphasized the --
19 the language, "shall be detained."

20 And you went on. This is a brief
21 filed by your predecessor, Mr. Gershengorn.
22 "Unlike the word 'may,' which implies
23 discretion, the word 'shall' usually connotes a
24 requirement. And, here, the repeated 'shall be
25 detained' clearly means what it says, because

1 Congress said 'may' when it meant 'may.'
2 Congress crafted only one exception to that
3 rule. Congress provided that the Secretary
4 'may' parole into the United States any alien
5 applying for admission on a case-by-case basis
6 for urgent humanitarian reasons or significant
7 public benefit."

8 GENERAL PRELOGAR: Let me respond to
9 that in two ways if I could, Justice Alito. And
10 the first is to make clear that, of course,
11 there we were addressing a very different type
12 of argument, which is whether Section 1225
13 contains effectively an implicit statutory
14 entitlement to release on bond, which is what
15 the non-citizens in that case were claiming.
16 And -- and we said then and remain of the view
17 and this Court said in Jennings that that's not
18 a proper interpretation of that "shall be
19 detained" language.

20 But we had no occasion in that case
21 and this Court had no occasion in that case to
22 consider how to interpret these provisions of
23 the INA against the backdrop of traditional
24 enforcement discretion principles. And I would
25 point in particular now to the -- the opinion of

1 Chief Judge Sutton in the Sixth Circuit, a
2 recent opinion we cite in our reply brief in the
3 Arizona case, that I think has a really useful
4 distillation of the relevant principles in this
5 context when you're looking at those types of
6 provisions in the INA in light of limited law
7 enforcement resources.

8 But the -- the second point I'll make
9 is that to the extent you are focused on this
10 differential use of "shall" and "may," I think
11 that only fortifies our principal contention in
12 this case, which is that the -- the contiguous
13 territory return provision uses that
14 discretionary "may return," and it's
15 Respondents' position that would actually fail
16 to give effect to Congress's drafting choices by
17 turning that into a mandate.

18 JUSTICE SOTOMAYOR: Counsel --

19 JUSTICE KAGAN: Do you think that as
20 to each non-citizen, that you have to comply
21 with one of the four, let's call them now,
22 because you added bond, that you have to comply
23 with one of the four options that the statute
24 gives you? Or do you think that there is a kind
25 of residual discretion so that even if an

1 immigrant could not be paroled under 1182, you
2 could release that immigrant -- you could still
3 release that immigrant rather than detain him?

4 GENERAL PRELOGAR: So I think the
5 question of residual discretion is a difficult
6 one. And we haven't had to process that here
7 because we think that DHS is complying with
8 those four statutory options. Our position is
9 that DHS is faithfully implementing both the
10 parole provision in 1182(d)(5) and the bond and
11 conditional parole provision in Section 1226(a).

12 And I think that its implementation of
13 those provisions suffices in itself to resolve
14 this case because Respondents as the plaintiffs
15 alleged and said that DHS was violating those
16 obligations but came forward with no evidence to
17 substantiate that claim.

18 JUSTICE KAGAN: I mean, I think
19 General Stone's position is sort of we don't
20 need evidence because it's kind of laughable on
21 its face to think that you're paroling this many
22 people by using case-by-case determinations
23 rather than, I think, his word is "en masse."

24 GENERAL PRELOGAR: Well, those kinds
25 of arguments just don't engage with the

1 statutory text here. 1182(d)(5) has a
2 procedural requirement, case-by-case
3 adjudication. DHS does that. It does not grant
4 parole to any individual non-citizen without
5 reviewing the individual case and making an
6 assessment of individualized factors like flight
7 risk, likelihood of absconding, and whether the
8 release of that individual would advance an
9 urgent humanitarian reason or a substantial
10 public -- a significant public benefit. And
11 that's, of course, the substantive criteria.

12 Our position is that DHS can
13 permissibly take account of its detention
14 capacity in determining that there is a
15 significant public benefit from releasing a
16 low-priority individual who's not a flight risk,
17 who doesn't have a criminal history, if that
18 would preserve a bed space for someone who's a
19 higher priority under our detention policies.

20 JUSTICE KAGAN: But you're saying we
21 don't need -- or you don't need to argue for
22 residual discretion because you're not using any
23 residual discretion? You're saying that --

24 GENERAL PRELOGAR: That's right.

25 JUSTICE KAGAN: -- that everything

1 fits --

2 GENERAL PRELOGAR: We are not using
3 residual discretion here.

4 JUSTICE KAGAN: -- within these four
5 categories?

6 GENERAL PRELOGAR: That's correct. We
7 think that we do not need residual discretion
8 here, and I think that it's an interesting
9 question, but it's largely an academic one
10 because, here, DHS's release authorities amply
11 justify what it's doing on the ground.

12 JUSTICE SOTOMAYOR: Counsel, can you
13 tell me what "case-by-case review" means? You
14 -- you -- part of your answer addressed it, but
15 each alien is interviewed?

16 GENERAL PRELOGAR: That's right. So
17 what DHS does --

18 JUSTICE SOTOMAYOR: Is a background
19 check done on them?

20 GENERAL PRELOGAR: There is usually a
21 criminal background check done. There's a
22 biometric records check that's completed. And
23 DHS reviews that information and makes judgments
24 about things like flight risk and security
25 concerns for purposes of administering these

1 provisions.

2 JUSTICE SOTOMAYOR: I -- I'm assuming
3 there's a terrorist list of some sort or a
4 database that you look at as well?

5 GENERAL PRELOGAR: I assume so as
6 well, although I haven't checked with DHS on
7 that.

8 JUSTICE SOTOMAYOR: All right. So --
9 and you -- presumably, you find out what ties or
10 not the person has to the United States and
11 whether they've absconded before, et cetera?

12 GENERAL PRELOGAR: That's right. So,
13 by regulation, DHS is required to take into
14 account those kinds of considerations insofar as
15 they bear on flight risk, and the parole
16 determination will only be made after making a
17 judgment that the person does not likely present
18 a flight risk.

19 JUSTICE SOTOMAYOR: Now your
20 adversary, General Stone, points to a lot of
21 legislative history that Congress intended
22 1182(d)(5)(A) to be narrow. Virtually all of
23 the history that he points to is a House
24 committee report, correct?

25 GENERAL PRELOGAR: That's right. And

1 it -- it was a committee report that addressed a
2 different version of the statute, not the one
3 that was enacted.

4 JUSTICE SOTOMAYOR: So, with respect
5 to this version of the statute, was there
6 anywhere a directive by Congress to limit the
7 number of people?

8 GENERAL PRELOGAR: No, there's
9 certainly nothing in the text of the statute
10 that Congress enacted that places that kind of
11 cap. Instead, Congress directed how parole
12 determinations need to be made case by case, and
13 it set forth that substantive criteria of the
14 bases for parole, but it nowhere suggested that
15 there is a numerical cap on the number of people
16 who can receive parole.

17 JUSTICE SOTOMAYOR: Now please tell me
18 how you satisfy the urgent humanitarian reasons
19 or significant public benefit requirements of
20 the statute.

21 GENERAL PRELOGAR: We satisfy that
22 because there is a significant public benefit in
23 ensuring that DHS doesn't run out of detention
24 space to house individuals who are higher
25 priorities for detention because of their

1 criminal records or because they might be
2 particularly likely to abscond or because
3 Congress itself has directed that they should be
4 detained without release under provisions like
5 1231(a)(2), 1226(c).

6 And DHS's judgment in implementing the
7 statute has been, I think, properly interpreted
8 against the background of enforcement discretion
9 here, that that serves a significant public
10 benefit in ensuring that it doesn't run out of
11 capacity when someone is a low-priority
12 individual because they're -- they don't have a
13 criminal history, they're not a danger to
14 society, they aren't likely to abscond.

15 JUSTICE SOTOMAYOR: How about the
16 issue of whether you have enough resources to
17 detain all these people, feed them, clothe them?
18 If you don't, you're going to let them starve
19 and you're going to have the horrific conditions
20 that have gotten so much public attention,
21 correct?

22 GENERAL PRELOGAR: Well, certainly,
23 DHS is committed to providing humanitarian
24 conditions for detention. But I do think that
25 the report --

1 JUSTICE SOTOMAYOR: If you had to
2 detain everybody, could you?

3 GENERAL PRELOGAR: No. And no one
4 disputes that. DHS does not have sufficient
5 detention capacity. Congress knows that.

6 Congress was aware of that in 1996
7 when it enacted this -- this provision, and
8 there is no indication that Congress intended
9 the safety valve here to be contiguous territory
10 return.

11 JUSTICE KAGAN: Well, what are the
12 numbers with respect to that, both now and in
13 the past, in terms of the percentage of people
14 who are stopped or encountered or, you know,
15 arrested at the border -- think of those as
16 synonyms, I didn't mean to -- versus the number
17 that you can detain?

18 GENERAL PRELOGAR: So let me give you
19 a -- a sense of the current numbers. I'll point
20 to the recent monthly reports that we've been
21 filing in accordance with the district court's
22 reporting requirement of the injunction.

23 The most recent numbers are from March
24 2022. At -- at that juncture, DHS apprehended
25 about 220,000 people at the border. There were

1 -- that was the number of border encounters. At
2 that point in time, DHS was appropriated for a
3 little under 32,000 detention beds, counting
4 some COVID restrictions, some court restrictions
5 in place.

6 And the average daily amount of
7 detention over that same month was also at about
8 32,000 individuals. That's ICE being a little
9 under its capacity and CBP being over capacity.

10 So I think that it's -- it's kind of
11 self-evident and no one disputes here that there
12 is a tremendous shortfall and that DHS could not
13 detain everyone who it's encountering at the
14 border.

15 JUSTICE BREYER: Is 320 -- you say
16 220,000 come in?

17 GENERAL PRELOGAR: Yes, about 220,000
18 encounters.

19 JUSTICE BREYER: How -- per what? Per
20 what? Per month, per day, per week, per what?

21 GENERAL PRELOGAR: This was in March
22 2021 --

23 JUSTICE BREYER: For a month?

24 GENERAL PRELOGAR: -- it's the most
25 recent --

1 JUSTICE BREYER: In a month? You're
2 saying 220,000 in a month or 220,000 in a week
3 or what?

4 GENERAL PRELOGAR: No, in one month.
5 Those were the numbers for March.

6 JUSTICE BREYER: In one month?

7 GENERAL PRELOGAR: Now, of course, it
8 -- it fluctuates.

9 JUSTICE BREYER: So 220,000 come to
10 the border and about 30,000 or so, 38,000 are
11 detained, and the rest are paroled?

12 GENERAL PRELOGAR: Well, there are a
13 variety of tools that DHS uses. They're not all
14 paroled. Some are expelled under Title 42.

15 JUSTICE BREYER: These are the ones
16 who are --

17 GENERAL PRELOGAR: Some are put in
18 expedited removal.

19 JUSTICE BREYER: Okay, so how many are
20 paroled, about?

21 GENERAL PRELOGAR: In March 2021, I
22 believe the parole figure was about 37,000, and
23 then there were another 43,000 that received
24 bond or conditional parole under Section
25 1226(a).

1 JUSTICE BREYER: So that's what
2 happened. So there were 110,000 or 120,000, and
3 we don't know what happened to them? What --
4 where did they go?

