

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, ET AL.,)
) Petitioners,)
) v.) No. 22-58
TEXAS, ET AL.,)
) Respondents.)

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 22-58, United States versus 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:

There are more than 11 million removable non-citizens in this country, and DHS has about 6,000 interior enforcement officers. To focus the agency's limited resources on threats to public safety, national security, and border security, DHS adopted enforcement priorities. But the district court issued a sweeping ruling vacating the guidelines nationwide. This Court should reverse.

First, the states lack standing. They argue states can challenge any federal policy that imposes even one dollar of indirect harms on their own taxing or spending. That theory has no limiting principle. It's incompatible with our constitutional structure, and it

1 contradicts more than 200 years of history and
2 tradition where states could not sue the United
3 States on this basis. Federal courts should not
4 now be transformed into open forums for each and
5 every policy dispute between the states and the
6 national government.

7 On the merits, the INA does not create
8 an unyielding mandate to apprehend and remove
9 every non-citizen described in provisions that
10 use the term "shall." This Court has repeatedly
11 held that the word "shall" does not displace
12 background principles of enforcement discretion.

13 Across 25 years and five presidential
14 administrations, the agency has never
15 implemented the INA in the manner that
16 Respondents suggest. Given congressional
17 funding choices, it would be impossible for DHS
18 to do so.

19 Adopting Respondents' reading would
20 not lead to more immigration enforcement.
21 Instead, it would just deprive the Secretary of
22 his statutory authority to set priorities to
23 protect the nation's security and borders.

24 Finally, as to remedies, the APA did
25 not create a novel remedy of universal vacatur,

1 and the INA specifically bars that remedy.
2 Section 1252(f)(1) prohibits the lower courts
3 from granting coercive relief against the
4 operation of the covered INA provisions, and
5 vacatur is plainly coercive.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: General, does that
8 same provision, 1252(f), also affect
9 redressability for standing purposes?

10 GENERAL PRELOGAR: Well, you know, I
11 think that we've obviously analyzed these issues
12 in two separate ways, and I think that here,
13 assuming that there were standing, it would have
14 been possible to get a different remedy, like a
15 declaratory judgment, which the state sought in
16 their complaint.

17 JUSTICE THOMAS: But you don't think
18 that 1252(f) precludes a declaratory judgment?

19 GENERAL PRELOGAR: That's right, we do
20 not think that. So long as the declaratory
21 judgment is not issued in such a way that the
22 court has made clear that it's coercive and, for
23 example, would be backed up by contempt, that
24 would effectively function like an injunction.
25 We're not disputing that litigants would be able

1 to obtain a declaratory judgment in line with
2 Section 1252(f)(1).

3 JUSTICE THOMAS: So which remedies
4 would it preclude in this case?

5 GENERAL PRELOGAR: So it would
6 preclude the nationwide vacatur that the states
7 obtained here, and the reason for that is
8 because the -- the statute clearly focuses on
9 forms of coercive relief.

10 As the Court said in Aleman Gonzalez
11 last term, it prevents orders that would require
12 DHS officials to take or refrain from taking
13 action to implement the covered INA provisions
14 while a suit proceeds, and that's because
15 Congress's judgment in this area was that only
16 this Court should have authority to enter that
17 kind of broad programmatic interference with the
18 operation of the statute while a suit is
19 proceeding.

20 So we think that here, vacatur shares
21 the -- the same feature as an injunction in
22 terms of preventing DHS from being -- being able
23 to implement these covered INA provisions while
24 the litigation runs its course.

25 CHIEF JUSTICE ROBERTS: Your Linda

1 R.S. argument under standing, doesn't that mean
2 that no state would ever have standing to
3 challenge immigration policies concerning
4 apprehension or removal of aliens?

5 GENERAL PRELOGAR: That's right. We
6 think that the Court articulated a principle
7 there that an individual or a state doesn't have
8 a judicially cognizable injury in seeking
9 enforcement of the law against a third party.

10 CHIEF JUSTICE ROBERTS: Well, what
11 about Biden against Texas?

12 GENERAL PRELOGAR: The MPP case from
13 last term? There --

14 CHIEF JUSTICE ROBERTS: Four -- four
15 months ago. Your position seems inconsistent
16 with that to me.

17 GENERAL PRELOGAR: Well, we did
18 protest the state's standing in that case as
19 well. In the lower courts, we litigated that
20 issue, and the Fifth Circuit and the district
21 court ultimately rejected our arguments.

22 We had also contested the state
23 standing at the stay stage in this Court, and
24 the Court ultimately declined to grant us stay
25 relief and found that the states had a

1 likelihood of success on the merits.

2 And, at that point, we went back to
3 the drawing board and thought hard about these
4 arguments and believe very strongly that the
5 states here lack standing both under the kind
6 of constitutional --

7 CHIEF JUSTICE ROBERTS: So you went
8 from one argument to believing very strongly the
9 other way?

10 GENERAL PRELOGAR: This has been a
11 through line. We have been protesting state
12 standing, broad theories of state standing in
13 the lower courts, and, Mr. Chief Justice, the
14 lower courts have not been accepting those
15 arguments, but we think that the lower courts
16 are fundamentally misunderstanding this Court's
17 precedents as it relates to our constitutional
18 structure and the kind of separation --

19 CHIEF JUSTICE ROBERTS: I would have
20 thought you'd have a little more concern about
21 an opinion of ours that's four months old. I
22 mean, it's not even out of the cradle yet and
23 you're throwing it under the bus --

24 GENERAL PRELOGAR: No, no.

25 CHIEF JUSTICE ROBERTS: -- to kind of

1 mix the analogies there.

2 GENERAL PRELOGAR: We -- we certainly
3 aren't suggesting that that opinion should be
4 thrown under the bus. We were obviously
5 briefing these issues with multiple mistakes
6 that we thought the district court had made in
7 that case, but I don't think this is a -- you
8 know, this is a jurisdictional principle, and I
9 don't think that it would prevent the Court here
10 from recognizing that the kind of theories of
11 state standing that the states here are pressing
12 and that the lower courts are accepting would
13 really remove every possible restriction that
14 could exist in this space, and that's just
15 fundamentally incompatible with the
16 constitutional structure and the separation of
17 powers.

18 JUSTICE ALITO: Let me ask you about
19 another case. Is it the position of the United
20 States that the states lacked standing in the
21 Little Sisters of the Poor case from two years
22 ago because their expected additional healthcare
23 spending was an indirect injury?

24 GENERAL PRELOGAR: Justice Alito, I
25 can't recall whether the government made

1 standing arguments in that case.

2 JUSTICE ALITO: Well, I'm just asking
3 you now what do you think about that. The
4 argument was that they -- the states,
5 Pennsylvania, I believe, and another state, had
6 standing because the regulation they were
7 challenging would have the effect of imposing --
8 it would remove healthcare from certain
9 residents, students who were away at college in
10 other states, and thereby impose an additional
11 cost on the states.

12 Was that wrong?

13 GENERAL PRELOGAR: So, if I understand
14 the facts of the case correctly, I think that
15 it's possible that that would constitute the
16 kind of direct injury that this Court's
17 precedents have recognized in this space if the
18 challenged regulation operated directly on the
19 states with respect to dictating, for example,
20 their federal funds or requiring curriculum and
21 directly --

22 JUSTICE ALITO: No. It's just they --
23 no, they just said that they would have to pick
24 that up under state programs. Well, let me move
25 on to something else.

1 On this indirect/direct injury
2 distinction that you're drawing, should we hold
3 that injury -- that an indirect injury is never
4 injury in fact for Article III purposes for all
5 plaintiffs?

6 GENERAL PRELOGAR: No, we're not
7 asking for that.

8 So we think that this is a distinctive
9 principle that the Court has applied when states
10 are seeking to vindicate sovereign or
11 quasi-sovereign interests, and the reason for
12 that, I think the reason the Court's precedents
13 recognize that the states are then under an
14 obligation to show this form of direct injury is
15 about our constitutional structure. It's for
16 that --

17 JUSTICE ALITO: So this is a -- this
18 is a special standing rule for states that
19 disfavors state standing?

20 GENERAL PRELOGAR: Well, let me be
21 perfectly clear that when the states are seeking
22 to proceed on the basis of proprietary harms,
23 the same kinds of interests that other private
24 litigants can bring --

25 JUSTICE ALITO: Yes, but --

1 GENERAL PRELOGAR: -- we think that
2 the same rules apply.

3 JUSTICE ALITO: Yes, but an injury
4 that would be sufficient for Article III
5 purposes for an individual or for a private
6 entity is not sufficient in your view for the
7 states? There's a special rule for the states?

8 GENERAL PRELOGAR: With respect to
9 quasi-sovereign and sovereign interests, yes.
10 And the reason that we think the Court has --

11 JUSTICE ALITO: So this is a rule of
12 special hostility to state standing. How is
13 that consistent with Massachusetts versus EPA,
14 where the Court said that there is a special
15 solicitude for state standing?

16 GENERAL PRELOGAR: Special solicitude,
17 as we understand it in this Court's precedents,
18 reflects the fact that states have more theories
19 of injury available to them, so they're not
20 limited to the same proprietary interests that
21 other parties can assert with respect to their
22 contract rights where being regulated as an
23 employer. Instead, special solicitude reflects
24 the fact that states can also seek to proceed on
25 the basis of sovereign or quasi-sovereign harms.

1 But I don't think it's right to
2 suggest that the Court's rules or framework in
3 this area amount to hostility. This is about
4 recognizing that when one sovereign is suing
5 another sovereign under our constitutional
6 structure, that implicates fundamental
7 constitutional principles.

8 And I think a contrary rule --

9 JUSTICE ALITO: Well, maybe you don't
10 like the --

11 GENERAL PRELOGAR: -- would
12 effectively mean that states can sue about
13 anything.

14 JUSTICE ALITO: -- maybe you don't
15 like the -- you don't like the word "hostility,"
16 but you have a special rule for state standing
17 that disfavors the states. The states are in a
18 less favorable position than they would have
19 been if they were a private entity or an
20 individual.

21 Let me move on to one other case. Do
22 you concede that Federal Election Commission
23 versus Akins acknowledges that Congress can
24 permit civil actions challenging nonenforcement
25 decisions?

1 GENERAL PRELOGAR: Yes, in that case,
2 I recognize that the Court concluded obviously
3 over Justice Scalia's dissent, but that is an
4 example where the Court allowed standing in that
5 circumstance.

6 JUSTICE SOTOMAYOR: General --

7 JUSTICE ALITO: And why doesn't that
8 principle apply here?

9 GENERAL PRELOGAR: Well, I think that
10 the -- the more on point precedent in this case
11 is *Sure-Tan*, where the Court specifically took
12 the *Linda R.S.* principle and said that it
13 applied in the realm of immigration law as well.

14 JUSTICE KAVANAUGH: What do you do
15 with *Heckler versus Chaney*, where the Court
16 recognized that general principle but also said,
17 when Congress puts specific limits on executive
18 enforcement, that courts have authority to
19 enforce those limits?

20 GENERAL PRELOGAR: Well, in that case,
21 of course, the Court wasn't confronted with
22 standing questions. That was a case about
23 whether a decision was committed to agency
24 discretion by law.

25 And I think the Court's recognition

1 there is that Congress has statutory authority
2 to make its own judgments that sometimes will
3 direct agencies in the exercise of discretion.
4 But we think that that presents a merits issue
5 and it raises the question whether you should
6 interpret particular statutory language to
7 create that kind of displacement of discretion
8 in the first place.

9 JUSTICE SOTOMAYOR: General, assuming
10 hypothetically that I don't accept your
11 argument, that the costs to a state could give
12 it standing in a certain situation, Judge
13 Sutton, in a related case to this one or a
14 similar case to this one, pointed out, however,
15 that under Arizona versus Wynn we have said that
16 if you're going to claim costs, you have to show
17 us that it's a net cost.

18 Could you address that as an
19 alternative theory here?

20 GENERAL PRELOGAR: Yes, of course,
21 Justice Sotomayor.

22 And we think, here, getting into the
23 facts of this case, that there was no basis in
24 this record to conclude that the states will
25 actually incur these kinds of indirect effects

1 on their own taxing or spending or regulating.

2 The district court seemed to think
3 that these enforcement priorities would suppress
4 overall levels of enforcement such that there
5 would be the prospect that there might be
6 additional non-citizens present in Texas.

7 But, if you look at how the
8 enforcement priorities are intended to operate,
9 this is not about reducing enforcement of the
10 immigration laws. It's about prioritizing
11 limited resources to say go after person A
12 instead of person B, and there is no reason to
13 conclude that that's actually going to lead to
14 less enforcement against individuals overall.