5 GENERAL PRELOGAR: Many of them were
6 expelled pursuant to Title 42.

7 JUSTICE BREYER: I see.

8 GENERAL PRELOGAR: Others were --

9 JUSTICE BREYER: Okay. So half of
10 them --

11 GENERAL PRELOGAR: -- processed under
12 other provisions of the Act.

13 JUSTICE BREYER: -- they say you have
14 no business here and it comes right under here
15 that they're not -- oh, under 42, in other
16 words, under the --

17 GENERAL PRELOGAR: The public health
18 order --

19 JUSTICE BREYER: Under public health.
20 Right.

21 GENERAL PRELOGAR: -- that CDC had
22 issued. And that's -- that number, though, also
23 includes other processing under Title 8
24 authority, so it includes things like expedited
25 removal.

1 JUSTICE BREYER: Now -- now suppose --
2 I mean, here, I'm worried about -- suppose I
3 accept your argument for -- hypothetically,
4 let's assume that. And then I say I see (b) has
5 to do with people whom the immigration person at
6 the border says you're inadmissible or you want
7 asylum and it tells you what to do.

8 But now we go to our part, which is
9 other people who come in. So I don't know if
10 they're inadmissible or not. Maybe, maybe not.
11 That's -- that's -- that's what we're -- this is
12 number 2, is that right?

13 GENERAL PRELOGAR: I'm sorry, you're
14 looking at 1225(b)(2) --

15 JUSTICE BREYER: Yeah. Yeah.

16 GENERAL PRELOGAR: -- (B)?

17 JUSTICE BREYER: It says "inspection
18 of other aliens." Those are the aliens who were
19 not in the first part, which is the first
20 part --

21 GENERAL PRELOGAR: Oh, I'm sorry,
22 you're looking at, right, (b)(1). So you're
23 looking at the -- the provisions about --

24 JUSTICE BREYER: (b)(1) are certain
25 people where they say you're inadmissible,

1 good-bye, or they say you want asylum and here's
2 the procedure.

3 GENERAL PRELOGAR: That's right.

4 JUSTICE BREYER: Then it says
5 inspection of other aliens. That's what we're
6 talking about.

7 GENERAL PRELOGAR: That's correct,
8 yes.

9 JUSTICE BREYER: Okay. Who are the
10 others? The others are the ones you don't know
11 if they're inadmissible or not?

12 GENERAL PRELOGAR: So these are the
13 ones who wouldn't be inadmissible under the
14 grounds that are specified in (b)(1).

15 JUSTICE BREYER: Okay. Okay. We got
16 that.

17 GENERAL PRELOGAR: This also can be
18 applied --

19 JUSTICE BREYER: Now it says there are
20 three things you can do. One is, as you say,
21 confine them, you know, detain. And then number
22 B is an exception, and number C is send them
23 back to Mexico with the word "may," okay? So
24 we've got those three things right equally under
25 the statute.

1 And you say it says "may." So what
2 happens if you say no? And it seems to say
3 "shall be detained." And that's what we're
4 talking about. Suppose you just don't detain
5 them, vast numbers. You parole them. You say,
6 I can do that because of 1182. So I got the
7 structure in my mind.

8 But you are not doing what they said,
9 which "shall be detained." Well, we can parole
10 them case by case. Okay. Suppose you lose on
11 that. At that point, you have Congress telling
12 you "shall be detained" and you're not doing it.

13 What happens? I'm asking you that
14 because the words are important. And the reason
15 I ask you that is this is not the first time
16 Congress has said to an agency, do it. Do it by
17 May 15. May 15 comes. They haven't done it.
18 That happens more than you might think.

19 Okay. So there's a case law history
20 there of what judges did when the government
21 just didn't do what Congress told them within
22 the time frame they were supposed to do it.

23 Have you looked at that? Do you know
24 what that was? My impression, very vaguely, at
25 a distance, was the judge sort of tried to work

1 things out. They sort of tried to negotiate
2 with the agency. They sort of -- they -- they
3 didn't just order them detained they -- or order
4 the SALT regulation issued because they
5 couldn't.

6 What happened? And does that have any
7 instruction for us?

8 GENERAL PRELOGAR: Well, I think,
9 here, I -- I have a couple of reactions to that,
10 Justice Breyer, and I hope I can work through
11 them. I -- I first want to push back on the
12 idea of how you describe the -- the statutory
13 structure only insofar as I think that it's
14 wrong to treat this as a self-contained unit.

15 It's not as though Congress sat down
16 at one point in time and thought this is going
17 to be our universal solution for how to deal
18 with these encounters at the border with this
19 class of non-citizen.

20 Instead, all of these provisions were
21 added to the statute at different times and for
22 different reasons. The "shall be detained"
23 language came in 1903. That was first. Then
24 Congress added the parole authority in 1952 in
25 the INA, and that was actually a -- a

1 codification of the executive's prior practice
2 of granting parole even when it didn't have
3 express statutory authority to do so.

4 It was only in 1996 that Congress
5 added the (c) that you referred to, contiguous
6 territory return. And so I just want to push
7 back on the suggestion that this was all at one
8 point in time with Congress kind of thinking
9 about these --

10 JUSTICE BREYER: So that -- that --
11 that suggests the argument that you gave up on,
12 and that was the argument that "shall" doesn't
13 literally mean shall this instant. It means
14 shall as best you can.

15 Now you've given -- you've given up on
16 that argument, I think, or have you?

17 GENERAL PRELOGAR: Well, no. I -- I
18 think "shall" properly interpreted means that we
19 should use the detention capacity that we've
20 been afforded here. I think that the argument
21 --

22 JUSTICE BREYER: Did you ask for more?

23 GENERAL PRELOGAR: -- in my response
24 to Justice Kagan --

25 JUSTICE BREYER: Did you ask Congress

1 for more?

2 GENERAL PRELOGAR: -- was that we have
3 express statutory release authorities here, and
4 we think that all of these releases are
5 happening in conformance with the INA.

6 Left off your list as well was
7 1226(a). This is an important source of
8 authority for DHS. This is a provision that
9 applies as all agree to anyone who is in the
10 United States, and so that means --

11 JUSTICE BREYER: Yeah, but these are
12 people that -- coming to the border. I thought
13 1226(a) does just what you say, it applies to
14 people who are already here. And I didn't think
15 --

16 GENERAL PRELOGAR: Yeah. But that
17 applies --

18 JUSTICE BREYER: -- therefore, it
19 applied to this case particularly because I
20 think, here, we're dealing with people who come
21 up to the border. Am I -- tell me why I'm wrong
22 on that.

23 GENERAL PRELOGAR: You're wrong on
24 that because DHS's long-standing interpretation
25 has been that 1226(a) applies to those who have

1 crossed the border between ports of entry and
2 are shortly thereafter apprehended. So that's
3 an important category of the group of
4 non-citizens that we're talking about here.

5 And it memorialized that understanding
6 in regulations shortly after IIRIRA was enacted,
7 and as well that has been the agency's
8 consistent interpretation across the -- the
9 subsequent 25 years.

10 JUSTICE KAVANAUGH: The October memo
11 does not rely on 1226.

12 GENERAL PRELOGAR: Justice Kavanaugh,
13 I -- I -- I think that the October memo, of
14 course, wasn't focused on any of these issues
15 about detention or release because the Secretary
16 was making a judgment about whether to continue
17 with MPP, and that was his policy judgment
18 weighing all of the costs and benefits of the
19 program.

20 JUSTICE KAVANAUGH: Now, in the
21 section about the relationship between MPP and
22 statutory mandates, it was all about significant
23 public benefit under the parole authority.

24 GENERAL PRELOGAR: That's right, that
25 he discussed that at length because that is an

1 important source of DHS's authority here. I
2 believe he also referred to the authority that's
3 conferred by Section 1226(a).

4 JUSTICE BREYER: I need to know this
5 for this reason, that I -- I -- I think --
6 suppose we do exactly what you suggested we
7 might do, "may" means may. Okay? End of the
8 matter.

9 Then the thing goes back. At that
10 point, I'm guessing, but somebody might say,
11 okay, "may" means may. You don't have to send
12 them back to Mexico, but you do have to detain
13 them. No, we don't, because of the two statutes
14 you mentioned. Yes, you do, because they don't
15 apply. There will be an argument.

16 I don't know if, one, we should
17 foresee that argument and take a view or, two,
18 we should foresee that argument and not take a
19 view or, three, we should just forget about that
20 and just say whether "may" means may.

21 GENERAL PRELOGAR: I think that is the
22 simplest --

23 JUSTICE BREYER: What's your view?

24 GENERAL PRELOGAR: That -- that is the
25 simplest way to resolve this case. We certainly

1 agree that "may" means "may." And that's really
2 the only issue that's directly teed up for this
3 Court's review in light of the injunction.

4 We are actively litigating those other
5 issues in other cases brought by states with
6 respect to our interpretation of 1225(b)(2)(A),
7 with respect to our application of the release
8 authorities, and I think that that is a better
9 context where it's not essentially relying on
10 those release and detention authorities as a
11 collateral way to force the reimposition of MPP.

12 JUSTICE KAGAN: But -- I -- I --

13 CHIEF JUSTICE ROBERTS: Your --

14 JUSTICE KAGAN: -- General, I could --
15 I could --

16 CHIEF JUSTICE ROBERTS: Go ahead.

17 JUSTICE KAGAN: I could understand
18 General Stone saying back to you, well, you
19 know, "may" means "may," but you have to read
20 that "may" within the entire statutory structure
21 and within the set of authorizations that you
22 have.

23 And, essentially, the "may" would
24 become a "shall" if you couldn't meet the
25 obligations -- if you -- if -- if -- if -- if

1 you were using completely residual discretionary
2 authority, right, so that if you couldn't parole
3 people under 1182, give them bond under whatever
4 that provision is, et cetera, et cetera, and you
5 were just throwing up your hands in the air and
6 saying, well, we have to do something, so now
7 we're operating outside the statute entirely, I
8 could see him saying, well, in that case, the
9 "may" becomes a "shall." It's kind of a
10 springing mandate if you can't satisfy your
11 obligations in another way.

12 So I -- I have to think -- am -- am I
13 wrong about this -- that your argument depends
14 on the fact that you say you are satisfying your
15 obligations in other ways. If you weren't,
16 wouldn't you have a harder argument?

17 GENERAL PRELOGAR: No, I don't think
18 so. I think that's actually an easy argument in
19 this case. We certainly do think that we're
20 satisfying those other provisions, so the
21 predicate of Texas's suit fails here.

22 But even if this Court disagreed or
23 thought there was room for doubt, there is no
24 way to interpret Section 1225(b)(2)(C) to be
25 that kind of springing mandate.

1 First, there's a textual problem.
2 Congress said "may return." On their view, it's
3 been mandatory from the get-go and at all times
4 thereafter, and it would be inexplicable for
5 Congress to use that discretionary language if
6 it wanted to have detention capacity be the
7 trigger.

8 Second, I would point to the
9 significant foreign policy consequences that are
10 implicated by that interpretation. We cannot
11 unilaterally implement foreign -- contiguous
12 territory return. Instead, each exercise of
13 this authority requires ongoing negotiation and
14 cooperation and coordination with Mexico. And
15 there again, it's implausible that Congress
16 would have demanded that we do that, that the
17 executive branch engage in those negotiations,
18 without saying so expressly and just using "may
19 return."

20 Third, I'd point to the history. No
21 one at any point in time during the legislative
22 drafting acknowledged that the -- the provision
23 would have this kind of effect that they're
24 attributing to it. Instead, the history is
25 clear that this was just responding to that BIA

1 decision and overturning the conclusion that the
2 executive's prior discretionary use of the
3 authority required authorization with no
4 indication that Congress was changing it into a
5 mandate.