15 JUSTICE ALITO: Suppose Congress
16 passed a law that said that every person must
17 buy seven apples per week. And let's say I
18 don't like apples, and the cost of seven apples
19 is, I don't know, \$8, and that's -- I say that's
20 a pocketbook injury for me, so I have standing
21 to challenge that.

22 Do I -- do I have standing, or do I
23 have to show that the net benefit to me,
24 monetary benefit to me of buying all these
25 apples is that it will improve my long-term

1 health and so I will -- healthcare costs that I
2 might have otherwise incurred I'll avoid by
3 buying all these apples. If I buy them, I'll
4 feel that I have to eat at least some.

5 GENERAL PRELOGAR: Justice --

6 JUSTICE ALITO: Do I have to show net
7 injury there?

8 GENERAL PRELOGAR: Justice Alito, I
9 acknowledge that in that hypothetical, no, you
10 could challenge that regulation that is directly
11 operating on you.

12 But I think the problem for the states
13 here is that they're asserting indirect harms.
14 They're suggesting that there, through an
15 attenuated chain of events, there is going to be
16 perhaps the prospect of one additional
17 non-citizen in their borders and that's going to
18 cause them harms.

19 JUSTICE ALITO: Well, no, no. You're
20 --

21 GENERAL PRELOGAR: And there I think
22 you need to substantiate it.

23 JUSTICE ALITO: -- you're -- you've
24 gone back to a different argument. I understood
25 those to be two separate arguments. You have

1 the direct/indirect argument and you have the
2 net cost argument.

3 GENERAL PRELOGAR: Well, here, I think
4 I was trying to --

5 JUSTICE ALITO: Well, I'm talking
6 about the --

7 GENERAL PRELOGAR: -- engage on
8 whether the district court could have reasonably
9 concluded that there would be that kind of
10 actual out-of-pocket expense for the states, and
11 I was trying to make the overarching point that
12 that's not how these enforcement priorities work
13 in the first place. But, even on the specific
14 conclusions that the district court reached, we
15 think that the findings were fundamentally
16 flawed.

17 JUSTICE BARRETT: So clearly
18 erroneous?

19 GENERAL PRELOGAR: Yes.

20 JUSTICE BARRETT: To agree with you,
21 we have to find -- because you didn't talk a lot
22 about the clearly erroneous standard in your
23 brief, so I wondered whether you were
24 saying that the district court's factual
25 findings were clearly erroneous or that the

1 district court made an error of law because it
2 didn't offset burdens with benefits.

3 GENERAL PRELOGAR: No, we are arguing
4 that these factual findings are clearly
5 erroneous. And I recognize that the Court
6 infrequently delves into facts like these, but I
7 guess what I would say is that if any facts are
8 clearly erroneous, it's -- it's these facts, and
9 it's not hard to see on the record why.

10 The district court committed really
11 two independent errors here. The first thing is
12 that it looked at the wrong time frame. It
13 focused on fiscal year 2021 to suggest that the
14 states had incurred costs. But that was a time
15 period before these guidelines even took effect,
16 and so it was improper to draw those kinds of
17 causal errors based on that data.

18 But, even putting that to the side and
19 looking at the data, it doesn't support the
20 district court's analysis. The court said DHS
21 is not detaining the same number of criminal
22 non-citizens. But the -- the very chart that
23 the district court included at JA 314 shows that
24 over the time in question, the number of
25 criminal non-citizens in custody remained

1 essentially unchanged.

2 And then, with respect to removals,
3 the district court said DHS has done far less
4 enforcement action with removals and focused on
5 a comparison between fiscal year 2019, about
6 250,000 removals, and fiscal year 2021, where
7 there were about 55,000. But the district court
8 ignored entirely that that was during the
9 pandemic and the CDC's public health order under
10 Title 42 was in effect, and DHS excluded more
11 than a million non-citizens under the Title 42
12 order. So the bottom-line conclusion here that
13 there was less immigration enforcement overall,
14 I think, was clear error.

15 JUSTICE JACKSON: General --

16 CHIEF JUSTICE ROBERTS: General, if I
17 could move to the merits, let's say that I
18 disagree with you on standing and on the
19 remedies and I have to reach the merits, and
20 when we get to the merits, I think "shall" means
21 "shall." Then we're in a position where, as you
22 see it, Congress has passed a law that is -- it
23 is impossible for the executive to comply with.

24 Now it's our job to say what the law
25 is, not whether or not it can be possibly

1 implemented or whether there are difficulties
2 there. And I don't think we should change that
3 responsibility just because Congress and the
4 executive can't agree on something that's
5 possible to address this -- this problem. I
6 don't think we should let them off the hook. So
7 shouldn't we just say what we think the law is,
8 even if we think "shall" means "shall," and then
9 leave it for them to sort that out?

10 GENERAL PRELOGAR: Well, Mr. Chief
11 Justice, let me take a stab at trying to
12 persuade you that these considerations of
13 resource constraints do properly inform the task
14 for this Court, which is to interpret the
15 meaning of "shall" and the statute itself.

16 And the first thing --

17 CHIEF JUSTICE ROBERTS: Well, it seems
18 to me that you're arguing with one of the
19 predicates to my question, that we think -- I
20 think anyway -- "shall" means "shall." What do
21 we do in that situation?

22 GENERAL PRELOGAR: If this Court were
23 to actually adopt that interpretation of the
24 statute, then I think that it would be
25 incredibly destabilizing on the ground.

1 CHIEF JUSTICE ROBERTS: No, I didn't
2 ask you what it would be. I want to know what
3 we should do. Should we still fulfill our
4 responsibility to say what the law is, and then
5 it's up to Congress and the executive to figure
6 out a way to comply with that?

7 GENERAL PRELOGAR: I think, if the
8 Court did that -- and the reason I'm turning to
9 the practical implications here is because, in
10 the meantime, while Congress and the executive
11 try to figure it out, it would absolutely
12 scramble immigration enforcement efforts on the
13 ground. It would mean that DHS, I think, if it
14 were under this kind of judicially enforceable
15 obligation to treat each of those "shalls" as a
16 mandatory "shall," would have to --

17 CHIEF JUSTICE ROBERTS: So you're
18 still arguing -- I'm sorry to --

19 GENERAL PRELOGAR: Yeah.

20 CHIEF JUSTICE ROBERTS: You're still
21 arguing that that would be wrong, to say "shall"
22 means "shall"?

23 GENERAL PRELOGAR: I think it would --
24 I think it would be wrong to say that "shall"
25 means "shall," and I would -- I would welcome

1 the chance to explain as a matter of statutory
2 interpretation why that's so, but, at the very
3 least, I don't think the Court should announce
4 it as a judicially cognizable injury here that
5 could justify interference by the courts in
6 light of the practical ramifications.

7 And they're really two sides of the
8 same coin, because I think one of the reasons
9 the Court has recognized that there is
10 enforcement discretion in this area is precisely
11 because of the practical necessity that agencies
12 cannot proceed against every violation of the
13 statute. That's what the Court said in Heckler,
14 or in Town of Castle Rock. The Court emphasized
15 that an arrest mandate, if it were truly a
16 mandatory, judicially enforceable duty, would be
17 a duty of entirely uncertain scope and priority
18 and duration. It would be impossible to comply
19 with it. And the Court said that these
20 background principles of enforcement discretion
21 are a practical necessity.

22 JUSTICE KAVANAUGH: Are those --

23 JUSTICE JACKSON: But --

24 JUSTICE KAVANAUGH: -- are those
25 background principles constitutional principles?

1 In other words, if Congress says "shall" means
2 "shall" and we really mean "shall" means
3 "shall," is that unconstitutional?

4 GENERAL PRELOGAR: So not in each and
5 every case.

6 JUSTICE KAVANAUGH: Is it -- is it
7 ever --

8 GENERAL PRELOGAR: I -- I -- I think
9 that --

10 JUSTICE KAVANAUGH: -- is it ever
11 unconstitutional? In other words, does the
12 President have an Article II ability to say I
13 possess enforcement discretion under the
14 Constitution and any attempt by Congress to
15 restrict that enforcement discretion by saying
16 "shall" means "shall" would itself violate
17 Article II? You gestured Article II briefly in
18 your brief, but you don't really unpack it very
19 much. I'm curious what your answer is to
20 whether that could be unconstitutional.

21 GENERAL PRELOGAR: So I think that,
22 yes, there could be certain circumstances where
23 Congress has engaged in a really intrusive
24 effort to command the executive to take
25 particular enforcement actions to prosecute

1 individuals in a particular way where we would
2 say that that does transgress Article II limits.

3 JUSTICE KAVANAUGH: And does this one
4 --

5 GENERAL PRELOGAR: But we're not --

6 JUSTICE KAVANAUGH: -- does this one
7 transgress Article II, this statute, if -- if
8 the Chief Justice posits "shall" means "shall"?
9 I don't see an argument in your brief that if
10 the statute is read to mean what it says,
11 "shall" means "shall," that the statute would be
12 unconstitutional. But I just want to make sure
13 I'm reading your brief correctly. I didn't see
14 an argument that that would be unconstitutional.

15 GENERAL PRELOGAR: That's right, we
16 haven't argued that the statute would be
17 unconstitutional. And we accept that Congress
18 in various provisions of the INA has created
19 mandatory duties.

20 JUSTICE SOTOMAYOR: General, can --

21 JUSTICE JACKSON: But can --

22 JUSTICE SOTOMAYOR: -- can -- General,
23 can we break down 1226(c)'s "shall"?

24 GENERAL PRELOGAR: Yes.

25 JUSTICE SOTOMAYOR: Section 20 --

1 1226(a) applies to arrest and detention pending
2 a decision on whether the alien is to be
3 removed, correct?

4 GENERAL PRELOGAR: That's correct.

5 JUSTICE SOTOMAYOR: In Reno and
6 elsewhere, we have repeatedly recognized the
7 agency's broad prosecutorial discretion to not
8 put someone in removal proceedings and to drop
9 proceedings, correct?

10 GENERAL PRELOGAR: That's right. The
11 Court said that exists at all stages of the
12 removal process, including whether to charge a
13 non-citizen in the first place.

14 JUSTICE SOTOMAYOR: So, if someone's
15 not in a removal proceeding, you have the
16 discretion to drop them -- if they are, if
17 they're not, you can say we're not going to
18 remove you, correct?

19 GENERAL PRELOGAR: That's correct,
20 yes.

21 JUSTICE SOTOMAYOR: We've said that in
22 a legion of cases.

23 GENERAL PRELOGAR: Yes.

24 JUSTICE SOTOMAYOR: So (c) is only
25 applicable, mandatory detention, when there's a

1 removal proceeding in place, correct?

2 GENERAL PRELOGAR: That is correct,
3 yes, under --

4 JUSTICE SOTOMAYOR: And so --

5 GENERAL PRELOGAR: -- the provision in
6 (a).

7 JUSTICE SOTOMAYOR: -- so we would
8 have to basically say that (c) trumps (a), and
9 (c) trumps a discretionary power we've
10 recognized for decades, correct? That you
11 cannot proceed with removal, correct?

12 GENERAL PRELOGAR: That's right, I
13 think, if you were focused on the decision
14 whether --

15 JUSTICE SOTOMAYOR: All right.

16 GENERAL PRELOGAR: -- to proceed with
17 removal in the first place. And we don't --

18 JUSTICE SOTOMAYOR: So the only issue
19 is, if there is a proceeding, if someone is in
20 removal already, whether or not you are
21 mandatorily required under (c) to put them into
22 removal, correct --

23 GENERAL PRELOGAR: Yes.

24 JUSTICE SOTOMAYOR: -- and take
25 custody of --

1 GENERAL PRELOGAR: The -- the state's
2 assertion here is that we would have a mandatory
3 obligation, I think, to seek out and identify
4 and go out and apprehend every person who could
5 possibly be described under that provision.

6 JUSTICE SOTOMAYOR: That's the logic
7 of their -- that's the logic of us saying that
8 "shall" means "shall" in all contexts. It means
9 that you have to go look for everybody, even
10 when you don't know where they are, correct?

11 GENERAL PRELOGAR: That's right. And
12 I want to --

13 JUSTICE SOTOMAYOR: So --

14 GENERAL PRELOGAR: -- emphasize it's
15 not just this provision. There are "shalls"
16 throughout the INA that would, if it were
17 interpreted to mean a mandatory, inflexible duty
18 that displaces enforcement discretion, would
19 create these kinds of unyielding mandates across
20 the realm of actions and --

21 JUSTICE ALITO: Well, I don't
22 understand the states' argument to depend on the
23 proposition that the executive must detain
24 everybody even if it doesn't have the capacity
25 to detain them. I understood their argument to

1 be centered on something quite different.