6 And then, fourth and -- and finally, I
7 would point to the consistent executive
8 interpretation of this provision. No one's
9 interpreted the INA this way before. Every
10 presidential administration has understood this
11 to just be a purely discretionary authority.
12 That goes for the prior administration. On
13 their view, MPP itself would be unlawful because
14 it doesn't maximize the use of contiguous
15 territory return.

16 JUSTICE ALITO: Part of --

17 CHIEF JUSTICE ROBERTS: General, your
18 interpretation of the statute, I think, is
19 entirely manipulable. You use -- the -- the --
20 the statute has what seems to be a serious
21 limitation on parole, significant public
22 benefit.

23 And yet you say that goes down due to
24 the fact that you have limited detention. So --
25 and -- and you have limited detention. It's not

1 like you're going to hit a number there which is
2 going to take care of everything. More than
3 30,000 are going to come in at a time, and you
4 say, well, it's not -- it's actually less than
5 that because we have to save a number of beds --
6 beds for this.

7 So you can have a phrase in the
8 statute mean what you want it to mean to
9 accommodate as many people at the border by
10 releasing them as -- as you want, right? There
11 is no limit, as you read the statute, to the
12 number of people that you can release into the
13 United States, right?

14 GENERAL PRELOGAR: Congress did not
15 create a limit in that statute, but, of course,
16 it's Congress itself that's making these
17 appropriations decisions about how much bed
18 space to give us.

19 CHIEF JUSTICE ROBERTS: Well, right.
20 But -- but -- but, if Congress wants there to be
21 the release of a significant or whatever number,
22 all they have to do is not fund the detention
23 facilities to keep the number low, and then you
24 would have whatever authority you want to -- to
25 extend the number of people released into the

1 United States to as great an extent as you want.

2 And you say, well, we're not going to
3 -- don't worry about MPP. And, you know, maybe
4 that's your decision, but you're sort of making
5 it even harder for you to do anything other than
6 release the people encountered at the border
7 into the United States --

8 GENERAL PRELOGAR: Well, this is a
9 statutory --

10 CHIEF JUSTICE ROBERTS: -- even
11 though -- I don't mean to repeat myself, but
12 it's a significant question -- even though the
13 statute that allows you to release people into
14 the United States says there has to be a
15 significant public benefit.

16 And you say there's a significant
17 public benefit when there aren't enough
18 people -- there aren't enough beds in detention.
19 So there's no limit on -- at all on how many you
20 can release into the United States.

21 GENERAL PRELOGAR: Well, I think the
22 inherent limit, of course, is the detention
23 capacity. Congress didn't define that term,
24 "significant public interest."

25 CHIEF JUSTICE ROBERTS: Well, yeah.

1 No, I'm putting that to one side because
2 everybody knows that's not nearly enough beds to
3 take care of the problem.

4 GENERAL PRELOGAR: That's right. And
5 -- and this has been the agency's --

6 CHIEF JUSTICE ROBERTS: And if you
7 don't think it's a problem, you don't want to
8 have -- you shouldn't add more beds anyway.

9 GENERAL PRELOGAR: Well, this is the
10 agency's consistent interpretation of the parole
11 provision. Congress has never disapproved it.
12 It has known that DHS is exercising its parole
13 authority that way.

14 But, Mr. Chief Justice, to the extent
15 that the impetus for this question is this sense
16 that contiguous territory return could take care
17 of that issue, I -- I want to forcefully push
18 back on that idea because contiguous territory
19 return cannot be the solution here. Over the
20 life of the program in the prior administration,
21 only 6.5 percent of individuals we encountered
22 at the border were enrolled in MPP.

23 It has inherent constraints. The
24 statute limits who can be enrolled in MPP. You
25 have to be arriving by land from contiguous

1 territory. We're constrained by what Mexico is
2 willing to consent to with respect to who it
3 will allow to be enrolled into the program, and
4 it's placed important limitations on our
5 exercise of that.

6 There were entire categories of people
7 who were excluded from MPP, like all Mexican
8 nationals. Our international commitments, our
9 non-refoulement obligations, likewise provide a
10 constraint here.

11 So, to the extent that you are
12 concerned about how parole operates, that
13 concern doesn't go away based on implementing
14 MPP. And, in fact, in the prior administration,
15 when MPP was in full force, still DHS was
16 implementing its parole decisions this way, as
17 it's always done consistently for the past 25
18 years.

19 JUSTICE SOTOMAYOR: Counsel --

20 JUSTICE BARRETT: General --

21 JUSTICE SOTOMAYOR: I'm sorry,
22 General.

23 JUSTICE BARRETT: Well, I don't want
24 to -- I know we were into seriatim time, so I
25 don't want to --

1 CHIEF JUSTICE ROBERTS: No, not just
2 yet. Justice Sotomayor?

3 JUSTICE SOTOMAYOR: General, going
4 back to Justice Breyer's question, assuming just
5 for the sake of argument that there's no
6 injunctive power in the court below the way
7 you're arguing, how would we ever reach the
8 question that Justice Breyer raised, which is
9 the district court being wrong on its assumption
10 that this "may" is a "shall"? How do we reach
11 that question if the injunction was erroneously
12 issued?

13 GENERAL PRELOGAR: We think that
14 question would be appropriately reached in the
15 case of an individual non-citizen. And there
16 is, of course, jurisdiction preserved to reserve
17 those kinds of claims in those types of cases.
18 This was Congress channeling the review to those
19 cases in order to --

20 JUSTICE SOTOMAYOR: So you would say
21 under an -- we should just say an injunction of
22 any kind is improper?

23 GENERAL PRELOGAR: Yes. We think that
24 that is the correct interpretation of
25 1252(f)(1).

1 JUSTICE SOTOMAYOR: Would we need to
2 reach the declaratory judgment issue in your
3 mind, or should we just simply address whether
4 what's before us, which is the injunction, that
5 it's improper?

6 GENERAL PRELOGAR: I think, here, the
7 Court could just reach the injunction and
8 declare that that's improper.

9 JUSTICE BARRETT: General Prelogar,
10 can I ask you a question about significant
11 public benefit? You've identified the number of
12 beds and the need to prioritize as the public
13 benefit that DHS is taking into account and --
14 when deciding whether to parole.

15 Can you -- is it your position that
16 you cannot consider the significant public
17 benefit in not releasing into Mexico? In other
18 words, that you're only looking at the
19 significant public benefit of releasing into the
20 United States but not in choosing that option
21 versus the other?

22 GENERAL PRELOGAR: So I think, with
23 respect to kind of how this is working on the
24 ground, the -- the individual immigration
25 officers -- and there are thousands of them who

1 would be responsible for making these decisions
2 -- are -- are focused on the actual detention
3 capacity at that moment.

4 With respect to the broader question,
5 though, about using contiguous territory return
6 versus releasing into the interior, I think
7 that's ultimately a policy judgment for the
8 Secretary. It's not as though return to Mexico
9 is costless. It involves an enormous investment
10 of our diplomatic resources and our engagement
11 with that bilateral negotiation.

12 And so I think that the Secretary is
13 well justified in thinking that in light of the
14 tremendous costs that he identified with the
15 program and in light of his determination that
16 it actually detracted from other strategies and
17 -- and programs he thought would be more
18 effective in stemming the tide of irregular
19 migration, that he was well justified in making
20 that policy determination.

21 JUSTICE BARRETT: Let me go back --

22 CHIEF JUSTICE ROBERTS: Thank you --

23 JUSTICE BARRETT: -- to the individual
24 -- oh, sorry.

25 CHIEF JUSTICE ROBERTS: Go ahead,

1 finish up.

2 JUSTICE BARRETT: For the individual
3 determinations. So you would say that it is not
4 DHS's practice or responsibility with respect to
5 any individual non-citizen to decide the
6 significant public benefit of paroling into the
7 United States versus sending that particular
8 non-citizen back to Mexico?

9 GENERAL PRELOGAR: Well, while MPP was
10 operational -- I should -- I should take the
11 opportunity to clarify -- my understanding is
12 that the officers were making those kinds of
13 discretionary decisions, and, in fact, the vast
14 majority of -- of -- of non-citizens who were
15 eligible for MPP, or at least a substantial
16 number, were actually diverted out of the
17 program.

18 And that's why the -- the numbers are
19 only about 6.5 percent of those we encountered
20 at the border were enrolled in the program. So
21 there was discretion to not put an individual in
22 MPP while the program was in effect.

23 JUSTICE SOTOMAYOR: Counsel --

24 CHIEF JUSTICE ROBERTS: Thank you.
25 Thank you, General. We'll get back to you.

1 Justice Thomas, anything further?

2 Justice Breyer?

3 Justice Alito?

4 JUSTICE ALITO: The parole decisions
5 are supposed to be made on a case-by-case basis,
6 right?

7 GENERAL PRELOGAR: That's correct.

8 JUSTICE ALITO: And you -- the
9 statistics that you cite and the statistics that
10 the Respondents provided in their brief about
11 the number of individuals who are being paroled
12 every month are -- are very high.

13 So what does it mean for there to be a
14 case-by-case determination? Let's think of --
15 think of the example of people who want to go to
16 a baseball game at Nationals Park.

17 So they all line up, they try to get
18 through the turnstile, and somebody says -- goes
19 through a little checklist. Do they have a
20 ticket? Yes. Do they have a gun? No gun. Do
21 they have alcohol? No alcohol. Something to
22 throw on the field? Nothing to throw on the
23 field. Fireworks? Nothing. No fireworks,
24 fine.

25 Is that a case-by-case determination

1 in your -- in your view?

2 GENERAL PRELOGAR: I think that that
3 would satisfy the --

4 JUSTICE ALITO: And that's what you're
5 doing.

6 GENERAL PRELOGAR: -- legal
7 requirement.

8 JUSTICE ALITO: That's basically what
9 you're doing. You've got a little checklist and
10 you're going -- and, you know, boom, boom, boom,
11 and that's how you can process. Maybe you're
12 right, but that's -- that's what you think
13 Congress meant by a case-by-case determination?

14 GENERAL PRELOGAR: Yes, we think that
15 Congress required us to give individualized
16 attention to each non-citizen and make an
17 assessment about the categories like flight risk
18 and security concern, and DHS is doing that on
19 the ground.

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor?

22 JUSTICE SOTOMAYOR: Counsel, before
23 the MPP program at issue, I thought that there
24 were a lot fewer people, but there were people
25 who were sent back under MPP, correct?

1 GENERAL PRELOGAR: I wouldn't call
2 that MPP. That's kind of the broad programmatic
3 use of contiguous territory return. I think
4 what you're referring to was the executive's
5 prior practice on an ad hoc basis of sometimes
6 returning individuals, usually monthly.

7 JUSTICE SOTOMAYOR: Then I understood
8 this wrong? I thought that each asylum officer,
9 there were two -- I understood from my reading
10 there were two criterias for MPP. There was a
11 set of criteria that's different than the parole
12 criteria and that asylum officers determined
13 whether to exercise -- if the person fit below
14 the MPP criteria, they would be sent back.

15 GENERAL PRELOGAR: Yes, I apologize.
16 I thought you were referring to the prior
17 executive practice before MPP itself was
18 implemented. But, yes, under MPP, there was
19 that discretion to choose whether to enroll
20 individuals who were eligible in the program.
21 And, of course, there were entire categories of
22 individuals who were excluded from eligibility.

23 JUSTICE SOTOMAYOR: Under the prior
24 administration?

25 GENERAL PRELOGAR: That's correct, and

1 under this administration as well.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 JUSTICE KAGAN: I have two rather
4 different questions.

5 First, to go back to Justice Alito's
6 question when he said aren't you really just
7 using a checklist. And then, at the end of your
8 answer, you said, well, you know, what we're
9 doing with respect to each individual is trying
10 to assess flight risk and danger.

11 So that is not just a, like, are you a
12 flight risk check, right? That involves
13 something or other. So what do you do with this
14 many people? I mean, you have a lot of officers
15 too, but what do you do to determine flight risk
16 and danger?

17 GENERAL PRELOGAR: So this relates to
18 the colloquy I was having with Justice Sotomayor
19 where we conduct criminal records checks. We
20 take biometric records checks. We assess ties
21 to the community and -- and assess other factors
22 that might bear on the flight risk question.

23 And I do want to push back on the idea
24 that this is anything like just formality, going
25 through a checklist. DHS takes seriously its

1 obligation to responsibly allocate the limited
2 law enforcement resource here of detention beds.
3 And it's not as though it's not giving attention
4 to each individual non-citizen to make these
5 determinations.

6 JUSTICE KAGAN: Okay. My -- my second
7 question takes you to someplace that we -- we
8 have not been, which is the second question
9 presented, and I just wanted to ask, there's --
10 there's a lot of skepticism on the Fifth
11 Circuit's part that there was a second
12 assessment of this question.

13 In other words, the Fifth Circuit
14 said, oh, you're just sort of adding stuff to
15 the first one. So -- and you say, no, this was
16 an independent assessment.

17 I mean, how are we to make that
18 decision? What is -- what -- what do you look
19 for in determining whether an assessment is new?

20 I mean, the DACA case basically points
21 to two paths that the agency can take, and one
22 is just to kind of use the initial assessment as
23 a base and -- and -- and -- and add some stuff
24 maybe, and the other is no, you can start anew,
25 start afresh.

1 How do we decide whether you've
2 started afresh?

3 GENERAL PRELOGAR: Well, I think you
4 look in the first instance to the agency action
5 itself. And -- and, here, the October 29
6 termination decision was by its own terms a new
7 agency action. The Secretary said, I hereby
8 terminate MPP. And I think that that's
9 fundamentally different than the situation the
10 Court confronted in the DACA case, where the
11 agency action by its own terms just supplied
12 additional reasoning and said this is not a new
13 decision, this is additional context for a
14 decision that was made long ago.

15 But, here, Secretary Majorkas did the
16 opposite. He took Option 2 in Regents. He
17 accepted the remand. He engaged in a thorough
18 process of reconsideration. He -- he showed his
19 work. He described in considerable detail
20 exactly what he did, the meetings he held with
21 stakeholders, those in border communities, state
22 and local law enforcement officials, advocates
23 and proponents for and against MPP. He
24 described the material he had consulted, the
25 congressional records, the litigation records,

1 all of the agency internal memoranda.

2 And then, over dozens of pages, he
3 explained the considerations he had taken into
4 account and the conclusions he reached. And I
5 think, on that record, this doesn't present a
6 difficult question because there's no doubt that
7 that qualifies as a new agency action.

8 And the Fifth Circuit's contrary
9 conclusion rested on this inapposite reopening
10 doctrine from the D.C. Circuit about statute of
11 limitations issues that Respondents aren't even
12 seeking to defend or mention in this Court. So
13 I think whatever hard questions could
14 theoretically arise, this isn't one of them.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

17 Justice Kavanaugh?

18 JUSTICE KAVANAUGH: I have several
19 questions. If you had sufficient detention
20 capacity, could you still exercise your
21 discretion to parole people into the United
22 States?

23 GENERAL PRELOGAR: I think, at that
24 point, we couldn't count as a significant public
25 interest any resource constraints because, under

1 the hypothetical, there wouldn't be those
2 resource constraints.

3 That wouldn't, of course, supplant
4 the -- the authority that DHS has to take into
5 account other humanitarian reasons or other
6 significant public interests, but I -- I
7 certainly agree that at that juncture, we
8 wouldn't be relying on these allocation of
9 resource constraints for purposes of -- of
10 complying with that requirement.

11 JUSTICE KAVANAUGH: And why is that?

12 GENERAL PRELOGAR: Because, at that
13 point, there wouldn't be a significant public
14 interest in trying to preserve the limited
15 resource.

16 JUSTICE KAVANAUGH: Why would you have
17 to detain them, though?

18 GENERAL PRELOGAR: Well, as I said
19 before, we understand Section 1225(b)(2)(A) to
20 set forth Congress's expectation that we should
21 use the detention capacity that we've been
22 afforded.

23 So we're not saying that's a "may" or
24 that Congress was neutral on the issue. We're
25 simply pointing to the fact that, in this

1 circumstance, where Congress hasn't given us the
2 bed space and no one disputes that, it's not
3 only permissible but responsible for DHS to take
4 that into account in its detention and release
5 decisions.

6 JUSTICE KAVANAUGH: Okay. So you
7 agree that Congress has expressed a preference
8 for detention where -- where that's available?

9 GENERAL PRELOGAR: Yes, we do. We
10 don't think that that is a -- a "may" or simply
11 neutrality on the issue.

12 JUSTICE KAVANAUGH: Okay. Switching
13 gears, I don't know if this is before us, so my
14 first question is, is the State Farm issue with
15 respect to the October memo before us or not?
16 Because, if so, I have a lot of State
17 Farm-related questions to ask you. I'll
18 probably ask you them anyway. But is this
19 before us or not?

20 GENERAL PRELOGAR: So we didn't ask
21 this Court to review the substance of the
22 October 29 memorandum, in -- in recognition that
23 the lower courts haven't considered that issue.
24 Respondents did brief that issue at the -- the
25 end of their brief, and we responded to that in

1 our reply brief.

2 We think, if the Court reaches that
3 issue, it should clearly reject their arguments,
4 their exceedingly weak arguments, that this
5 wasn't reasoned decision-making, but I, of
6 course, acknowledge that the lower courts
7 haven't had an opportunity to consider that
8 issue.

9 And I would say that I think the
10 problem that we're -- we're trying to address
11 here and the thing we're asking the Court to do
12 is reverse the Fifth Circuit's flawed conclusion
13 that this just isn't an agency action at all.

14 JUSTICE KAVANAUGH: Okay. On the --
15 if -- if State Farm is before us -- if it's not
16 before us here, when will it be before us?

17 GENERAL PRELOGAR: So we fully expect
18 that Texas will amend its complaint back in
19 district court and we'll be litigating that
20 issue then.

21 JUSTICE KAVANAUGH: Okay. Well, I'll
22 ask a couple just in --

23 GENERAL PRELOGAR: Although, if you
24 are interested in reaching it, then I'm happy to
25 defend it.

1 JUSTICE KAVANAUGH: Well, I'll just
2 ask a couple questions in case we reach it.
3 There were two parts of the explanation in the
4 October memo that jumped out to me as
5 potentially State Farm-type issues.

6 One is that you said -- the -- the
7 memo says that the choice to bring people into
8 the country is because, otherwise, other more
9 dangerous people would come into the country.
10 In other words, you have a choice between the
11 less dangerous or more dangerous coming into the
12 country. That's on page 28 of the memo.

13 And that strikes me as a false choice
14 because the other option, of course, is to send
15 people to Mexico. So that's one issue.

16 The other issue is I don't see -- and
17 this follows up on Justice Barrett's questions
18 -- any real explanation in the October memo of
19 what "public" means in "significant public
20 benefit." Is that the American public? Is that
21 the non-citizen public? Who is that?

22 And if it's the American public,
23 there's no real explanation of how the public is
24 benefitted by more people coming into the United
25 States who are not lawfully admitted into the

1 United States rather than trying, if feasible,
2 for some of those people to remain in Mexico.

3 I'm not saying what the best exercise
4 of policy discretion is there. I'm saying I
5 think the October memo doesn't quite get into
6 what is public benefit, what does it mean, how
7 are we supposed to assess that.

8 GENERAL PRELOGAR: So, if I can, I
9 think, actually, the October 29 memo largely
10 addressed both of those issues by reference to
11 the concerns about detention capacity and the
12 recognition that DHS has not been appropriated
13 to detain each and every non-citizen we
14 encounter by -- by orders of magnitude.

15 And so what Secretary Majorkas was
16 acknowledging there is that in applying those
17 release authorities -- and of -- it's not just
18 parole, of course, but it's also bond under
19 1226(a) -- it's appropriate to take account of
20 that limited resource.

21 With respect to how that intersects
22 with the use of contiguous territory return,
23 Secretary Majorkas gave that sustained attention
24 in the memorandum. He explained that there were
25 enormous costs associated with maintaining that

1 program, and with respect to our diplomatic
2 negotiations with Mexico, that we had to divert
3 resources away from other types of bilateral
4 negotiations and cooperation we wished to
5 pursue, that it also drained resources with
6 respect to how DHS can pursue some other
7 policies, and -- and that for all of those
8 reasons, on balance, he found, after giving the
9 issue sustained attention, that MPP just wasn't
10 worth the tremendous costs that it imposed.

11 And if I could make one final point to
12 this line of questioning, I think, again, I -- I
13 want to make clear that it's not as though, to
14 the extent you have concerns about significant
15 public benefit, that MPP cures those concerns.
16 There are inherent limits on the number of
17 people we can enroll. Mexico now, under the
18 court-ordered injunction and reimplementation of
19 MPP, is requiring that we process those removal
20 cases within 180 days, and -- and that's a big
21 change from how MPP operated before because it
22 didn't function as intended. There were huge
23 backlogs. People remained in Mexico far longer
24 than anyone had anticipated. There were
25 horrible problems of predatory violence. And to

1 honor that commitment to Mexico, we are very
2 much constrained in the number of people we can
3 enroll in the program.

4 JUSTICE KAVANAUGH: Okay. I think
5 this is Justice Barrett's earlier question. I
6 want to try to get a precise answer on this. In
7 considering significant public benefit, is it
8 appropriate for the Secretary to consider the
9 possibility of some people remaining in Mexico
10 against the possibility of all the people for
11 whom there is not detention capacity coming into
12 the United States?

13 GENERAL PRELOGAR: Yes, I think that
14 the Secretary could take that consideration into
15 account. Here, I think that he analyzed at
16 length the tremendous cost imposed by MPP and
17 keeping this program up and running. He
18 identified other strategies that he wished to
19 pursue that he thought would be --

20 JUSTICE KAVANAUGH: Do you think --

21 GENERAL PRELOGAR: -- more effective
22 than MPP.

23 JUSTICE KAVANAUGH: -- do you think
24 the memo sufficiently grapples with what the 19
25 states' amicus brief asserts with respect to the

1 costs to the states and to the people in the
2 United States in terms of increased
3 expenditures? Again, not saying which way that
4 should come out. Do you think that's
5 sufficiently addressed in the October memo?

6 GENERAL PRELOGAR: I do think it is.
7 The Secretary took seriously the concern that
8 the district court had raised that in the June 1
9 termination decision he hadn't appropriately
10 accounted for the asserted reliance interests of
11 states.

12 There was an entire section of the
13 October 29 memorandum where the Secretary worked
14 through all of the concerns the states had
15 raised, and I think that that certainly
16 satisfies the APA's requirement of reasoned
17 decision-making.

18 JUSTICE KAVANAUGH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?

21 JUSTICE BARRETT: Thank you, Justice
22 Kavanaugh. You did a better job asking my
23 questions than I did before.

24 General Prelogar, I just want to
25 follow up one last thing. The -- the question

1 that I have is one of statutory interpretation
2 and what "significant public benefit" means.
3 And as you say, Congress has expressed a
4 preference for detention, and capacity is -- is
5 a limit on that and -- and it seems like the
6 primary driver of your assessment of significant
7 public benefit.