2 So let's just assume for the sake of
3 argument that there isn't an issue about how
4 many people you were going to detain but only a
5 question about which ones you were going to
6 detain. And the -- the problem that I see with
7 your final memorandum is that Congress has
8 established its own set of priorities and has
9 said that certain categories of aliens must be
10 detained, shall be detained. And the final
11 memorandum says -- tells ICE officers don't do
12 that. Don't detain anybody based solely on that
13 person's criminal history. You must make a
14 totality-of-the-circumstances decision about
15 every single alien whom -- who you're
16 considering for detention. Isn't that correct?

17 GENERAL PRELOGAR: No, that's
18 incorrect, and let me be really clear about how
19 the Guidelines operate with respect to
20 detention. They don't govern the question of
21 continued detention at all. They're focused on
22 apprehension and removal, and, therefore, when
23 DHS officers have someone in custody and there
24 are -- there are pending removal proceedings,
25 the Guidelines leave it to the statute to

1 dictate those kinds of detention decisions, and
2 DHS does treat 1226(c)(2) as mandatory in that
3 circumstance.

4 JUSTICE JACKSON: And so, therefore,
5 it's sort of analogous to mandatory pretrial
6 detention statutes, where Congress says, if you
7 as a prosecutor determine that you're going to
8 go after somebody, you're going to prosecute
9 them in the criminal realm, there are certain
10 people you have to detain during the
11 prosecution. There are certain -- you know,
12 people who have been convicted of certain
13 crimes. We have statutes where Congress says
14 those people have to be detained. But that
15 doesn't speak to the antecedent determination of
16 whether or not to prosecute those people.

17 I think the problem that I'm seeing
18 with the state's argument is that they appear to
19 be conflating Congress's mandates with respect
20 to detention and Congress's statements with
21 respect to removal and that the idea of 1226 --
22 1226(c) is that once the determination has been
23 made pursuant to prosecutorial discretion that
24 you're going to remove someone, if those people
25 fall into the particular criminal alien

1 categories, they have to be detained for the
2 purpose of that removal.

3 Am I reading that correctly?

4 GENERAL PRELOGAR: Yes. So the way
5 that DHS has long understood and implemented
6 this provision is that if we have a non-citizen
7 in custody with pending removal proceedings, as
8 1226(a) requires, then, if the non-citizen is
9 described in 1226(c), detention is mandatory.

10 And the reason for that is not because
11 it says "shall detain." We don't think that
12 that bare use of "shall" alone displaces
13 enforcement discretion. It's because in
14 1226(c)(2) Congress specifically delineated the
15 permissible bases for -- for release and said
16 the Secretary may release only for narrow
17 witness protection purposes --

18 JUSTICE JACKSON: And isn't it also --

19 JUSTICE ALITO: General, if we --

20 GENERAL PRELOGAR: -- and that kind of
21 mandatory language.

22 JUSTICE JACKSON: -- isn't it also --
23 isn't it also related to sort of conceptions of
24 government power? In other words, the reason
25 why you are -- you have the authority to detain

1 someone is because you made the determination
2 that they're going to be removed.

3 The government doesn't just go around
4 detaining people without having made a
5 determination about their prosecutorial ability
6 without the fact that they're going to prosecute
7 these people or they're going to remove these
8 people. That's where the authority comes from,
9 right?

10 GENERAL PRELOGAR: Yes. And I think
11 that this relates both to the colloquy that I
12 was having with Justice Sotomayor and with
13 Justice Kavanaugh. It would be a really
14 extraordinary thing for Congress to have
15 dictated to the executive that it has to seek
16 out, identify, apprehend, and remove as an
17 inflexible mandate each and every non-citizen
18 who's described in a provision that uses the
19 word "shall" in the INA.

20 JUSTICE KAGAN: Well, is that true --
21 I -- I -- I guess your stronger argument is
22 where their removal proceedings have not been
23 initiated. But how about, are there some
24 circumstances in which there are pending removal
25 proceedings so that 1226 kicks in, but you

1 haven't apprehended the person? And are you
2 then saying that you don't have an obligation to
3 apprehend the person even while removal -- even
4 once you've initiated a removal proceeding?

5 Has that ever happened? Is that your
6 argument? Why is it your argument?

7 GENERAL PRELOGAR: Yes. So it's
8 possible that that could happen in a
9 circumstance, for example, where DHS encounters
10 someone at the border who lacks papers and so
11 they're removable and they're issued a notice to
12 appear and have pending removal proceedings, but
13 the agency isn't aware that they're a
14 non-citizen described in 1226(c) and then later
15 gains that kind of information after the
16 non-citizen has already been released and
17 therefore is aware of the information at that
18 juncture.

19 But I do want to be clear that it's
20 not as though DHS has a database and an
21 awareness ex ante of each and every non-citizen
22 who might have a 1226(c) credit because --

23 JUSTICE SOTOMAYOR: Answer that
24 question which is the one Justice Kagan did. If
25 someone is in removal proceedings, you know it,

1 can you release them?

2 GENERAL PRELOGAR: So I -- I --

3 JUSTICE KAGAN: No, that was -- that
4 was not the question. The question was that the
5 person had not been apprehended.

6 GENERAL PRELOGAR: Yes.

7 JUSTICE KAGAN: And the question is
8 does this statute force you to apprehend the
9 person once you've initiated removal proceedings
10 as to that person.

11 GENERAL PRELOGAR: The answer to that
12 question is no, we think that the "shall take
13 into custody" language has to be read against
14 the backdrop of enforcement discretion, and it
15 would be totally unmanageable to have a
16 judicially enforceable duty to go out and
17 apprehend, because how many officers do we have
18 to put on the manhunt? How long do we have to
19 look? How many resources do we have to devote
20 to it?

21 But I should also be clear about the
22 factual premise, which is that we would know
23 with certainty that the person is subject to
24 1226(c). That's actually a really complicated
25 legal analysis under this Court's categorical

1 approach. It requires parsing the elements of
2 the state statute, comparing that to the generic
3 federal offense or the federal crime, deciding
4 whether there's an overmatch, deciding whether
5 the statute's divisible, tracking down the
6 Shepard documents.

7 So it's not as though DHS conducts
8 that analysis or knows in advance. Instead, it
9 conducts the 1226(c) analysis when it's making
10 release determinations for people who are
11 already in its custody.

12 CHIEF JUSTICE ROBERTS: Counsel, maybe
13 we can move on to individual questions now, and
14 I'm sure that some of it'll deal with remedy,
15 which is the one area -- area we haven't
16 addressed yet. And, in that area, your -- your
17 position on vacatur, that sounded to me to be
18 fairly radical and inconsistent with, for
19 example, you know, with those of us who were on
20 the D.C. Circuit, you know, five times before
21 breakfast, that's what you do in an APA case.

22 And all of a sudden you're telling us
23 that, no, you can't vacate it, you do something
24 different. Are you overturning that whole
25 established practice under the APA?

1 GENERAL PRELOGAR: Yes, I acknowledge,
2 Mr. Chief Justice, that the lower courts,
3 including the D.C. Circuit, have in our view
4 been getting this one wrong. They have
5 reflexively assumed that vacatur is authorized
6 under Section 706 of the APA.

7 But what I would say is that they
8 haven't reached --

9 CHIEF JUSTICE ROBERTS: Wow.

10 GENERAL PRELOGAR: -- that conclusion
11 with --

12 CHIEF JUSTICE ROBERTS: I mean, this
13 is a long -- that's what the D.C. Circuit and
14 other courts of appeals have been doing all the
15 time as a staple of their decision output.

16 GENERAL PRELOGAR: But they haven't
17 been doing it with any attention to the text,
18 context, and history of the provision. So it's
19 not as though there are decisions out there that
20 have really engaged with these arguments and
21 come out the other way.

22 Instead, it seems like this happened
23 and came about because courts just reflexively
24 transposed remedies that were available under
25 special statutory review provisions, which do

1 sometimes authorize vacatur, to the APA context
2 writ large.

3 And our argument is that if you
4 actually drill down on the text of 706 and look
5 at its context and also look at the history of
6 the APA, which was not intended to create any
7 kinds of new remedies but instead to simply
8 provide for the remedies that had preexisted the
9 statute's enactment and the traditional forms of
10 legal action under Section 703, it demonstrates
11 that the courts have erred here.

12 CHIEF JUSTICE ROBERTS: How --

13 GENERAL PRELOGAR: And I don't think
14 --

15 CHIEF JUSTICE ROBERTS: -- how many
16 cases would you say that we have issued over the
17 past year, decade, whatever, where we have
18 upheld decisions vacating agency rulings under
19 the APA?

20 GENERAL PRELOGAR: The Court has --

21 CHIEF JUSTICE ROBERTS: Thousands?

22 GENERAL PRELOGAR: -- done it in a --
23 in a number of cases. Some of those involve
24 special statutory review provisions, so I do
25 want to box those off. But I acknowledge, yes,

1 the Court has sometimes affirmed decisions that
2 we think the agency --

3 CHIEF JUSTICE ROBERTS: No, no,
4 sometimes, over and over and over again.

5 GENERAL PRELOGAR: But also never with
6 attention to the remedial arguments that we're
7 making here, and I -- I don't think it's ever
8 too late for this Court to give the statute its
9 proper construction when you actually look at
10 its text, context, and history.

11 CHIEF JUSTICE ROBERTS: Thank you.

12 GENERAL PRELOGAR: And I don't
13 think --

14 CHIEF JUSTICE ROBERTS: Justice
15 Thomas?

16 Justice Alito?

17 JUSTICE ALITO: Well, I want to come
18 back to the last question that I asked you and
19 break it down, and I hope you can give me a
20 succinct answer to these questions that I'm
21 going to ask.

22 If "shall" means "shall," is there
23 a -- well, let me amend that. Does the statute
24 say that an alien who has been convicted of an
25 aggravated felony shall be detained?

1 GENERAL PRELOGAR: Yes, it says that
2 in Section 1226(c).

3 JUSTICE ALITO: All right. And I'm
4 looking at the final memorandum, pages 114 to
5 115 of the Joint Appendix, where you set out
6 certain aggravating factors, which includes a
7 serious prior criminal record, the gravity of
8 the offense of conviction and the sentence
9 imposed, and then a list of mitigating factors,
10 advanced or tender age, mental condition,
11 various others, military or public service.

12 And then you say on 115: "Our
13 personnel should not rely on the fact of
14 conviction or the result of the database search
15 alone."

16 Now that's what I was getting at.
17 Congress has set out certain priorities. With
18 respect to an alien convicted of an aggravated
19 felony, it says that person shall be detained.

20 And what your final memorandum says is
21 no, that person shall not be detained based
22 solely on this prior conviction for an
23 aggravated felony. You have to take into
24 account that as one of the aggravating factors
25 and then all of these mitigating factors and

1 then the officer must make a determination.

2 So we have one set of priorities
3 established by Congress and a different set of
4 priorities established by the executive branch.
5 Isn't that correct?

6 GENERAL PRELOGAR: No, that's wrong
7 because the Guidelines govern only decisions
8 about apprehension and removal, whether to
9 charge a non-citizen in the first place. And I
10 think that the kind of mismatch here is that
11 1226(c) governs when DHS has already made the
12 charging decision, so there are pending removal
13 proceedings, and at that point, if we have a
14 non-citizen in custody, we will detain them if
15 they're described in Section 1226(c). ICE does
16 not make release determinations without running
17 that analysis.

18 And so I don't think that there is any
19 fundamental override here of the detention
20 provisions because the Guidelines don't have
21 anything to do with continued detention.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 JUSTICE SOTOMAYOR: Let's break that
25 down again, okay? (a) and (c) operate only when

1 you've decided to remove somebody, correct?

2 GENERAL PRELOGAR: Correct, because of
3 the pending removal proceedings --

4 JUSTICE SOTOMAYOR: All right.

5 GENERAL PRELOGAR: -- pending a
6 decision on whether the non-citizen --

7 JUSTICE SOTOMAYOR: Nothing in (a) and
8 (c) takes away your discretion, explicitly or
9 otherwise, to decide not to remove any
10 particular person?

11 GENERAL PRELOGAR: That's correct.

12 JUSTICE SOTOMAYOR: What it says is
13 you have to do something when you decide to
14 arrest and detain and remove, correct?

15 GENERAL PRELOGAR: And, at that point,
16 we are prohibited from release if there are
17 pending removal proceedings.

18 JUSTICE SOTOMAYOR: So that at any
19 point in this process, you're saying the
20 Guidelines -- we're focusing in on the
21 Guidelines as making the determination of
22 whether to detain, you're saying, no, you're
23 making a determination as to whether to remove
24 or not, correct?