8 I guess my question is, on the
9 case-by-case basis, when DHS assesses whether
10 any individual non-citizen -- whether there
11 would be a significant public benefit to release
12 and parole rather than send back to Mexico or
13 other contiguous territory, what is the benefit?
14 Is that a limit -- you know, the Chief Justice
15 said that if you're only considering capacity,
16 that's a pretty capacious term and there might
17 not be any limit.

18 So do you have to -- do you have to
19 take into account as a matter of statutory
20 interpretation the public benefit, the
21 significant public benefit of choosing that
22 option, the parole into the United States
23 option, rather than sending back to Mexico or
24 whatever contiguous territory?

25 GENERAL PRELOGAR: Well -- well, I

1 think that Congress, in enacting these various
2 provisions, in no way signaled that it was
3 necessary to think about contiguous territory
4 return with respect to each of these parole
5 decisions.

6 Again, I think that Congress would not
7 have used the unexplained and -- and purely
8 discretionary "may return" language if it meant
9 to try to transform how the government was
10 thinking about its parole determinations.

11 And so, you know, here, I think that,
12 on the ground, DHS immigration officers are
13 looking at each individual non-citizen to make
14 those judgments, and in -- in making those
15 judgments, it's not even clear that there would
16 be an alternative to return to Mexico for all of
17 the reasons I listed before, because of the
18 exclusions under the program, the
19 non-refoulement obligations, the fact that
20 Mexico would never agree or consent to accept
21 everyone that we are currently paroling.

22 So, for all of those reasons, I just
23 don't think the statutory structure can work
24 that way.

25 JUSTICE BARRETT: And does that go

1 back to your point that we shouldn't look at
2 this when you -- you were responding to Justice
3 Breyer earlier saying that you would resist the
4 characterization of this as a unit because each
5 of these provisions was passed at a different
6 time. Is that driving part of your answer here,
7 that significant public benefit shouldn't -- we
8 shouldn't interpret that as any kind of
9 instruction to the agency to take into account
10 its various options because each of these
11 provisions, you're arguing, should be more
12 stand-alone?

13 GENERAL PRELOGAR: I think that is
14 absolutely part of it, that it's wrong to think
15 about 1225 as being that kind of self-contained
16 unit. And -- and I would point as well to the
17 fact that we know from the statutory history
18 exactly what Congress was aiming at with the
19 contiguous territory return provision. It
20 wasn't weighing in on how to make those kinds of
21 judgments about significant public benefit.

22 Instead, it was simply trying to
23 reverse that BIA decision that had disapproved
24 the prior kind of ad hoc executive practice of
25 occasionally returning some non-citizens to

1 contiguous territory.

2 JUSTICE BARRETT: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer?

5 JUSTICE BREYER: Just -- I mean, it
6 may well be wiser just to focus on "may," okay,
7 but just -- it might happen that we go beyond
8 that and consider this later memo, the October
9 memo, et cetera. And what's making me worried
10 about that -- I'm not sure if you want to say --
11 and you don't have to -- but what is the
12 Administration's view of the detention versus
13 the parole? That is, has the Administration
14 asked Congress for more money for detention?
15 What -- and how is that relevant? That's
16 floating around in my mind. So don't answer it
17 if you don't want to. If you have something you
18 want to say on it, do.

19 GENERAL PRELOGAR: Well, Congress is,
20 of course, responsible for making those
21 appropriations decisions. And the -- the
22 government has submitted budget requests to
23 Congress, trying to balance a variety of
24 different considerations here. Among other
25 things, we asked for more resources for

1 immigration judges, who could speed the
2 processing of cases. That would allow us to
3 detain more individuals with fewer beds because
4 we'd be able to remove them more quickly by
5 resolving their cases more quickly.

6 We've also asked for funding for
7 alternatives to detention, which would help us
8 supervise a greater number of people and ensure
9 that they're not absconding, that they appear
10 for their hearings. We've asked for more
11 resources for enforcement at the southwest
12 border, to hire additional officers.

13 And so all of these ways, I think that
14 we are seriously engaging with the -- whatever
15 challenges exist at the border.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 General.

18 General Stone.

19 ORAL ARGUMENT OF JUDD E. STONE, II

20 ON BEHALF OF THE RESPONDENTS

21 MR. STONE: Thank you, Mr. Chief
22 Justice, and may it please the Court:

23 This case presents a procedural
24 question about the October memoranda's effect on
25 Petitioners' appeal and a substantive question

1 about Petitioners' obligations under
2 Section 1225(b)(2).

3 The answer to the procedural question
4 is straightforward. The Fifth Circuit announced
5 only two holdings regarding the October
6 memoranda's effect on that appeal. The first is
7 that the termination of MPP via the October
8 memoranda did not deprive the June termination
9 of its status as final agency action for
10 purposes of that court's jurisdiction. The
11 second is that the Fifth Circuit concluded that
12 those memoranda did not moot this case.

13 Petitioners did not challenge the
14 first in their opening brief, and thus Texas did
15 not address the reopening doctrine, and
16 Petitioners have affirmatively disclaimed any
17 challenge to the Fifth Circuit's mootness
18 holding in their reply brief. Because
19 Petitioners challenged neither holding, neither
20 -- the October memoranda provide no basis to
21 disturb the judgment.

22 Petitioners instead asked this Court
23 to evaluate the merits of potential APA
24 challenges to the October memos in the first
25 instance and without an administrative record

1 and then to decide that those memos satisfy the
2 district court's injunction. This is not the
3 proper forum for Petitioners to initially seek
4 such relief.

5 This Court should also affirm the
6 Fifth Circuit on the substantive question of
7 Petitioners' detention obligations under 1225.
8 Jennings held that executive officials must
9 detain aliens who fall within 1225(b)(2)'s
10 scope. And that holding all but forecloses the
11 executive -- Petitioners' arguments under Castle
12 Rock and past practice that say subsection
13 (b)(2)(A) is discretionary.

14 There are just two other ways to
15 satisfy this detention mandate. This Court in
16 Jennings mentioned one, parole under
17 Section 1182(d)(5). The other is to return,
18 rather than to detain, certain aliens under
19 1182(b)(2)(C).

20 The Fifth Circuit concluded that the
21 executive was not permitted to rescind MPP and
22 thus to increase its total number of violations
23 of Section 1225(b)(2)(A)'s mandate in lieu of
24 exercising that authority. If this Court
25 agrees, it need go no further.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: General Stone, the --
3 I know there's not much briefing, but I would
4 like your reaction to the 1252(f)(1) problem
5 that we've discussed.

6 MR. STONE: Certainly, Your Honor. In
7 candor, I can only give general observations
8 because the United States confined that to a
9 footnote and we viewed it as -- as certainly
10 inapplicable.

11 That 1252(f)(1) specifically prohibits
12 the district court from enjoining the operation
13 or application of the -- of Title 4 of the
14 Immigration -- Immigration and Nationality Act,
15 our APA challenge is against their rescission of
16 a program that would, in fact, exercise their
17 powers underneath (b)(2)(C).

18 So we see -- in our view, (f)(1) has
19 just simply nothing -- no role to play here.

20 JUSTICE THOMAS: Well, I don't know
21 whether we can dispose of it that easily, but
22 going to the merits, the -- or -- do you think
23 with your reading of the -- of 1225, do you
24 think that the MPP as implemented complied with
25 the -- with 1225?

1 MR. STONE: MPP as implemented reduced
2 the number of violations. It did not fully
3 satisfy the executive mandate, but so far as it
4 went, it complied with the executive's
5 obligations to return rather than detain the
6 aliens enrolled in MPP.

7 JUSTICE THOMAS: So you could have
8 brought -- you could have brought the same
9 lawsuit against the last administration under
10 your reading of 1225?

11 MR. STONE: We could have brought a
12 related lawsuit, Your Honor. We would still be
13 required to hew to the Administrative Procedure
14 Act's limitations, and, at that point, we would
15 be saying that the Administration was required
16 to take a certain specific action, which is to
17 say craft a policy in which they would have
18 otherwise some discretion about how to use
19 (b)(2)(A), (b)(2)(C), and 1182. I think that --

20 JUSTICE THOMAS: So has any
21 administration ever applied -- complied with
22 1225 under your reading?

23 MR. STONE: I assume not, Your Honor.
24 Petitioners suggest that no administration, no
25 executive has fully complied with their

1 detention obligations. That certainly doesn't
2 prove that past administrations assumed that
3 those obligations could be essentially -- could
4 be shirked in the event that they preferred not
5 to use one of Congress's allowed statutory
6 tools, but I have no reason to think that that's
7 incorrect.

8 JUSTICE THOMAS: But wouldn't --
9 assuming you're right, wouldn't it be odd for
10 Congress to leave in place a statute that would
11 appear to be impossible to comply with?

12 MR. STONE: No, Your Honor. Congress,
13 as -- as my friends on the other side mentioned,
14 had this mandatory detention obligation for over
15 a century. It has added authorities to enable
16 the executive to attempt to meet it
17 additionally.

18 Now, to some extent, I think some of
19 the problem of the question that you're getting
20 at is what happens when Congress doesn't provide
21 enough money to be able to actually require that
22 to be satisfied.

23 Then the executive has to do the best
24 it can with the obligated -- with the -- with
25 the amount of money that's been appropriated to

1 it and the other lawful -- the other lawful
2 authorities it's been provided.

3 JUSTICE THOMAS: So you're -- we're
4 just talking then in -- about how much an -- an
5 administration would be out of compliance
6 because they would all be out of compliance
7 under your reading.

8 MR. STONE: Yes, Your Honor. Each
9 individual -- each individual who is subject to
10 mandatory detention, as this Court described it
11 in Jennings, under 1225(b)(2)(A), who is not
12 either detained, returned pursuant to (b)(2)(C),
13 or otherwise paroled on a case-by-case basis is
14 a separate divisible violation of the
15 Immigration and Nationality Act.

16 To what extent, again, that there
17 might be relief in any of those circumstances,
18 especially if, you know, we're talking about
19 them individually, that's a different case.

20 JUSTICE SOTOMAYOR: Counsel, I have a
21 different view of history, and perhaps you'll
22 deal with mine, and that is that when Congress
23 knows that something's happening and it responds
24 or it fails to respond, that that tells us
25 something about its intent.

1 And the General said that the "shall"
2 language has been in existence since the turn of
3 the century and that in no time in American
4 history has any administration followed your
5 interpretation and attempted to detain every
6 single illegal immigrant.

7 On top of that, that they have been
8 paroling or bailing out people in the face of
9 that language since the turn of the century and
10 that the most that Congress has done is passed
11 1182 and 1226(a), the parole and the bail
12 provisions.

13 And at least in the bail application,
14 there's no limit. It just says the attorney
15 general can do this. In the 1182, it has set
16 parameters, but it didn't set the parameters of
17 the extensive legislative history you cited in
18 your brief that it intended to limit the number
19 to a narrow few. That was the House bill that
20 was rejected. And it set no limit in 1182.

21 So what do I do if I'm a person who
22 views that history and says, whatever Congress
23 didn't do, which is give enough resources or
24 pass legislation that said be inhumane and
25 detain every person without any resources, that

1 we should accept what the practices have been
2 through generations of presidents?

3 MR. STONE: I think, Your Honor, if I
4 understand your question correctly, you should
5 first start with two things.

6 The first is this Court's unequivocal
7 detention mandate in Jennings that described
8 Section 1225(b)(2)(A). That was only in 2018.
9 So, to the extent that past administrations
10 might have thought that there was some room for
11 discretion on their part, that -- that was a
12 mandatory provision as something this Court only
13 resolved --

14 JUSTICE SOTOMAYOR: Just deal -- just
15 deal with the history involving 1182 and
16 1226(a).

17 MR. STONE: Certainly.

18 JUSTICE SOTOMAYOR: That's been used
19 since both provisions were passed and exactly in
20 this way essentially.

21 MR. STONE: The history of 1182(d)(5),
22 the specific amendment that -- that Congress
23 passed to that, previously the section had said
24 something to the effect of that parole could be
25 provided by the attorney general if he

1 determined that there was -- it was in the
2 public interest.

3 The 1996 amendment specifically
4 inserted the case-by-case requirement and made
5 an obligation that there had to be either a
6 significant public benefit or urgent
7 humanitarian reason. And so that undoubtedly
8 narrowed the executive's discretion in at least
9 those two ways.

10 It also had a third component, which
11 required the duration of that parole be only so
12 long as that reason or that benefit maintains --
13 kept being the case.

14 So, to illustrate what kinds of
15 benefits those might be, Petitioners actually
16 have certain regulations. Let me call to your
17 attention 8 CFR 212.5, which discusses three
18 kinds of circumstances among others that might
19 satisfy as one or the other, one being an
20 individual for whom essentially they've got a
21 medical condition for whom detention is simply
22 incompatible or will worsen it significantly,
23 another being a pregnant woman, and a third
24 being an individual who is here to provide
25 testimony to a legislative adjudicatory or

1 administrative body.

2 So nothing in how this provision has
3 been interpreted before, at least through those
4 regulations, suggests that it would be a
5 significant public benefit simply to not detain
6 individuals. And that would be a very strange
7 result to consider given that Congress has made
8 an unequivocal mandate that it wants detention,
9 doesn't just prefer it the way Petitioners have
10 suggested, it has unequivocally mandated that
11 result.

12 CHIEF JUSTICE ROBERTS: Well, Congress
13 may want detention, but it hasn't come up with
14 the money to make -- to provide more beds,
15 right?

16 MR. STONE: Certainly, Your Honor.

17 CHIEF JUSTICE ROBERTS: I mean, it
18 gets back to General Prelogar's point, which is
19 it's not going to make a difference. You can
20 have MPP and send a limited number of people
21 back to Mexico, although I gather that requires
22 the consent of the Mexican government, and I
23 don't know if that's going to be forthcoming or
24 not.

25 And then there's a limited number of

1 beds. I mean, it may mean that it's difficult
2 for them to comply with the law, but what good
3 do you think will come from a requirement that
4 the -- the -- the government keep MPP in place?

5 MR. STONE: Put candidly, Your Honor,
6 fewer statutory violations of (b)(2)(A) is
7 better than more. The United States is required
8 to attempt to comply, even in the face of
9 limited resources, as best it can with the
10 resources it's been appropriated.

11 JUSTICE BREYER: All right. So you're
12 --

13 MR. STONE: Of course, the harms --

14 CHIEF JUSTICE ROBERTS: But -- but --

15 MR. STONE: I'm sorry to interrupt.

16 CHIEF JUSTICE ROBERTS: -- the only --
17 the only point I would make is that that remains
18 true, but given their termination of MPP, the
19 most that does as I can see it is make it more
20 difficult for them to comply with the law.

21 I think it's a bit much for Texas to
22 substitute itself for the -- the Secretary and
23 say that you may want to terminate this, but you
24 have to keep it because it will reduce to a
25 slight extent your violations of the law.

1 MR. STONE: Certainly not, Your Honor.
2 And Texas isn't seeking injunctive relief to
3 require the Administration to take any
4 particular view -- any particular view of the
5 immigration policy.

6 Texas is bringing a garden variety or
7 two garden variety APA claims, one of which are
8 sort of the traditional arbitrary and capricious
9 that I mentioned earlier during my opening. The
10 other is that, in fact, this is not consistent
11 with Section 1225 because this will predictably
12 -- and this is a finding of fact that was made
13 by the district court after it was hotly
14 contested on trial on the merits -- that the --
15 the rescission of MPP will cause the government
16 to systemically increase its 1225(a)
17 obligation -- or its violation of its
18 1225(b)(2)(A) obligations.

19 That's the reason in the APA sense
20 that rescission doesn't comply with law.
21 There's -- now, to speak to the --

22 JUSTICE KAGAN: But, General Stone,
23 it -- it doesn't really seem like a garden
24 variety APA thing to -- to basically tell the
25 executive how to implement its foreign and

1 immigration policy.

2 And that's what this does. It puts
3 the United States essentially at the mercy of
4 Mexico. Mexico knows that, you know, if we come
5 out your way, well, Mexico has all the leverage
6 in the world to say: Well, you want to do that?
7 You want to comply with the Court's order? Here
8 are 20 things that you need to do for us. Or
9 maybe Mexico says: No, we'd like to see you
10 squirm and not be able to comply with the
11 Court's order, and so we won't allow you to do
12 the program regardless.

13 And either way, I mean, it puts Mexico
14 in a position vis-à-vis the United States which
15 I don't think it's really Texas's position to
16 require.

17 MR. STONE: A couple of points, Your
18 Honor. The first is whether or not this
19 required in order to be implemented initially
20 Mexico's consent was a question of fact
21 litigated on the merits in the district court.

22 The district court made a finding of
23 fact, which I don't understand Petitioners to be
24 challenging for clear error, that the United
25 States was able to initially implement MPP --

1 JUSTICE KAGAN: Mexico can change --

2 MR. STONE: -- without Mexico's
3 consent.

4 JUSTICE KAGAN: -- its -- its -- its
5 mind any day.

6 MR. STONE: Well, certainly, Your
7 Honor, and to the extent that Petitioners were
8 to show, well, Mexico has changed its mind and
9 thus we no longer --

10 JUSTICE KAGAN: Or Mexico can change
11 the conditions that it imposes for consenting
12 any day. And the point is that requiring the
13 Secretary to do something like this essentially
14 says to Mexico: It's all yours. You have
15 control.

16 I mean, they do have control. You're
17 -- you're putting the Secretary's immigration
18 decisions in the hands of Mexico.

19 MR. STONE: I disagree, Your Honor.
20 Three quick points, the first of which being
21 this Court recognized in Massachusetts versus
22 EPA that though the President undoubtedly has
23 broad foreign policy discretion powers in
24 dealing with foreign governments, that doesn't
25 give the President a basis for ignoring a

1 congressional command.

2 The second is that the district
3 court's injunction here does not, in fact,
4 require negotiation with Mexico by its own
5 terms. In fact, had the President or had the --
6 had the United States gone to the district court
7 and sought to modify the injunction on the basis
8 that they can no longer implement MPP in good
9 faith because of Mexican noncompliance, that
10 strikes me as a very strong reason by which the
11 district court would be required in the rubric
12 of a Rule 50 -- 60(b)(5) motion to permit it to
13 not have to continue MPP or --

14 JUSTICE KAGAN: Yeah, you're putting a
15 district court in the position of assessing the
16 Secretary's determinations about what its
17 negotiations with Mexico have been like, about
18 whether Mexico is demanding too much, about
19 which conditions Mexico is -- I mean, how can a
20 district court do that?

21 MR. STONE: Certainly not, Your Honor.
22 Certainly not. The district court would not be
23 able to sort of supermand over the negotiations
24 with Mexico. It only has to continue
25 implementing MPP in good faith.

1 And if it turns out in good faith
2 because of Mexican non-consent or obstruction
3 the amount is none, then that's all the
4 injunction requires in the first place.

5 JUSTICE KAGAN: But -- but -- but
6 somehow the Secretary has to walk in and
7 convince a district court that Mexico's
8 conditions are too stringent and it can no
9 longer implement MPP or it can only implement it
10 with -- you know, to a certain extent or -- and
11 that that's a daily obligation on the part of
12 the Secretary, to walk into district court and
13 say, you know, what Mexico is asking, what the
14 U.S. Government is willing to give, et cetera,
15 et cetera.

16 MR. STONE: Certainly not a daily
17 obligation, Your Honor. I can only imagine the
18 Secretary having to do anything like that if we
19 sought to enforce the permanent injunction.

20 JUSTICE BREYER: But I think the
21 question -- the question is the same question
22 that I -- that -- that -- that I have. Think of
23 this Court. And this Court is basically being
24 asked, the only question I saw relevant here, is
25 what about the Mexico program? And you have a

1 procedural argument and you have a substantive
2 argument. Okay? Let's look at the presumptive
3 argument.

4 Remember -- isn't this true? One,
5 there are cases written by, if not me, at least
6 by people I knew in this Court which said, where
7 Congress and the President want something, the
8 political branches have greater than ordinary
9 responsibility for determining immigration
10 policy. And, here, Congress has not
11 appropriated the detention money.

12 Two, opinions written by people I
13 actually didn't know, like John Marshall, you
14 know, have said that where --

15 (Laughter.)

16 JUSTICE BREYER: -- where -- where
17 Congress -- where foreign affairs is involved,
18 you don't have to be as -- you can be as
19 specific as Justice Kagan said or not, but
20 foreign affairs is involved. And, Judges, this
21 is above your pay grade, okay? Stay out of it
22 as much as you can.

23 And, three, they used the word "may."

24 And, four, there is no indication --
25 this has been in existence for years, passed at

1 different times, and there is no indication that
2 Congress tied that "may" which is in Section (C)
3 to the detention which is in detention (A). You
4 have created a very good argument. But Congress
5 nowhere can -- has -- has said anything like
6 that. To the contrary, they didn't pass the
7 money.

8 So, one, Congress. Two, foreign.
9 Three, "may." Four, at different times with no
10 connection. And you heard their policy
11 arguments.

12 Now you may disagree with their policy
13 arguments, but it's pretty hard to say those
14 policy arguments are beyond the pale created by
15 one, two, three, and four. Well, what's your
16 response?

17 MR. STONE: I may --

18 JUSTICE BREYER: I'm making an
19 argument, but what's your response?

20 MR. STONE: Respectfully, I may need
21 help keeping all four questions straight in my
22 head. So for --

23 JUSTICE BREYER: Well, one was foreign
24 affairs. Two is immigration. Three is the fact
25 they use the word "may." And four is the fact

1 that, in fact, it passed at different times and
2 no evidence of any connection in Congress
3 between (C) and (A).

4 MR. STONE: The Congress and foreign
5 affairs piece I think I can address
6 simultaneously.

7 First of all, again, as I just said to
8 Justice Kagan, nothing about this injunction
9 actually requires negotiation with a foreign
10 power, but in the extent -- that to some extent
11 this Court thought that it did, the -- of
12 course, the foreign affairs power is shared
13 between Congress and the President.

14 JUSTICE KAGAN: Could -- I'm sorry, I
15 have to stop you there, General. You can get
16 the other four questions, but what do you mean
17 it doesn't require negotiation with the foreign
18 power? What are we supposed to do? Just drive
19 truckloads of people into Mexico and leave them
20 without negotiating with Mexico?

21 MR. STONE: First of all, MPP has to
22 be continued in good faith, and to the extent
23 that Mexico does not consent or otherwise
24 obstructs, again, I think that would be an
25 excellent reason for the government to go back

1 to the district court and seek relief from the
2 injunction.

3 Second, the particular authority on
4 which MPP relies, (b)(2)(C), was passed in 1996
5 where Congress was very well aware of the
6 country through which most inadmissible aliens
7 arriving on land proceed. And Congress did not
8 see fit to require the consent of a foreign
9 country before giving this as a supplemental
10 tool to the United States to discharge its
11 mandatory (b)(2)(A) options.