25 GENERAL PRELOGAR: Yes, that's

1 correct.

2 JUSTICE SOTOMAYOR: And it's only then
3 that (a) and (c) come into effect?

4 GENERAL PRELOGAR: Yes.

5 JUSTICE SOTOMAYOR: All right.

6 GENERAL PRELOGAR: And we've been
7 talking about 1226, but, Justice Sotomayor, your
8 questions touch on 1231 as well, which has in --
9 in subsection (a) a directive that DHS shall
10 remove non-citizens with final orders of
11 removal. But this Court already said in *Reno*
12 versus *AADC*, in -- in Justice Scalia's opinion
13 for the Court, that the executive retains
14 discretion not to remove at all stages,
15 including after a final order of removal.

16 So I think we see the same kinds of
17 situations, and these principles of enforcement
18 discretion apply there.

19 JUSTICE SOTOMAYOR: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?

21 JUSTICE KAGAN: You referred a little
22 while ago to past administrations' practice and
23 said what you were doing was consistent with
24 that or at least that Texas's view would be
25 inconsistent with that, and I wondered if you

1 could give a little bit more detail on that.

2 And I'll tell you just that it seems
3 to me that your -- the -- you have a quite
4 strong argument under 1231, but I'm not so sure
5 of your argument under 1226. And so if you
6 would address each of the two provisions and
7 what prior administrations have done.

8 GENERAL PRELOGAR: Yes, I would be
9 happy to. So the -- the agency has always
10 implemented these provisions, which were added
11 to the INA in 1996, in recognition that it
12 retains its background principles of enforcement
13 discretion. And so it has never implemented the
14 statute with respect to 1226, 1231, or some of
15 the other big ones, like 1225, that use "shall"
16 as creating an inflexible mandate to -- to go
17 after each and every one of the non-citizens
18 described in those provisions. And that has
19 been constant.

20 With respect to 1226(c) itself, the
21 other thing that's been constant is what I was
22 describing to Justice Alito, which is that DHS
23 has long understood (c)(2) to require mandatory
24 detention in circumstances where we have pending
25 removal proceedings and already have an

1 individual in custody. But it has never
2 interpreted that provision as requiring it to go
3 out and arrest every individual who's described
4 in that provision, both because that would be an
5 impossible burden and because it's never
6 understood that the "shall" language, the bare
7 use of "shall" with respect to the "take into
8 custody" provision to create that kind of
9 inflexible mandate.

10 JUSTICE SOTOMAYOR: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch?

13 JUSTICE GORSUCH: We haven't had a
14 chance to discuss 1252 much, and I'd like your
15 thoughts on that. In particular, if we were to
16 agree with you on that, do we have to address
17 your standing arguments, let alone the merits?

18 GENERAL PRELOGAR: No, I think that if
19 the Court agreed with us on the scope of
20 1252(f)(1) as prohibiting the vacatur that was
21 ordered here, the Court can say that alone and
22 stop. That's also a jurisdictional threshold
23 issue in this case.

24 JUSTICE GORSUCH: Is it
25 jurisdictional, though? We've had some question

1 about that last term, as you'll recall, as well
2 and whether it's just a remedial -- a limitation
3 on remedial options for the district court
4 or whether it is truly a jurisdictional statute.

5 GENERAL PRELOGAR: So we think that it
6 is clearly a jurisdictional obstacle to entering
7 a form of relief, and Congress is free to attach
8 the jurisdictional label and the jurisdictional
9 consequences to provisions like this one which
10 take particular remedies off the table. And
11 1252(f)(1) itself says that courts shall not
12 have jurisdiction to -- to issue these kinds of
13 orders that enjoin or restrain. So we think
14 that it does clearly function as a
15 jurisdictional limit.

16 JUSTICE GORSUCH: Okay. And your --
17 your friend on the other side has made certain
18 arguments about why 1252 doesn't apply, and I
19 just want to give you a chance to address those.

20 GENERAL PRELOGAR: So we think that
21 their arguments are fundamentally inconsistent
22 with both the text and the purpose of the
23 statute. Their argument seems to be that the
24 word "restrain" in the statute does no work at
25 all, that "enjoin and restrain" is just

1 superfluous, Congress didn't need to use that
2 term. But we think that that clearly ignores
3 the fact that the Court generally doesn't
4 interpret statutory language to produce that
5 kind of superfluity.

6 And then there's a second statutory
7 principle here, where the very next subsection
8 of (f)(2), 1252(f)(2), uses just the term
9 "enjoin." And that implicates the principles
10 this Court has articulated that Congress
11 generally means different things when it uses
12 different language in adjacent subsections of
13 the same provision.

14 And then, on top of all of that, we
15 think that Texas's arguments would essentially
16 create a giant loophole in what Congress was
17 attempting to do with this statute. The whole
18 point of this provision is to prevent lower
19 courts, not this Court, the lower courts from
20 entering coercive programmatic relief while the
21 case is being litigated, and that's precisely
22 the effect of universal vacatur here.

23 JUSTICE GORSUCH: You indicated
24 earlier, I believe, that you thought a district
25 court could still enter a declaratory judgment,

1 and at least my recollection is the federal
2 government tries to abide by declarations of the
3 law. So how is that -- how does that fit into
4 your theory?

5 GENERAL PRELOGAR: So I think a
6 declaratory judgment would not have been
7 coercive in the same way. If the district court
8 had entered a declaratory judgment here, it
9 wouldn't have required us to comply. We would
10 have thought that that judgment was entered in
11 error. We would have pursued our appeal rights.
12 And I think that DHS would have been free to
13 continue to apply the Guidelines in the interim
14 while the case was proceeding.

15 JUSTICE GORSUCH: Okay. And on the
16 APA argument, some of us didn't have the benefit
17 of sitting on the district -- the D.C. Circuit
18 --

19 (Laughter.)

20 JUSTICE GORSUCH: -- five times before
21 breakfast entering these orders. And, you know,
22 I stare at the language and I -- I'm -- I hear
23 your argument. I think your friend on the other
24 side's going to point us most specifically to
25 the -- the language "set aside" in 706 and --

1 and hang his hat there if I had to guess, and
2 I'd just like to hear your response.

3 GENERAL PRELOGAR: So we have never
4 disputed that "set aside" can sometimes mean
5 "vacate." But I think it's equally clear that
6 that text can sometimes bear the meaning of
7 "disregard" or literally "set to the side."
8 That's how the Court uses it when it reviews
9 federal statutes. For example, if the Court
10 thinks a statute is invalid, it might say we're
11 setting aside the statute --

12 JUSTICE GORSUCH: We don't erase them
13 from the books.

14 GENERAL PRELOGAR: Correct. You do
15 not vacate or void the statute and take it off
16 the statute books. Instead, you literally
17 disregard it for purposes of fixing the rights
18 of the parties before you. And we think that's
19 how Section 706 uses the term.

20 The reason for that is because 706 is
21 setting forth a rule of decision that governs
22 across all of the cases where APA claims can be
23 brought, including things like habeas actions or
24 judicial enforcement -- or judicial review of --
25 of agency enforcement actions. And there, it

1 would be just like a statute. You can't vacate
2 an agency regulation in a habeas case. You
3 would have to set it to the side.

4 It's Section 703 that sets forth the
5 remedies under the APA, not 706, and we think
6 that if you look at the context here and also
7 the history that there was no intent by Congress
8 to create a truly unprecedented, sweeping,
9 non-party-specific remedy, it -- it fortifies
10 the conclusion that that would not be the proper
11 interpretation of the text.

12 JUSTICE GORSUCH: I think it is kind
13 of interesting that remedies are expressly
14 listed in 703, that Congress would sneak in the
15 most important remedy and by far the most
16 sweeping one in Section 706, what is it, (2)(b),
17 something like that, which governs the scope of
18 review, and that nobody at the time, Davis,
19 Jaffe, you know, people who noticed things,
20 noticed this innovation.

21 GENERAL PRELOGAR: That's correct. We
22 think that certainly, if Congress were going to
23 take the action of creating this kind of
24 unprecedented remedy that operates directly on
25 the agency rule itself rather than with respect

1 to the parties, someone would have said
2 something and Congress would have made that much
3 clearer in the text of the statute and not
4 separately addressed remedies in 703.

5 JUSTICE GORSUCH: Thank you, General.

6 CHIEF JUSTICE ROBERTS: Justice --

7 JUSTICE KAVANAUGH: I have questions
8 on each bucket. So, on standing, if a new
9 administration comes in and says we're not going
10 to enforce the environmental laws, we're not
11 going to enforce the labor laws, your position,
12 I believe, is no state and no individual and no
13 business would have standing to challenge a
14 decision to, as a blanket matter, just not
15 enforce those laws, is that correct?

16 GENERAL PRELOGAR: That's correct
17 under this Court's precedent, but the framers
18 intended political checks in that circumstance.
19 You know, if -- if an administration did
20 something that extreme and said we're just not
21 going to enforce the law at all, then the
22 President would be held to account by the
23 voters, and Congress has tools at its disposal
24 as well.

25 JUSTICE KAVANAUGH: And what -- and

1 what are those tools? Because you mentioned
2 earlier this would be extraordinary. But I
3 think Congress in 1996 and today, but in 1996,
4 which is the relevant date, thought the
5 immigration problem in the United States was
6 extraordinary and the lack of enforcement to the
7 degree that Congress as of 1996 wanted. And so
8 that's why they toughened the laws and
9 constrained the executive's discretion. At
10 least that would be, I think, the position.

11 So, if courts aren't going to be able
12 to enforce those congressional mandates, what
13 are the exact tools that Congress has to make
14 sure that the laws are enforced in the United
15 States?

16 GENERAL PRELOGAR: Well, I think that
17 Congress obviously has the power of the purse.
18 It can make the executive's life difficult with
19 respect to its decisions about how to
20 appropriate funds. Congress has oversight
21 powers.

22 These were the same kinds of
23 considerations that the Court cited in *Raines*
24 versus *Byrd* when it was confronted with some of
25 these same separation of powers, structural,

1 constitutional considerations and re -- and --
2 and identified the fact that Congress wasn't
3 powerless to act.

4 But, Justice Kavanaugh, if I could
5 just for a minute press on the premise of your
6 question that Congress in 1996 intended these to
7 be judicially enforceable mandates, I guess I
8 would say two things.

9 One is that Congress has never
10 actually appropriated funds to DHS to permit
11 treating all of these "shalls" as mandatory,
12 judicially enforceable "shalls," and the other
13 thing is that Congress specifically precluded
14 judicial review in provisions like 1226(e) and
15 1231(h) --

16 JUSTICE KAVANAUGH: And --

17 GENERAL PRELOGAR: -- which we haven't
18 had a chance to discuss.

19 JUSTICE KAVANAUGH: Right. Those
20 are --

21 GENERAL PRELOGAR: And I think that
22 demonstrates --

23 JUSTICE KAVANAUGH: -- those are good
24 arguments, except we have precedent that's
25 against you on those, so -- at least on 1226.

1 And I -- I take -- I know you have a response to
2 that, but we don't need to go into it now.

3 But -- but I think your position is,
4 instead of judicial review, Congress has to
5 resort to shutting down the government or
6 impeachment or dramatic steps if it -- if some
7 administration comes in and says we're not going
8 to enforce laws or at least not going to enforce
9 the laws to the degree that Congress by law has
10 said the laws should be enforced, and -- and
11 that's forcing -- I mean, I understand your
12 position, but it's forcing Congress to take
13 dramatic steps, I think.

14 GENERAL PRELOGAR: Well, I think that
15 if those dramatic steps would be warranted, it
16 would be in the face of a dramatic abdication of
17 statutory responsibility by the executive.

18 And there's a reason we don't see that
19 throughout our history because of those
20 political checks that prevent the executive from
21 taking those kinds of actions. And it would be
22 like saying, if the President decided to pardon
23 every federal criminal and release them all,
24 obviously, no one could sue about that, but
25 there's a reason that doesn't happen.

1 JUSTICE KAVANAUGH: Right, but there's
2 also -- just to press on this a little more,
3 you -- you make a big point in your brief
4 this -- this is unusual, this is rare, but it's
5 unusual for Congress to mandate particular
6 exercises of enforcement or prosecutorial
7 discretion. Most statutes in -- do not say the
8 executive shall detain, shall prosecute. And I
9 think that's why this is an unusual situation,
10 but I take your point on that.

11 Can I move to remedy then because I
12 still have -- I have some problems with that, as
13 you might imagine.

14 Set aside, you said the judges on the
15 D.C. Circuit haven't paid attention to text,
16 context, and history. I guess I would
17 respectfully push back pretty strongly on that.
18 I sat with judges like Silberman and Garland and
19 Tatel and Edwards and Williams. They paid a lot
20 of attention to that.

21 And the government never has made this
22 argument in all the years of the APA, at least
23 not that I remember sitting there for 12 years.
24 I haven't seen it made. It's a pretty radical
25 rewrite, as the Chief Justice says, of what's

1 been standard administrative law practice.

2 And you devote three pages in your
3 brief to this complete change that all these
4 judges have been doing for all these years, and
5 the government comes up and acknowledges that in
6 case after case after case with labor, energy,
7 environmental. And I think it's a big step.

8 And you say they're not paying
9 attention to the text. Yeah, we did. "Set
10 aside" means "set aside." That's always been
11 understood to mean the -- the rule's no longer
12 in place. No one's really had this -- no case
13 has ever said what you're saying anywhere.

14 No one -- you know, it's a recent law
15 review proposal, good for that, but, you know,
16 that's not been the law. And so I find it
17 pretty astonishing that you come up here and
18 make -- and I realize it's not your -- you know,
19 the main part of your submission, but I'm just
20 going to push back pretty strongly on the, you
21 know, three pages for just -- just toss out
22 decades of -- of this Court's law, of circuit
23 law.

24 And you've got Public Citizen and
25 Texas coming after you on this. They don't

1 usually unite in a administrative law case in my
2 experience, and they both say your position is
3 completely unprecedented on that. So that's not
4 really a question, but that is a --

5 (Laughter.)

6 JUSTICE KAVANAUGH: -- that is a
7 comment on which -- what I think is a pretty
8 extreme argument, and I know it's not your whole
9 argument, but this piece of the argument -- so I
10 don't want to overstate what I'm saying here --
11 just this piece of your argument I think is
12 pretty extreme, so --

13 GENERAL PRELOGAR: So, Justice
14 Kavanaugh, let me say first, let me clarify,
15 that, of course, I didn't mean that the D.C.
16 Circuit isn't generally paying attention to
17 text, context, and history, and I should have
18 been more precise that I don't think that the
19 Court has ever had the opportunity to actually
20 engage with the arguments that we're making here
21 in this case.

22 And -- and what I was trying to -- to
23 point out is that I don't think it's too late
24 for courts to start to engage with these
25 arguments. And I recognize that we ourselves

1 are landing on them somewhat late in the day,
2 but we have been making these arguments
3 consistently.

4 I think the first time we started to
5 make them was in 2008 in the Summers versus
6 Earth Island Institute case. We've repeated it
7 pretty consistently since the Little Sisters
8 case in the last administration and in cases
9 here, and some lower courts, now that they are
10 actually looking at our arguments, have
11 recognized the force of those arguments.

12 It's not accurate to say that no court
13 ever has considered this or accepted it. The
14 Fourth Circuit has said that universal vacatur
15 is not a permissible remedy under the APA.
16 Chief Judge Sutton in the Arizona versus Biden
17 case in his separate concurrence recognized the
18 force of our arguments about vacatur under
19 Section 706. A few courts --

20 JUSTICE KAVANAUGH: And what does it
21 mean just in this case if -- does it mean, for
22 example, if we rule against you on the other
23 issues but then agree with you on the remedy,
24 the -- the set aside point, does that mean the
25 government can then ignore the substance of this

1 Court's ruling in other states?

2 GENERAL PRELOGAR: No, not at all. I
3 think, if this Court then --

4 JUSTICE KAVANAUGH: Why not?

5 GENERAL PRELOGAR: -- determined to
6 issue -- well, this Court would have authority,
7 of course, to issue a declaratory judgment and
8 we would abide by that throughout the nation if
9 this Court said what the law meant in this area.

10 So I don't think it suggests that
11 courts are going to be powerless to issue
12 remedies here. They'll just be confined to the
13 traditional legal remedies that preexisted the
14 APA, as Congress intended, and that can include
15 in other contexts injunctions, injunctive
16 relief. It can include declaratory judgments
17 and any other permissible remedy that preexisted
18 the APA.

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 JUSTICE BARRETT: Let me pick up on
23 the vacatur point. So one question I have,
24 obviously, the Chief and Justice Kavanaugh have
25 pointed out that the courts of appeals,

1 particularly the D.C. Circuit, have employed the
2 remedy of vacatur for a long time.

3 Why isn't it possible -- and let's say
4 that I agree with you and agree with some of the
5 scholarship that says that this was not
6 contemplated at the time of the APA's enactment.

7 Why can't remedial authority evolve
8 over time? You know, even if injunctions and
9 declaratory judgments are what those, you know,
10 who enacted the APA, Congress at the time,
11 scholars at the time, Jaffe, thought that
12 didn't -- vacatur didn't occur to them.

13 Remedial authority is a flexible
14 concept, and so maybe the courts of appeals have
15 expanded that concept. Why would that be
16 impermissible?

17 GENERAL PRELOGAR: Well, I think it
18 would be inconsistent with how the Court
19 ordinarily approaches these types of questions
20 of statutory interpretation.

21 And I think, if you agreed with us
22 that this is not what Congress meant to
23 authorize when it enacted Section 706 of the
24 APA, then there would be kind of no basis to
25 alter the text at this state and to suggest that

1 actually the Court can read into that language
2 that all agree was not intended to cover vacatur
3 to --

4 JUSTICE BARRETT: But set aside is
5 broad, right? It's not specific. And even in
6 703, it says including actions for declaratory
7 judgments or writs of, you know, probatory or
8 mandatory injunctions. It doesn't exclude it.

9 And given that set aside is broad, you
10 know, it's -- it's -- it's -- you're asking for
11 a narrowing construction of it. And I guess
12 what I'm saying is, when set aside could be read
13 to include vacatur, doesn't preclude it, why is
14 it not subject to evolution?

15 GENERAL PRELOGAR: Well, I think that
16 there is an additional problem here with trying
17 to expand it in that basis insofar as it would
18 expand beyond party-specific relief, and that
19 implicates its own considerations under Article
20 III and implicates the same arguments we've been
21 making about nationwide injunctions, that when
22 courts issue remedies that go beyond the parties
23 in the case, it can take courts beyond the
24 traditional forms of relief that are authorized,
25 whether under Article III or under the statute.

1 So I think, here, reading into the
2 statute a new unprecedented remedy that would
3 apply on the agency action itself instead of
4 with respect to the parties would be
5 problematic.

6 JUSTICE BARRETT: Okay. I'm glad you
7 brought that up because I have a question about
8 that too. Why don't you treat this then as a
9 jurisdictional argument?

10 You concede that vacatur could be
11 appropriate in a special statutory scheme but
12 say simply that as a matter of statute,
13 statutory interpretation, that APA doesn't
14 authorize it.

15 Why isn't it a matter of Article III
16 jurisdiction? Why do you concede that it would
17 be acceptable if Congress specifically
18 authorizes it?

19 GENERAL PRELOGAR: Well, you know, as
20 this Court well knows from its various cases,
21 trying to parse that line on whether specific
22 statutes are jurisdictional or not, it -- it can
23 often require Congress to speak very clearly if
24 it's trying to attach that jurisdictional label.
25 And, here, with respect to the remedies that the

1 APA contemplates, we don't --

2 JUSTICE BARRETT: No, no, no. I mean
3 as a matter of Article III.

4 GENERAL PRELOGAR: As a matter of
5 Article III jurisdiction, you know, I guess it
6 would be possible to think about it that way.
7 We haven't made that argument, but I wouldn't
8 want to shut the door on it because of the --
9 the particular concerns with extending beyond
10 party-specific relief.

11 JUSTICE BARRETT: Last question on
12 jurisdiction. You know, in response to some of
13 Justice Gorsuch's questions about whether we
14 should interpret 1252 to be a preclusion of
15 remedial authority or actually tied into
16 jurisdiction, you said you thought it was
17 jurisdictional.

18 If you think that the APA doesn't
19 authorize the remedy of vacatur, is that
20 jurisdictional --

21 GENERAL PRELOGAR: We --

22 JUSTICE BARRETT: -- by that same
23 logic, I mean?

24 GENERAL PRELOGAR: So no, because I
25 think, if the APA doesn't authorize vacatur in

1 the first place, then you wouldn't have any
2 issue under Section 1252(f)(1). So we're not
3 disputing that a set-aside order in the terms of
4 just setting an unlawful agency action to the
5 side for purposes of rendering the --

6 JUSTICE BARRETT: No, no. Maybe I
7 didn't articulate my question well. I
8 understand that 1252 precludes jurisdiction.

9 GENERAL PRELOGAR: Yes.

10 JUSTICE BARRETT: I'm saying that if a
11 court lacks jurisdiction when it lacks the
12 authority to issue a particular remedy, why
13 wouldn't we understand the APA then -- why
14 wouldn't we understand this issue as a matter of
15 statutory interpretation to be jurisdictional?
16 Because, if the district court is entertaining
17 an action to award a particular kind of relief
18 that it lacks authority to award, would that be
19 jurisdictional?

20 GENERAL PRELOGAR: We have not
21 previously argued that this APA limit is
22 jurisdictional. The reason we made the
23 arguments under 1252 is because it specifically
24 says no court shall have jurisdiction to do
25 this, and we think that that is Congress clearly

1 acting to attach jurisdictional consequences to
2 an exercise of remedial authority. But I take
3 the point and I think it might be possible to
4 conceive of a jurisdictional basis as well if a
5 statute is actually preventing a remedy from
6 being ordered.

7 JUSTICE BARRETT: Okay. Last
8 question. This one goes to the merits. So
9 Justice Alito was asking you -- you were kind of
10 going back and forth with him about the
11 complexities of making the determination whether
12 a non-citizen even falls in one of these
13 categories in the first place.

14 And I just wanted to give you a chance
15 to address how -- you know, there's a portion of
16 the statute that talks about your -- it's in (c)
17 -- (d), "the Attorney General shall devise and
18 implement a system to make available daily on a
19 24-hour basis to state, federal, and local
20 authorities to determine whether individuals
21 arrested for such authorities for aggravated
22 felonies are aliens." And then it goes on.

23 Why isn't that where the discretion
24 and the resources should be channeled as a
25 matter of statute rather than into the holistic

1 inquiry that the memorandum dictates?

2 GENERAL PRELOGAR: So I -- I certainly
3 acknowledge the point that Congress might have
4 anticipated that it would be easier to make this
5 determination about aggravated felony status and
6 it set up mechanisms to try to ensure that there
7 was information sharing between the federal
8 government and the states, and I think maybe
9 Congress couldn't have anticipated the -- the
10 developments in this Court with respect to the
11 categorical approach and the legal complexities
12 that would raise about trying to monitor any
13 number of varied state statutes that can be
14 drafted in very different ways, with the end
15 result being that before it's possible to
16 determine with certainty that someone is subject
17 to 1226(c)(2), it often involves an investment,
18 a considerable investment, of resources and
19 consultation between officers and -- and legal
20 advisors to try to ascertain the scope of that
21 provision.

22 JUSTICE BARRETT: But you do have such
23 a system?

24 GENERAL PRELOGAR: Yes, we do have
25 systems to share information between states and

1 the federal government with respect to those who
2 -- who have criminal convictions in state court.

3 JUSTICE BARRETT: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: Yes. As you might
7 imagine, I would like to circle back to the
8 concerns that the Chief Justice and Justice
9 Kavanaugh raised about vacatur and the argument
10 that you're making in this case. And --

11 JUSTICE KAGAN: Seems to be a kind of
12 D.C. Circuit cartel.

13 (Laughter.)

14 JUSTICE JACKSON: It is. It is.

15 And, in particular, the -- the -- the
16 conceptual problem that I'm having with your
17 argument, you point to text, context, and
18 history, and I understand those things, but,
19 ordinarily, there's a symmetry between the claim
20 that is being made in a case and the remedy that
21 is provided to a successful plaintiff. And your
22 remedy, the way that you're reading this,
23 actually creates a disconnect for me.

24 Here's what I mean. It is clear that
25 the claim under the APA is about the manner in

1 which the agency has exercised its discretion.
2 And we know -- we know that agencies have no
3 inherent authority. They get all of their power
4 to make valid and legally binding policies from
5 Congress, and Congress has said in the APA that
6 in order to make valid and legally binding
7 policies, agencies have to follow certain
8 procedures. So, when a plaintiff is making a
9 claim under the APA, they're complaining about
10 the agency's failure to follow the procedures
11 that are necessary in order to reach a valid and
12 legally binding result.

13 Given that that's the case, I think
14 there's a disconnect to say that the successful
15 plaintiff only gets a remedy that is about the
16 application of that rule to them, because their
17 complaint is not about the application. Their
18 complaint is that the agency did not have the
19 authority to do what it did because it didn't
20 follow the procedures under the APA. It's as
21 though they're saying what the agency did is
22 void. It's a null set because they did not
23 follow the procedures that Congress required.