12 If that has foreign policy
13 consequences, that's a function of the fact that
14 Congress has foreign policy decisions it makes
15 as well. Congress made one of them through
16 (b)(2)(C). And all we've asked the district
17 court to do is to prevent the United States from
18 increasing its number of 1225(b)(2)(A)
19 violations.

20 So, to the extent that there's a
21 foreign policy implication, at most, it comes
22 from the fact that Congress, well aware of the
23 fact that we'd be dealing essentially with
24 Mexico here, made a -- made a decision regarding
25 (b)(2)(C) and then directed the President, you

1 must do this, except unless you do this.

2 JUSTICE KAGAN: Well, that's a good
3 segue into Justice Breyer's "may" question,
4 because, actually, Congress just said "may."
5 Congress, aware that Mexico is a sovereign
6 nation, did not think it appropriate to say you
7 must ship people back to Mexico. It understood
8 that there was going to have to be discretion
9 and -- and significant foreign policy
10 considerations involved in that choice.

11 MR. STONE: To speak as to the "shall"
12 and "may" components, it's not that (b)(2)(C)
13 ever stops being a "may"; it's that when the
14 only choice the United States has is either to
15 exercise (b)(2)(C), assuming it can do so
16 lawfully, or to violate the law -- Petitioners
17 are not free simply to violate the law. That is
18 a -- that is a bedrock of their take-care
19 obligations. And if they can lawfully exercise
20 their authority under (b)(2)(C), they must do so
21 so as to not violate 1225(b)(2)(A).

22 Now there might be a limited --

23 JUSTICE KAVANAUGH: But the premise --

24 MR. STONE: I'm sorry. Please.

25 JUSTICE KAVANAUGH: Keep going.

1 Sorry. Go ahead.

2 MR. STONE: I -- I was just going to
3 say there might be a limited circumstance under
4 a specific case where some other mandatory
5 federal law prevents the exercise in that
6 condition, but those are the edge cases.

7 CHIEF JUSTICE ROBERTS: You -- you
8 can't avoid Justice Breyer's -- the remainder --
9 the three-quarters of his question that are
10 still outstanding.

11 (Laughter.)

12 JUSTICE KAVANAUGH: Immigration,
13 "may," and Congress.

14 MR. STONE: I -- I hope I've spoken at
15 least to the foreign -- to the foreign policy
16 component with Congress, which is to say that
17 Congress certainly memorialized a preferred
18 foreign policy through (b)(2)(C).

19 To the extent that Congress has, in
20 fact, not appropriated a sufficient number -- a
21 sufficient amount of money in order to detain
22 everyone simultaneously, it has several
23 different options it's given, and then, at most
24 -- at most, what that means is that the
25 executive has to do the best it can with the

1 resources it has.

2 It's -- it's a bit of a strange
3 argument here for Petitioners to say they have
4 limited resources when, again, the district
5 court found that the use of MPP would cause
6 fewer individuals to attempt to -- to migrate
7 illegally or inadmissibly and that those
8 individuals, of course, would not require
9 detention capacity. So, as a matter of fact,
10 again, here, after a full trial on the merits,
11 MPP caught -- reduces detention costs.

12 Again, my friends on the other side
13 occasionally sort of tussle with these facts as
14 though that we're in a sort of posture of where
15 we're asking for a stay as opposed to we're
16 defending a final judgment of a district court
17 with extensive factual findings. But, here, we
18 are. And -- and to one -- I'm sorry, I don't
19 want to -- I don't want to sort of speak to --

20 JUSTICE KAVANAUGH: Are you done?

21 MR. STONE: -- or forget any of your
22 other questions.

23 JUSTICE KAVANAUGH: The -- the heart
24 of this case, I think, is what does "significant
25 public benefit" mean under 1182, because your

1 arguments make a lot of sense, but the other
2 side's -- the government's arguments make a lot
3 of sense when they articulate the significant
4 public benefit exception.

5 And the question comes down to, what
6 does that mean? What does it encompass
7 reasonably, more a State Farm-type question?
8 And have they reasonably explained why this
9 would be a significant public benefit?

10 And that's the heart of the case. I
11 mean, I -- yes, 1225 does have a mandatory
12 detention. It does have the "may" for return to
13 Mexico. But 1182 is the key because it has this
14 phrase "significant public benefit" for paroling
15 everyone in the United States. And they say,
16 consistent with past practice, that that
17 language authorizes in a situation of limited
18 capacity for parole to be into the United
19 States.

20 So you need to deal with "significant
21 public benefit."

22 MR. STONE: Absolutely, Justice
23 Kavanaugh. So to speak -- there's sort of a
24 factual question here about what the United
25 States will do that was found as a matter of

1 fact by the district court. And then a legal
2 question as to the extent of significant public
3 benefit. They're sort of interrelated, so let
4 me try and start with the fact.

5 Through page -- through Findings of
6 Fact 41, 42, and 44 and on paragraphs 106 and
7 107, which I believe are around 201(a) and
8 202(a) of -- of its decision, the district court
9 determined after this question was litigated
10 about what the United States would do, in fact,
11 if it had rescinded MPP, the district court
12 determined that the United States would release
13 additional individuals illegally into the United
14 States.

15 It acknowledged in a footnote right
16 before that conclusion that it knew that 1182
17 provided an authority for release on a
18 case-by-case basis, relied on parts of the
19 administrative record to state that that could
20 not be used or could not as a matter of fact be
21 used in order to supplement -- in order to
22 supplement detention or return, and then said to
23 the extent that the United States were to
24 attempt to do so by saying --

25 JUSTICE KAVANAUGH: That's not really

1 getting at what "significant public benefit" is,
2 I don't think. I mean, "significant public
3 benefit," they say, is when there's limited
4 detention capacity, past practice and their
5 current application of this somewhat vague
6 provision, "significant public benefit,"
7 authorizes the government to parole people into
8 the United States on a case-by-case basis if
9 they're not too dangerous.

10 Why is that wrong either as a matter
11 of statutory interpretation, State Farm, or
12 their explanation?

13 MR. STONE: It's wrong both as a
14 matter of fact and as a matter of
15 interpretation.

16 As a matter of fact, let me turn you
17 to ECF 136, the same material that my friends on
18 the other side cited as their latest report
19 regarding compliance with the injunction, where
20 the United States lists the --

21 JUSTICE KAVANAUGH: Why is it wrong as
22 a matter of interpretation? Can you flip the
23 order of your --

24 MR. STONE: Absolutely. Your Honor,
25 again, the United States has already interpreted

1 what it viewed a significant public benefit to
2 be and what it thinks case-by-case adjudication
3 is. So its regulation 8 CFR 212.5 describes
4 several of those circumstances.

5 The notion that sort of public
6 benefits also can include the United States --

7 JUSTICE KAVANAUGH: But it has a
8 catch-all at the end of the regulation about
9 public interest.

10 MR. STONE: Certainly, Your Honor.
11 That no longer -- that no longer tracks the
12 statutory language, as is discussed in --

13 JUSTICE KAVANAUGH: Yeah, but if
14 you're pointing to the regulation, you're
15 omitting the -- the capacious term at the end of
16 the regulation if I -- if I'm reading it
17 correctly. Correct me if I'm wrong.

18 MR. STONE: As I believe we -- we
19 described in our brief, that's a relic of the
20 previous version.

21 JUSTICE KAVANAUGH: But it's still in
22 the reg, correct?

23 MR. STONE: Yes. And to the extent
24 that they -- they relied on that as a matter of
25 statutory interpretation, that would be wrong.

1 "Significant public benefit" --

2 JUSTICE KAVANAUGH: Okay.

3 MR. STONE: -- superimposed itself
4 upon what originally was "public interest."

5 The kinds of things that are described
6 as a public benefit here are specific
7 case-by-case individuals' sort of dire
8 circumstances, an individual with a serious
9 health problem or an individual who for public
10 benefit is going to be providing testimony.

11 The notion that Congress created a --
12 created a scheme where for -- in (b)(2)(A)
13 expressed an unequivocal detention obligation
14 but then said, because this isn't simply a
15 matter of whether or not -- of whether or not
16 there's going to be the exercise of parole, but
17 whether or not the United States wishes to use
18 its (b)(2)(C) authority, that its -- its refusal
19 to use that authority and refusal to -- to --
20 and refusal to detain individuals is a
21 significant public benefit, certainly is a very
22 strange contradiction in the language of the
23 statute.

24 JUSTICE KAVANAUGH: So I -- I --
25 you -- you make a good point. I think the

1 examples they did cite were witness testimony.

2 And I agree with that.

3 But the phrase "significant public
4 benefit," you know, that's a common -- that's
5 not a common phrase, but "public interest" is a
6 common phrase in statutes. And D.C. Circuit,
7 this Court, give a lot of deference to agencies
8 to figure out how they're going to apply those
9 terms. And that's -- the language is a bit of
10 an issue for you unless you revert to the
11 structure of the statute expressed as a
12 preference for return to Mexico over parole.

13 MR. STONE: Again, not merely a
14 preference. That is a mandatory detention
15 obligation in this words -- in this Court's
16 words in Jennings.

17 JUSTICE KAVANAUGH: Yeah. But the
18 question -- I keep -- I'm sorry to keep
19 interrupting, but the question is you can't meet
20 that, and the statute gives you -- the overall
21 statutory structure gives you two options then
22 at least in the "may," return to Mexico or
23 parole into the United States if significant
24 public benefit.

25 And the question is, why can't an

1 administration say "significant public benefit"
2 is -- is triggered in this situation?

3 MR. STONE: I had two points, Your
4 Honor. The first were the statutory points and
5 the relationship between 1182 as a way of
6 satisfying (b)(2)(A) and (b)(2)(C)'s sort of
7 dual requirement.

8 The other part is a matter of fact
9 based on the -- the submission that the
10 Petitioners offered to the district court.

11 After -- and this is in -- under their
12 captions, they list about 120,000 individuals
13 that they categorize as under 1225(b)(2), so
14 they're -- they're certainly 1225 individuals.
15 Out of those, they announced that they have --
16 that they have paroled roughly, and this is
17 rough numbers, 40,000.

18 Of those, they've said they paroled
19 under -- on a case-by-case basis or for
20 significant public benefit about 6,000. And so
21 the actual practice right now certainly doesn't
22 map on to what Petitioners are describing.

23 I might also call attention to in that
24 document the United States flatly admits that it
25 is releasing on its own -- on their own

1 recognizance something on the order of 31,000
2 aliens who would -- who would be subject to
3 1225(d). That's precisely the kind of systemic
4 violation of law that, even if MPP would not
5 altogether alleviate, and it certainly wouldn't,
6 would at least reduce.

7 So my friend on the other side's
8 arguments to the effect of that our actual
9 practice or our past practice with 1182(d) makes
10 the district court's finding that we will
11 increase our violations clearly erroneous or
12 wrong or just wrong as a matter of law is in the
13 face of their multiple, multiple reports where
14 they haven't even, as a matter of their own
15 assertions, contested that 1182 was being used
16 even as a matter of all of their paroles.

17 And this puts aside 1226 because these
18 are clearly 1225 aliens under their own heading.

19 JUSTICE BARRETT: Okay. But, General
20 Stone, returning you to the question of
21 interpretation, which you have to surmount, it's
22 not just a matter of fact. Again, returning to
23 Justice Kavanaugh's question about significant
24 public interest, you lose, right, if -- if the
25 government is right about what "significant

1 public interest" is and that prioritizing the
2 beds, you know, based on who would be dangerous,
3 you know, who would be the worst aliens to
4 permit into the United States, right, if -- if
5 -- if they're right about that, if they're right
6 about "significant public interest," you lose.
7 Am I right?