24 So I just don't even understand --
25 setting aside the -- how you read the statute to

1 get to that result, it seems to me to not make
2 sense to say that the remedy is to allow the
3 agency to apply its void, defective rule to
4 anyone else who's not the plaintiff.

5 GENERAL PRELOGAR: So, Justice
6 Jackson, I think where I disagree with the --
7 with your analysis is in suggesting that a
8 plaintiff in a case isn't protesting the
9 application of the invalid agency regulation to
10 that party. That's the very nature of this kind
11 of dispute. Now it might be the case that the
12 -- the arguments they're making outlie --

13 JUSTICE JACKSON: But, I'm sorry, it's
14 not the nature, because -- I mean, obviously,
15 they -- they are saying it was applied to them
16 as a matter of standing. You have to have it
17 applied to you in order to make the charge.

18 But the claim is that the agency has
19 failed to have notice and comment where it was
20 required or the agency has engaged in arbitrary
21 and -- and capricious decision-making. And, if
22 that's true, what it means is that the agency
23 does not have a valid exercise of its discretion
24 per Congress's requirements. The result then is
25 that the agency doesn't have a rule that it can

1 apply.

2 And the statute says very plainly the
3 most commonsense result of that is just like in
4 a contracts case. If a court were to find in a
5 contracts case that the contract is void because
6 it wasn't properly formed, you don't -- the
7 result is not you can apply it to whomever, just
8 not the plaintiff standing there. It's -- it's
9 not a thing anymore. And -- and -- and that's
10 to me what the statute says. You set it aside
11 because you haven't formed it properly and
12 consistently with what Congress has said.

13 GENERAL PRELOGAR: I certainly
14 acknowledge that when a plaintiff is challenging
15 the agency's decision-making, their legal theory
16 could suggest that the agency regulation is
17 invalid in all of its applications and as
18 applied to other parties too. But I still think
19 that in that case, just like in the case of
20 interpreting a statute, the proper remedy is the
21 party-specific relief of --

22 JUSTICE JACKSON: But we don't have --
23 the APA is a different kind of claim. It's not
24 a -- the statutory claim is not about Congress's
25 authority to make the policy decision. Did they

1 follow the right procedures in making it?

2 Let me ask you about 1252(f) because
3 that's another basis that you sort of suggest
4 that courts' authority is limited. When I look
5 at 1252(f), it says that there's no jurisdiction
6 or authority to enjoin or restrain the operation
7 of the provisions of this subchapter, which
8 seems to me as though Congress is prohibiting an
9 injunctive -- an injunction of the statute.
10 You've interpreted it, I think, to mean
11 operation in the sense of any regulations, any
12 policies of the government that are implementing
13 that statute.

14 But I guess I'm concerned about that
15 because, in (e)(3), just the provision prior,
16 Congress was very clear about spelling out
17 things like regulations, guidelines, et cetera.
18 I know that's a different provision because it
19 applies to expedited removal, but Congress knows
20 how to say when it's talking about claims being
21 brought about guidelines, procedures, and things
22 that the agency does. And yet, in this statute,
23 in (f), which would, I think, also apply to (e),
24 it talks about the operation of the statute.

25 So why isn't really what's going on

1 here that Congress didn't want its new
2 regulations, its new policies concerning
3 immigration to themselves be enjoined, and it
4 wasn't really talking about the agency's
5 implementation in this -- in this provision?

6 GENERAL PRELOGAR: So I think that
7 that approach would be inconsistent with the
8 Court's decision last term in Aleman Gonzalez,
9 where the claims of the non-citizens in that
10 case is that they were entitled to bond hearings
11 under these provisions, and the Court recognized
12 that this bar prevents an injunction that would
13 prevent the executive from implementing its
14 policies with respect to bond under that
15 statutory language. And so I think that the
16 same argument potentially could have been made
17 there, that that's not actually enjoining the
18 statute; it's enjoining the agency's policies
19 that are consistent with, in the agency's views,
20 those statutory provisions. But the Court --

21 JUSTICE JACKSON: All right. So what
22 do we do about (f) as it applies to (e)? And,
23 again, I know (e) is not in this case, but, if
24 we're going to be interpreting (f), do you -- do
25 you -- is it your view that the limitation on

1 injunctive relief, as you have interpreted it in
2 (f), applies to challenges on the validity of
3 the system in (e), in the -- in the expedited
4 removal context?

5 GENERAL PRELOGAR: Yes. I think that
6 we would take that position because I -- you
7 know, as we understand this Court's
8 interpretation in Aleman Gonzalez, it focuses on
9 whether the claims in the case are premised on
10 these statutory provisions and are seeking to
11 require DHS to implement the covered INA
12 provisions in a particular way.

13 And so, if the theory of the case were
14 under 1226, any of its provisions, DHS is
15 required to interpret the statute in a
16 particular way or to take particular action,
17 that comes within the bar that --

18 JUSTICE JACKSON: All right. But then
19 why --

20 GENERAL PRELOGAR: -- 1252 announces.

21 JUSTICE JACKSON: -- then -- then --
22 then -- then we have a statute here at (e) in
23 which Congress has authorized very specifically
24 a claim that Congress has said that you can
25 bring a case in order to challenge a regulation,

1 policy directive, written policy guideline, or
2 written procedure of the Attorney General or,
3 here, DHS, Congress has allowed that, and you're
4 suggesting that the only relief is declaratory
5 relief under those circumstances that you don't
6 even have to follow really?

7 GENERAL PRELOGAR: So there is the
8 opportunity for declaratory relief in any court.
9 1252(f)(1) also permits coercive relief on
10 behalf of individual non-citizens, and
11 1252(f)(1) preserves this Court's authority to
12 enter any form of relief. So I think that those
13 are the remedies that Congress delineated under
14 these statutory provisions.

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

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 The states proved their standing at
24 trial based on harms well recognized by this
25 Court's precedents, prevailed on merits

1 arguments grounded firmly in the INA's text, and
2 received vacatur, the standard APA remedy.

3 Petitioners respond by attempting to
4 rewrite the law of Article III, the INA, and the
5 APA. They are wrong.

6 Petitioners call the states' standing
7 illegitimate because -- because it is based on
8 the costs states incur when Petitioners violate
9 federal law. But such costs fall well within
10 those held as sufficient in at least
11 Massachusetts versus EPA and Department of
12 Commerce.

13 As this Court has recognized before,
14 the states bear many of the consequences of
15 federal immigration decisions. Those
16 consequences fit comfortably in this Court's
17 traditional Article III standing framework.

18 On the merits, the final memorandum is
19 unlawful for multiple reasons, most clearly
20 because it treats Section 1226(c) as
21 discretionary, while both this Court and every
22 previous administration have acknowledged it as
23 mandatory.

24 Petitioners respond by appealing to
25 resource constraints and their prosecutorial

1 discretion, both of which are beside the point.

2 The states do not claim the
3 Petitioners must remove anyone in particular.
4 Rather, Petitioners' detention obligations run
5 only to -- arise before and after their decision
6 to prosecute and run only to a small subset of
7 this nation's illegal aliens.

8 Finally, eliminating the APA's vacatur
9 remedy would jettison nearly a century of
10 administrative practice. When Congress
11 empowered federal courts under Section 706 to
12 set aside agency action, it authorized courts,
13 consistent with pre-APA practice, to vacate
14 unlawful rules, not merely to disregard them.
15 This Court should not hold otherwise.

16 I welcome the Court's questions.

17 JUSTICE THOMAS: General Stone, I'd
18 like you to respond to some of our back and
19 forth about 1252(f), particularly as it affects
20 your standing in this case and whether or not
21 you can obtain the remedies that you seek.

22 For example, is vacatur -- vacatur
23 actually possible under 1252(f)?

24 MR. STONE: Certainly, Justice Thomas.

25 So, in our view, vacatur is left

1 available by 1252(f)(1) for several reasons.
2 First of all, vacatur is not injunctive relief.
3 The terms "enjoin" and "restrain" in 1252(f)(1)
4 speak to two traditional kinds of injunctive
5 relief: injunctions and temporary restraining
6 orders.

7 And perhaps if there were other orders
8 that operated like them in key regards, which is
9 to say they operated in personam, they had a
10 prohibitory or a mandatory character, it might
11 bar those as well.

12 Vacatur is, as this Court has put in
13 Monsanto, a much less drastic remedy, and the
14 most important way in which it's less drastic
15 can easily be seen by the perspective of someone
16 who, in fact, has been enjoined.

17 A party who's been enjoined to do or
18 not do something is effectively under the
19 supervision of a federal district judge and has
20 to go to that district judge or suffer their
21 counterparty going to that district judge if
22 they want to attempt to re-implement or
23 otherwise take the action that's been -- that's
24 been subject to that injunction. No such
25 obligation and no collateral contempt potential

1 exposure exists with vacatur.

2 Now my friend on the other side said
3 quite -- quite candidly that in the event that
4 Texas were to have received a declaration, of
5 course, and I believe her words were, the United
6 States would follow that declaration or would be
7 bound by it.

8 It's very hard to explain how it is
9 that vacatur, which acts against -- directly
10 against a rule and does not in personam bind any
11 officer or agency of the United States, is
12 coercive or otherwise prohibited in the meaning
13 of 1252(f)(1), but that declaratory relief,
14 which the United States acknowledges it would,
15 in fact, follow, is somehow not coercive.

16 I think -- I think that line is
17 evanescent, if it exists at all, and so the best
18 reading of 1252(f)(1) is only to injunctions and
19 those sorts of orders and that Texas, the
20 state --

21 JUSTICE KAGAN: It strikes me,
22 General, that you had a better argument on this
23 score and maybe a good argument before Aleman
24 Gonzalez, but after Aleman Gonzalez, it -- it
25 seems hard to me for you to make the case.

1 I'm just going to read you a quote
2 there. We held that 1252(f)(1) "barred orders
3 that require officials to take actions that in
4 the government's views are not required by the
5 INA and to refrain from actions that again in
6 the government's view are allowed by the INA."

7 So wouldn't vacating the Guidelines
8 here require DHS officials to take enforcement
9 actions that in the government's view are not
10 required by the INA? It just falls with the --
11 the direct language of that decision?

12 MR. STONE: I don't think so, Your
13 Honor, and I have two points. First, vacatur is
14 self-executing. The vacatur order is affirmed
15 by this Court or, if it's issued otherwise in
16 any court, it acts against the -- it acts
17 against the challenged thing, the challenged
18 rule or order on its own and makes it legally
19 void. It does not require any action
20 whatsoever. It does not on its own prohibit any
21 action whatsoever.

22 And second, to the extent that
23 Petitioners have been attempting to draw a
24 distinction consistent with Aleman Gonzalez
25 between vacatur and declaratory relief, again, I

1 think there's no -- for purposes of what would
2 coerce or otherwise would restrain in the sense
3 of Aleman -- Aleman Gonzalez petitioners, an
4 adverse declaration saying that their -- that
5 the Guidelines, the final memorandum, has been
6 unlawful under 1226(c) and 1231 certainly has at
7 much -- at least as much coercive pressure -- I
8 think that's none -- but the same amount of
9 coercive pressure.

10 And so, if that's the case, if -- if
11 Petitioners are saying that 1230 -- that
12 1252(f)(1) removes all available remedies, then,
13 one, it's a very strange way of writing that
14 provision, and, two, they should come out and
15 say it and then say that, in fact, there are no
16 remedies available whatsoever. I just don't
17 think -- the vacatur/declaratory relief
18 distinction doesn't work.

19 JUSTICE GORSUCH: General, I take your
20 point about declaratory judgments, but just -- I
21 just want to press a little bit further on this
22 same point, and -- and that is, for purposes
23 of -- of standing and -- and redressability,
24 you -- you took the position, I believe, that
25 vacatur does solve Texas's problems because the

1 immigration laws will be enforced differently
2 without the Guidelines than with the Guidelines,
3 right?

4 MR. STONE: Yes. And to be a little
5 more specific, there are findings of fact from
6 the trial court --

7 JUSTICE GORSUCH: Sure. Sure.

8 MR. STONE: -- that the Guidelines --

9 JUSTICE GORSUCH: That support that.
10 Yeah.

11 MR. STONE: Yes.

12 JUSTICE GORSUCH: So, without the
13 Guidelines, the government will enforce the
14 immigration laws differently in a way that
15 satisfies Texas?

16 MR. STONE: Without the Guidelines,
17 yes. And just to specify a little bit, that
18 without the Guidelines, federal immigration
19 officials will no longer view their discretion
20 -- their mandatory obligations as discretionary.

21 JUSTICE GORSUCH: We can spin it out
22 as long as you want.

23 MR. STONE: I'm agreeing, Justice --

24 JUSTICE GORSUCH: But the answer is
25 yes, right?

1 MR. STONE: Yes, Your Honor.

2 JUSTICE GORSUCH: Okay. And if that's
3 the case, then why isn't a vacatur of the
4 Guidelines enjoining in the language that we
5 used last term the government's ability to
6 enforce the immigration laws in a certain way?

7 MR. STONE: In part because, Your
8 Honor, the essence of an injunction is not
9 whether or not people will react to it in a way
10 that -- that remedies someone's harm. It's that
11 they're compelled to.

12 Something about injunction doesn't
13 just say fix this person's injury. It says, you
14 must under pain of court supervision, under pain
15 of penalty, you must do these things or refrain
16 from them going --

17 JUSTICE GORSUCH: Well, isn't that
18 Texas's whole point, is that under 1226, 1231,
19 the government must do certain things and it's
20 not doing it because of the Guidelines. Getting
21 rid of the Guidelines will fix the problem, and,
22 therefore, the government is now effectively
23 required to enforce the immigration laws
24 differently than it otherwise would.

25 MR. STONE: Those are our merits

1 arguments as to 1226 and 1232(a).

2 JUSTICE GORSUCH: Mm-hmm.

3 MR. STONE: Our remedy is simply,
4 because the Guidelines are unlawfully causing
5 DHS agents essentially not to treat mandatory
6 things as -- or rather to treat mandatory things
7 as discretionary, they are as a matter of fact
8 reducing the number of detentions, et cetera.
9 But our relief would not coerce them into doing
10 anything. It's merely a matter of fact that DHS
11 agents would so respond. We're not asking for
12 anything coercive.

13 JUSTICE GORSUCH: Thank you.

14 JUSTICE BARRETT: But they could -- I
15 mean, the Guidelines are gone, but that doesn't
16 mean that ICE officers or DHS couldn't more
17 informally say we're going to exercise our
18 prosecutorial discretion not to institute a
19 removal proceeding against this particular
20 non-citizen.

21 MR. STONE: That certainly might well
22 be the case, Your Honor. Of course, that would
23 have been the kind of evidence that would have
24 attacked our redressability, that had
25 Petitioners submitted that to the district court

1 certainly would have undermined a number of the
2 findings.

3 JUSTICE BARRETT: But it's your burden
4 to show standing, right?

5 MR. STONE: Yes, Your Honor, and we
6 did by, again, findings supported by clear error
7 showing the causal relationship between actual
8 enforcement actions and this memorandum,
9 including, for example, 22 e-mails specifically
10 citing the Guidelines as -- as a reason for
11 removing detainers.

12 JUSTICE JACKSON: But why isn't the
13 causal relationship the chain broken in the
14 sense that you have voluntary decision-making by
15 Texas, say, in relation to the criminal justice
16 costs, that you are -- you feel compelled or you
17 want to go after individual people?

18 In other words, aren't the costs
19 associated with Texas's decision to incarcerate
20 or parole certain non-citizens if the federal
21 government decides not to detain them, aren't
22 those a result of the state's own policy choices
23 in a way, you know, that we have recognized or
24 decided is not sufficient in a case like
25 Pennsylvania versus New Jersey?

1 MR. STONE: Your Honor, I think,
2 ordinarily, in the Court's Article III standing
3 analysis, for example, in -- in the DACA case in
4 Regents, the Court didn't go, well, California
5 is -- is suffering this injury in the first
6 place because they have chosen to employ
7 individuals subject to this immigration right,
8 et cetera, and so, really, to some extent, the
9 loss of these individuals is a self-inflicted
10 injury.

11 More to the point, Texas suffers
12 injuries regardless of what it does, whether it
13 detains, releases, or paroles individuals,
14 because we have not only law enforcement costs
15 but social services costs and very serious
16 threats of recidivism that must be considered.

17 JUSTICE JACKSON: All right. Well,
18 separate -- separate out the -- the -- can we
19 just for a second separate out the criminal
20 justice costs from the healthcare and other
21 things that would be required? With respect to
22 the criminal justice costs, presumably -- first
23 of all, the federal government has said that
24 they have determined that these particular
25 individuals aren't going to be a high risk and

1 so that's why they're not detaining them.

2 So why isn't Texas's determination to
3 detain them on Texas? I mean, presumably, there
4 will be other states that might agree with the
5 federal government and say, you know, we're not
6 going to expend any money to try to supervise or
7 detain these particular individuals.

8 MR. STONE: Well, two points, Your
9 Honor. First of all, there are district court
10 findings of fact. This was a disputed subject
11 at the trial court regarding whether or not the
12 rates of recidivism were unacceptably high, what
13 kinds of risks Texas was exposed to by these
14 releases. And, more to the point, Congress has
15 made the determination specifically in the
16 passage of IIRAIRA and 1226(c) whether or not
17 these individuals are unacceptably --

18 JUSTICE JACKSON: Well, that's on the
19 merits.

20 MR. STONE: -- high of a risk.

21 JUSTICE JACKSON: That's a merits
22 question. I mean, you know, I guess my point is
23 just in terms of injury and who is bearing the
24 cost and why. Isn't it Texas's determination to
25 go after and detain or keep detained these

1 people, you know, a cost that Texas has chosen
2 to incur? The Guidelines don't require states
3 to keep these people in custody.

4 MR. STONE: No, Your Honor, and I
5 think that's because Texas is put to what we
6 call -- might call sort of an Article III
7 dilemma where it either pays the costs of
8 continued detention or pays the costs that are
9 incurred through recidivism, again, recidivism
10 in this case being a hotly contested question at
11 trial upon which there was direct testimony from
12 one of the largest counties in Texas regarding
13 the criminal population there, actual evidence
14 of recidivism by specific individuals who had
15 been detained and released pursuant to
16 detainers --

17 JUSTICE JACKSON: All right.

18 JUSTICE KAVANAUGH: Does --

19 JUSTICE JACKSON: So can we answer
20 Judge -- Justice Sotomayor's question about net
21 costs then? So, fine, there might be costs with
22 respect to this group of people, but the
23 government -- the federal government says that
24 you're going to save a whole lot based on other
25 aspects of the operation of the Guidelines.

1 What -- what's your response to that?

2 MR. STONE: Two responses to that
3 question. The first is somewhat
4 straightforward, which is to say that's in the
5 nature of a factual assertion, a factual
6 assertion about which Petitioners offered zero
7 evidence whatsoever. That was a disputed fact
8 question at trial. They offered no evidence.

9 If there were, in fact, evidence, I
10 think that would go -- that would be powerful
11 evidence attacking our standing. Their
12 assertions afterwards --

13 JUSTICE SOTOMAYOR: I'm sorry.

14 MR. STONE: -- are not a kind of
15 evidence.

16 JUSTICE SOTOMAYOR: You have to prove
17 standing. And we have said in Arizona, the
18 Arizona case, that you have to show the net
19 effect. And you didn't. You didn't show the --
20 what the government has said and what the record
21 clearly proves is that there's been a surge at
22 the border; if left unattended, that surge would
23 overwhelm all of the border states, not just
24 Texas; and that the cost of doing that has to
25 give them greater priorities in terms of aliens

1 who are already here.

2 But we know that many of those people
3 coming in will be risks to the State of Texas,
4 et cetera. Why haven't you shown that that net
5 effect of keeping more people out is going to
6 mean less than the few people that they decide
7 to erroneously let go?

8 MR. STONE: Respectfully, Your Honor,
9 I think there's two points here. One is that
10 this Court doesn't typically treat standing as
11 an accounting exercise as to whether or not an
12 individual who shows --

13 JUSTICE SOTOMAYOR: No, but you have
14 to -- you have to show -- you can't look at a
15 piece of a policy and say I don't like a piece.
16 You have to look at the policy altogether.

17 MR. STONE: Well, certainly, Justice
18 Sotomayor, what we are looking at here is a very
19 specific challenge to the exercise of detention
20 authority under two sections. I don't think
21 it's an Article III vice that Texas isn't
22 challenging the entire immigration code's
23 application in all cases.

24 JUSTICE KAGAN: General, do you think
25 that there's any immigration policy that you

1 could not challenge under the way you view
2 standing?

3 MR. STONE: I think that's hard to
4 discuss in the abstract. There might well be,
5 Your Honor, but it shouldn't come as a --

6 JUSTICE KAGAN: It's hard to think of,
7 I guess is what I'm saying. I mean, if all you
8 need to do is to say we have a dollar's worth of
9 costs and you don't even need to think about the
10 benefits on the other side, I mean, every
11 immigration policy, you let in more people, you
12 let in fewer people, is going to have some
13 effect on a state's fiscal condition. Maybe
14 they'll get less or more tax dollars. Maybe
15 they'll have to spend less or more money. I
16 mean, every single immigration policy. And
17 then, you know, not to mention all the other
18 policies in the world that if a state comes in
19 and says I got a dollar's worth of costs that I
20 can show you.

21 I mean, we're just going to be in a --
22 in a situation where every administration is
23 confronted by suits by states that can, you
24 know, bring a policy to a dead halt, to a dead
25 stop, by just showing a dollar's worth of costs?

1 MR. STONE: Two points, Your Honor.
2 The first is -- and I can't speak for all
3 states, obviously, even though 37 of them are
4 participating in this case, and none have
5 adopted the United States' theory of standing.
6 Texas has more than half of the southern border.

7 JUSTICE KAGAN: That's not responsive
8 to my question.

9 MR. STONE: Yes, Your Honor. Texas --

10 JUSTICE KAGAN: I mean, look -- and
11 this isn't anything that has to do with this
12 Administration. You know, some other
13 administration will come in and the California
14 solicitor general will be standing where you
15 are.

16 And, you know, there's an issue here,
17 especially with respect to immigration policy.
18 Immigration policy is supposed to be the zenith
19 of federal power, and it's supposed to be the
20 zenith of executive power. And, instead, we're
21 creating a system where a combination of states
22 and courts can bring immigration policy to a
23 dead halt.

24 MR. STONE: Two points, Your Honor.
25 The first is, again, speaking at least for

1 Texas, it shouldn't be particularly surprising
2 that we would suffer outsized Article III
3 injuries given the fact that half of the
4 southern border immediately abuts Texas.

5 JUSTICE KAGAN: But would you --

6 MR. STONE: We're --

7 JUSTICE KAGAN: You're -- you're not
8 saying that you have a special kind of injury
9 here. You're saying all the usual rules apply,
10 maybe more than the usual rules, and all you
11 need to show is a dollar's worth of costs.

12 MR. STONE: We are indeed saying the
13 usual rules apply, with one twist, which is, to
14 the extent the usual rules don't apply,
15 immigration surely is the kind of sort of
16 sovereign prerogative that in the sense of
17 Massachusetts versus EPA, Texas has had
18 to surrender to the union as a part of the state
19 of joining the union, and Texas has been given a
20 procedural right, just like in Massachusetts
21 versus EPA, to vindicate those interests that it
22 has had to surrender to the federal government.
23 So --

24 JUSTICE KAGAN: I guess what strikes
25 me is that these very broad arguments that the

1 Solicitor General is making, maybe we shouldn't
2 -- even if we don't think that we should accept
3 them as broad prohibitions, the fact that you
4 are not the party directly regulated, the fact
5 that you are challenging an enforcement action,
6 particularly an enforcement action where the
7 most discretion has been given to executive
8 officials, but -- but those form the backdrop by
9 which we should say, you know, it's just not
10 enough that you're coming in here with a set of
11 speculative possibilities about your costs. You
12 have to do more than that given the backdrop of
13 -- of what has become, I think, a system that
14 nobody ever thought would occur, which is that
15 the states can go into court at the drop of a
16 pin and stop federal policies in their tracks.

17 MR. STONE: So, Your Honor, I think
18 there's two points there, the first being, to
19 the extent you're describing a rule that sort of
20 shows special skepticism of the states, that's
21 at minimum -- that's at minimum in the teeth of
22 Massachusetts versus EPA.

23 JUSTICE KAGAN: Yeah, I'm -- I'm
24 saying that, like, coming in and saying, you
25 know, it seems to us that we have some costs

1 associated with this and we're not going to look
2 at the benefits and we're not going to look at
3 the fact that, as Judge Sutton said, the fact
4 that there are priorities, you know, that person
5 A will be -- you know, will -- will not be
6 removed versus person B will, that -- that that
7 doesn't particularly show that your net costs
8 are -- even that your -- your -- your gross
9 costs are going to rise, let alone your net
10 costs.

11 And all of the speculation and all of
12 this kind of like we think we kind of showed it
13 is just not enough given the backdrop of this
14 case.