8 MR. STONE: No, Your Honor.

9 JUSTICE BARRETT: Putting aside State
10 Farm and all that. I'm just talking on the --
11 on the statutory interpretation question.

12 MR. STONE: No, Your Honor, in part
13 because this injunction rests critically on what
14 the United States would do if it rescinded MPP.

15 As a matter of fact, along with -- and
16 I'll turn back to the statutory point -- the
17 United States attempted to prove that it would,
18 in fact, use 1182(d)(5) to satisfy these
19 obligations and thus it could not be required to
20 continue MPP because that was unnecessary. It
21 wouldn't violate 1225 anyway.

22 That is a matter of fact that was
23 based on a trial in which this was hotly
24 disputed. So the United States would have to
25 prove both, that, in fact, it could use

1 1182(d)(5) to address the entire swath of
2 individuals who obviously are coming in under
3 different circumstances, under different
4 conditions, to do so and that it would do so in
5 fact in order to get a modification of the
6 injunction, which would belong below. So they
7 -- they'd have to show both.

8 JUSTICE SOTOMAYOR: Counsel, can I get
9 --

10 JUSTICE ALITO: Does the statute allow
11 DHS to say that there would be a significant
12 public benefit in paroling an entire category of
13 aliens, a large class of aliens?

14 MR. STONE: Far from it, Your Honor.
15 The 1996 amendment to 1182(d)(5) specifically
16 inserted a case-by-case requirement. And,
17 again, read together with (b)(2)(A) and
18 (b)(2)(C), it's very difficult to see how the
19 significant public benefit, given a mandatory
20 detention obligation, could simply be the
21 preference not to detain or to return.

22 JUSTICE SOTOMAYOR: Counsel, I have
23 never seen Congress use a -- a "may" language in
24 the way you say. There are other parts of the
25 INA itself that says you do this or you do that.

1 If you can't do this, you do this other thing.

2 This is not an either/or. The
3 statute's not written that way.

4 And you said that it becomes mandatory
5 because they can't do A, but where does the
6 discretion fit in? Meaning they're not
7 challenging that they rescinded this problem --
8 this policy erroneously in June. They're saying
9 we did the right thing in October.

10 We looked at it anew. We've given all
11 of these reasons. And we've explained why the
12 cost of this program and running it is not in
13 the best interest of the United States because
14 we can detain more people and act more
15 expeditiously if we spend that money a different
16 way.

17 You're now telling us that we as
18 judges should be in the business of deciding
19 whether that policy choice is one that we think
20 who wants? That we as a Court want? Where does
21 Congress say that it shall need to do this?
22 Because I don't see it in the language. They
23 left it discretionary.

24 Having left it discretionary, why
25 isn't that the answer itself, that the policy

1 has been terminated or the rescission of the
2 policy in June, which is what the district court
3 had before it, was terminated, and the
4 injunction has to be lifted until you prove that
5 the rescission was wrong?

6 MR. STONE: Three reasons, Your Honor,
7 the first of which being where the "may" becomes
8 mandatory. It's only in the limited
9 circumstance where the only -- that is the only
10 way that -- that the executive can --

11 JUSTICE SOTOMAYOR: It's already
12 happened. They've done it. They did it and
13 looked at it and said this doesn't make sense.
14 Our discretion says we shouldn't use this.

15 So it's been considered. It was
16 considered by the old administration. They
17 followed it to an extent, not completely,
18 because they carved out huge numbers of
19 categories of people they weren't sending back.
20 And you're telling me they violated it too.
21 They now had it before them, they've given
22 thought to it, and they've said, as a matter of
23 our discretion, continuing this program doesn't
24 further the "shall" because we can do more with
25 the money in other ways.

1 MR. STONE: Respectfully, Your Honor,
2 our arguments don't depend on the policy wisdom
3 of MPP or any other particular approach to
4 immigration. They rely in here -- and
5 specifically on the APA merits of the June
6 termination. We agree with the United States
7 that the merits of the October termination under
8 the APA are not properly before this Court and
9 they weren't properly before --

10 JUSTICE SOTOMAYOR: So why shouldn't
11 we just lift this to say June is over with, it's
12 not being challenged, there's a new program, you
13 don't need the injunction?

14 MR. STONE: In part because, Your
15 Honor, that would be one of two things as I
16 understand it, either an appeal to mootness,
17 which, of course, they've already disclaimed
18 they are not challenging the Fifth Circuit's
19 holding on, or otherwise a request under Rule
20 60(b)(5) to set aside the injunction.

21 We're here after a trial on the merits
22 and having received a permanent injunction.

23 JUSTICE SOTOMAYOR: Well, the
24 injunction might be moot, but the lawsuit is not
25 moot. They're -- they're claiming there are

1 still issues to be resolved, including the
2 October issue, but the reasons for the
3 injunction are over with. So why should we
4 leave extant an injunction that's not necessary?

5 MR. STONE: Your Honor, to the extent
6 that -- that they have not affirmatively
7 disclaimed the position that the injunction is
8 moot, it would be upon them to show that, in
9 fact, it had become moot because of their
10 intervening actions, which they don't attempt.

11 And then, in response, of course, we'd
12 cite this Court's voluntary cessation doctrine.
13 In all candor, the United States' approach to
14 mootness here, when it argued below, was
15 something along the lines of that they'd evaded
16 review by accomplishing repetition. And so we
17 believe there are good reasons that this case
18 wouldn't be moot if that, in fact, had been
19 joined by the United States.

20 Nothing in the Fifth Circuit's opinion
21 below, nor should from this Court, rest on
22 whether or not the APA merits of the October
23 memoranda are good, bad, or otherwise. That's a
24 matter for them when they return to the district
25 court and seek relief from the injunction.

1 JUSTICE KAVANAUGH: So -- so the
2 questions I was pushing you on, how to interpret
3 "significant public benefit," I also alluded to
4 the fact there are State Farm issues potentially
5 that did the -- they have discretion, did they
6 reasonably exercise their discretion and have
7 they sufficiently explained their exercise of
8 discretion, very similar to the State Farm
9 opinion itself.

10 You're saying those concerns which I
11 was pressing your friend on the other side about
12 are not before us?

13 MR. STONE: No, Your Honor, but to the
14 extent this Court were to reach them -- in their
15 reply brief, they candidly acknowledged --

16 JUSTICE KAVANAUGH: Well, can -- can I
17 just stop -- they're not before us or --

18 MR. STONE: They're not before you, in
19 part because there's no administrative record.

20 JUSTICE KAVANAUGH: Okay.

21 CHIEF JUSTICE ROBERTS: Thank you --

22 JUSTICE KAVANAUGH: So -- okay.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 General.

25 Justice Thomas, anything further?

1 Justice Breyer?

2 Justice Alito?

3 Justice Sotomayor, anything further?

4 Justice Kagan?

5 Justice Gorsuch?

6 Justice Kavanaugh?

7 JUSTICE KAVANAUGH: How -- how do you
8 see this playing out then on the October memo?

9 MR. STONE: That this Court should
10 affirm the district -- the Fifth Circuit's
11 affirmance of the district court's injunction
12 and that with the October memoranda and the
13 October administrative record, the United States
14 should go to the district court, seek relief
15 under Rule 60(b)(5) and say either we have fully
16 satisfied both conditions or, at minimum for the
17 APA purposes, we have satisfied the APA
18 compliance condition.

19 And if they have, then, of course, it
20 would be an abuse of discretion for the district
21 court to deny modifying or satisfying that
22 injunction as a matter of law. And if they
23 haven't, then, of course, we'll litigate that
24 there.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett, anything further?

2 Thank you, counsel.

3 Rebuttal, General Prelogar?

4 REBUTTAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

5 ON BEHALF OF THE PETITIONERS

6 GENERAL PRELOGAR: Thank you,

7 Mr. Chief Justice.

8 Let me make one quick factual
9 correction, and then I'll turn to a couple of
10 points on the statutory question in the case.

11 First, I just want to respond on the
12 facts with respect to our monthly reports to the
13 district court, General Stone has misunderstood
14 the data in that report. All of the parole
15 decisions that DHS is making are on a
16 case-by-case basis. The -- the different
17 categories on that report refer to different
18 ways that DHS codes this data in its database,
19 but those are all following DHS's own
20 regulations, which themselves require
21 case-by-case assessment.

22 The orders of recognizance that are
23 referred to in that report are the -- the grants
24 of conditional parole under Section 1226(a).
25 Texas hasn't even challenged our reliance on

1 1226(a) in this case.

2 Turning to the statutory issue, my
3 friend conceded to Justice Thomas that MPP
4 itself was unlawful. He's conceded that on his
5 interpretation, every presidential
6 administration has been openly violating the
7 INA. I think that that is incredibly powerful
8 and persuasive evidence that that interpretation
9 is incorrect.

10 Second, I want to respond, Justice
11 Kavanaugh, to some of your questions about
12 significant public interest. We have not just
13 generated that -- that consideration of
14 detention capacity for purposes of this case.
15 That has been the executive branch's uniform,
16 consistent interpretation of how our parole
17 authority operates. It's encompassed in our
18 regulations, contrary to what General Stone
19 said, based on that catch-all category that you
20 referenced that specifically authorizes release
21 for other significant public interest.

22 And it makes sense because, in a world
23 where we don't have sufficient beds, as everyone
24 acknowledges, there is a imperative public
25 interest in ensuring that we are detaining the

1 people who might be criminals or who might
2 abscond or who threaten our national security
3 and not simply filling those beds on a first
4 come basis with no accounting for the limited
5 detention capacity.

6 Finally, I -- I'd like to leave the
7 Court with a few concluding thoughts on the
8 extraordinary nature of the district court's
9 injunction in this case and particularly with
10 respect to its effects on foreign relations.

11 As I've explained, the executive
12 cannot implement MPP unilaterally. General
13 Stone is simply wrong about that. Mexico has
14 its own sovereignty here, and we are sending
15 individuals on its -- onto its territory. So we
16 need to get Mexico's consent to operate the
17 program.

18 That gives Mexico an important point
19 of leverage, as Justice Kagan emphasized, in
20 those negotiations. And that's what the
21 district court has ordered here. It has ordered
22 us to conduct those ongoing negotiations with
23 Mexico. It's not just to start up the program.
24 It is coordinating on all of the day-to-day
25 logistics of operating a massive cross-border

1 program like this.

2 The individuals who are returned under
3 MPP need a place to live. They need work
4 authorization. They need access to counsel.
5 They need to be protected against predatory
6 violence from gangs and cartels. We need to
7 coordinate on the logistics of transferring them
8 back and forth across the border into the United
9 States for their immigration hearings and then
10 back to Mexico to continue to await the results
11 of those proceedings.

12 And in all of that, we have to have
13 ongoing logistical negotiations with Mexico.
14 The State Department has told me that it has a
15 weekly call with the Department of State, the
16 Department of Homeland Security, and their
17 counterparts in the Government of Mexico to talk
18 about regional migration and negotiate with
19 respect to all of these logistical details.

20 So I think the idea here that there is
21 a single district court in Texas that is
22 mandating those results, that is compelling the
23 executive to engage in those ongoing
24 negotiations, and is doing though -- so under
25 the constant threat of a contempt motion from

1 Texas to supervise our good-faith negotiations
2 with Mexico shows that something has powerfully
3 gone awry here.

4 This is not how our constitutional
5 structure is supposed to operate, and this is
6 not the statute that Congress drafted.

7 So we'd ask the Court to reverse the
8 flawed judgment below.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 General, General.

11 The case is submitted.

12 (Whereupon, at 11:47 a.m., the case
13 was submitted.)

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