15 MR. STONE: We don't think we showed
16 it, Your Honor. A trial court judge reviewable
17 for clear error thinks that we showed it, and he
18 based that on --

19 JUSTICE KAGAN: Can I -- can I --

20 CHIEF JUSTICE ROBERTS: Thank you.

21 JUSTICE KAGAN: -- say something about
22 that? Can I -- one more?

23 CHIEF JUSTICE ROBERTS: One more.

24 (Laughter.)

25 JUSTICE KAGAN: I mean, just to think

1 about just the backdrop of this case and what's
2 going on here, I mean, just add to the notion,
3 not your fault, this is not, you know, but in
4 Texas, there are divisions within districts.
5 You can pick your trial court judge.

6 You know, you play by the rules,
7 that's fine, but you pick your trial court
8 judge. One judge stops a federal immigration
9 policy in its tracks because you have a kind of
10 sort of speculative argument that your budget is
11 going to be affected.

12 MR. STONE: Respectfully, Your Honor,
13 it's not speculative. In fact, this is how
14 concrete it is. We have at least one example in
15 the record of a specific alien, Ruben Abonza,
16 who specifically had a detainer placed on him.
17 That detainer was removed. He had a final order
18 of removal and was a 1226(c) alien.

19 That detainer was removed. He was
20 released. And then he was reapprehended for
21 committing human trafficking. That commits the
22 kind of cost, both law enforcement and
23 recidivism, that certainly forms the basis of an
24 Article III injury. That is not speculative.
25 It occurred.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel. I'd like to move to the merits a
3 little bit.

4 The Solicitor General on the -- on the
5 other side responded to some of my questioning
6 about the impossibility by emphasizing that,
7 well, that's a good reason to think that
8 Congress really didn't intend that result.

9 You know, it's -- it's -- it's a
10 compelling argument, and what is your answer? I
11 mean, to the extent it is impossible -- it is
12 impossible for the executive to do what you want
13 him to do, right?

14 MR. STONE: I don't think so, Your
15 Honor, at least as applied to the narrow 60- to
16 80,000 -- and this is a matter of finding of
17 fact, there is evidence in the record, so I want
18 to just claim that -- the 60- to 80,000 pool of
19 individuals who are criminal aliens under
20 subsection C.

21 CHIEF JUSTICE ROBERTS: Are there 60-
22 to 80,000 empty beds?

23 MR. STONE: No, Your Honor, but the
24 way that those beds work is they work both in
25 terms of having a bed and the velocity with

1 which the individuals are removed under the
2 system. And, of course, under 1226(c), the
3 government's detention obligation runs only
4 until they make a determination whether or not
5 to remove the individual.

6 If the government says we made a
7 determination we're not going to remove, the
8 1226(c) obligation ends instantly.

9 CHIEF JUSTICE ROBERTS: Well, assuming
10 we think it would be, if not impossible,
11 surprising and very difficult for the executive
12 to comply, isn't that a consideration we should
13 take into account in trying to figure out if
14 "shall" means "shall"? Because, certainly,
15 there are cases where we've said "shall" means
16 "may."

17 MR. STONE: Your Honor, I don't think
18 so for two reasons, one being the backdrop that
19 "shall," indeed, means "shall" and that 1226 has
20 a variety of other intertextual clues that
21 suggest this "shall" especially means "shall,"
22 it's contradistinction with "may" in 1226(a),
23 its extremely tight restrictive possible release
24 provision in 1221(c)(2).

25 But, more importantly, Congress

1 actually considered this exact excuse in the
2 transition rules following IIRAIRA, where
3 Congress gave the executive two years, saying,
4 if the executive in any given 1226 case believes
5 it simply does not have the enforcement ability,
6 doesn't have the resources, that will excuse
7 mandatory detention.

8 After two years, the executive went
9 back to Congress and asked for renewal of that.
10 Congress said no, and then immediately, then the
11 Clinton Administration acknowledged that the
12 obligations under 1226(c) became mandatory.

13 JUSTICE KAVANAUGH: But the -- but the
14 resources are still not there. And so I guess,
15 on both standing and to pick up on Justice
16 Kagan's question, standing and merits, and the
17 Chief Justice's questions as well, there's a
18 tradition of not allowing people to challenge
19 non-enforcement decisions. Linda R.S. stands as
20 probably the lead precedent on that.

21 And so too on the merits question,
22 there is a tradition of reading statutes with --
23 against the backdrop of prosecutorial discretion
24 that at least in the federal context is rooted
25 in Article II and then Castle Rock talks about

1 that background principle in the state context.
2 Those two things together are both probably
3 united by the fact that there are never enough
4 resources or almost never enough resources to
5 detain every person who should be detained,
6 arrest every person who should be arrested,
7 prosecute every person who's violated the law.

8 And so those two principles seem to me
9 to come from the same problem, and that problem,
10 even after the two-year period you described, is
11 present today, right?

12 MR. STONE: Taking as an assumption
13 that it would not be possible, we think that's
14 at least disputable, that it's not possible to
15 detain everyone covered by this.

16 A couple of points. First of all, the
17 prosecutorial discretion, typically,
18 prosecutorial discretion means the power to
19 bring a criminal action and then pursue it or
20 not pursue it against someone, or in this
21 context a notice to appear, and to bring that
22 all the way through to a final order of removal
23 and execute or not execute it.

24 Prosecutorial discretion doesn't
25 prevent, as you pointed out, for example, in

1 Heckler versus Chaney, Congress setting
2 enforcement priorities, and it's not an excuse
3 for an executive not to comply with a mandate on
4 the executive itself.

5 Now I take the exception, of course,
6 for a possibility that Congress said you must
7 prosecute this individual. I think that would
8 be the sort of very core of an argument.

9 JUSTICE KAVANAUGH: How about if
10 Congress said you must prosecute, that the
11 executive must prosecute everyone who violates
12 this law?

13 MR. STONE: I think that would be the
14 strongest possible Article II argument
15 available. Nothing in the text, nothing in the
16 states' theory --

17 JUSTICE KAVANAUGH: That would be a
18 problem under Article II, don't you think?

19 MR. STONE: I think so, Your Honor,
20 yes, Your Honor, I think that would be the
21 strongest possible --

22 JUSTICE KAVANAUGH: Well, isn't -- how
23 is that different from what we have here in
24 terms of -- you know, let's change that
25 hypothetical, you must arrest, the executive

1 must arrest everyone who there's probable cause
2 to believe violated the law. How is that
3 different from, theoretically, from this -- this
4 provision?

5 MR. STONE: Certainly, because -- two
6 reasons: One, because arrest -- essentially,
7 prosecutorial discretion doesn't cover every
8 potential possible act of enforcement from soup
9 to nuts in the process. It is -- the core of
10 prosecutorial discretion is the ability to
11 choose whether or not to bring charges and
12 prosecute them.

13 Now I agree that perhaps that Article
14 II question gains strengths or loses it
15 depending on how intrusive the invasion is.
16 But, here, 1226(c)(1) as read alongside 1226(a)
17 and 1230 -- 12 -- 1231(a)(1), both respect the
18 executive's prosecutorial discretion immensely.

19 1226(c)(1) only applies until they
20 have made a decision whether or not to
21 prosecute. If they decide not to, it
22 immediately ends.

23 JUSTICE SOTOMAYOR: Counsel, I -- I --

24 JUSTICE KAVANAUGH: Right, but the --

25 JUSTICE SOTOMAYOR: I'm sorry, go

1 ahead.

2 JUSTICE KAVANAUGH: I was -- the last
3 question to tie this up, I'm sorry, is, if you
4 prevail here, what will happen? That's a
5 concern because I'm not sure much will change
6 because they don't have the resources to change.
7 So what -- what do you envision?

8 I know Florida's amicus brief says,
9 well, the executive will then strive to meet its
10 obligations. "Strive to" is not a usual term of
11 a judicial order. So what do you think happens
12 if you prevail here?

13 MR. STONE: We think, consistent with
14 the district court's findings, that individual
15 officers in ICE will go back to -- to not
16 believing that their enforcement discretion has
17 been restrained in the ways the prosecutorial --
18 the -- rather, the Guidelines and those have --
19 have caused that to be.

20 More specifically about the -- the
21 lack of -- the lack of resources, though, Your
22 Honor, there is an on-the-record finding of bad
23 faith in this specific context for two reasons.
24 One, here, Petitioners have repeatedly sought to
25 decrease their enforcement capabilities, to

1 decrease their detention capabilities, and, two,
2 they've persistently underused them.

3 JUSTICE KAVANAUGH: Okay. Why don't
4 you go to Justice Sotomayor.

5 JUSTICE SOTOMAYOR: Counsel, I don't
6 know that I understand your theory, but maybe
7 I'm getting it.

8 Number one, you're saying there is no
9 command to remove anyone who falls under 1226
10 and 1231?

11 MR. STONE: We're certainly not saying
12 that there is, Your Honor, whether or not --

13 JUSTICE SOTOMAYOR: All right. You're
14 -- you're -- you're saying there is complete and
15 absolute discretion for the government to say
16 anybody charged with any crime, we're not going
17 to remove you?

18 MR. STONE: I -- I'm not sure that I'd
19 concede that much, but we're certainly not
20 arguing otherwise.

21 JUSTICE SOTOMAYOR: All right. So
22 what are you arguing? Are you arguing that only
23 if they are told that there is a criminal who
24 fits the 1226(c) or 1231 conditions, that they
25 must remove those people?

1 MR. STONE: Our argument doesn't run
2 to removal at all, Justice Sotomayor.

3 JUSTICE SOTOMAYOR: All right. So --

4 MR. STONE: It runs to arrest and
5 detention.

6 JUSTICE SOTOMAYOR: -- why isn't the
7 policy guidelines exactly what the government
8 said, which is this has nothing to do with
9 detention, it has to do with removal. We've
10 made a decision that certain categories of
11 people, we're not going to spend the money on
12 giving them a notice of appearance or giving --
13 or removing them.

14 MR. STONE: Well, Your Honor, in part
15 because the Guidelines on their face -- and
16 1226(c) contains an arrest requirement. We
17 believe that's the natural reading of "take into
18 custody." But the Guidelines on their face
19 refer to individuals who should be subject to
20 arrest detainees and removal proceedings.

21 JUSTICE SOTOMAYOR: Should be, but you
22 just said to me they don't have to be.

23 MR. STONE: They don't have to remove
24 --

25 JUSTICE SOTOMAYOR: The government has

1 the discretion to say I don't want to remove
2 this person, correct?

3 MR. STONE: I apologize, Justice. I
4 was referring to how this does affect detainers.
5 I agree once again we are not seeking to
6 have any individual in specific removed.

7 JUSTICE SOTOMAYOR: So, really, this
8 case is all about the people that a detainer has
9 been put on and that the government can't
10 withdraw that detainer once they put it on?

11 MR. STONE: This case is about, under
12 two different --

13 JUSTICE SOTOMAYOR: Answer yes or no
14 to that. Is that -- because there's a lot of
15 states, for example, that don't cooperate with
16 ISIS and they don't tell the government about
17 somebody, but maybe the government found out
18 about it. Do they have to go and put the
19 detainer on that person?

20 MR. STONE: The -- the answer to your
21 previous question is no. The answer to this
22 question is yes.

23 JUSTICE SOTOMAYOR: All right. So
24 they have to go and spend the resources to sit
25 outside of that prison and find out what day

1 that person is going to be released so they can
2 arrest that person that day?

3 MR. STONE: 1226(d) actually directs
4 the federal government to create a 24-hour
5 accessible system for purposes of having this --

6 JUSTICE SOTOMAYOR: I -- I just asked
7 you a direct question. Does the government now
8 have to put the resources in place to watch the
9 prison every day to see if someone has been
10 released?

11 MR. STONE: The government must
12 attempt to fulfill its mandatory detention. How
13 it does it in terms of --

14 JUSTICE SOTOMAYOR: How -- how --

15 MR. STONE: -- individual resources or
16 expenditures --

17 JUSTICE SOTOMAYOR: You -- you -- you
18 just told me something contradictory.

19 How do you deal with 1231(h) and the
20 fact that it says that the statute, 1231, "does
21 not create any right or benefit that is legally
22 enforceable by any party"?

23 MR. STONE: May I?

24 CHIEF JUSTICE ROBERTS: Sure.

25 JUSTICE SOTOMAYOR: So how do you get

1 into court under 1231(h)?

2 MR. STONE: Two points, Your Honor.
3 The first is this Court in Zadvydas v. Davis
4 said that 1231 of its own force only prevents an
5 individual from saying that 1231 gives them
6 essentially a right or cause of action. It did
7 not block it --

8 JUSTICE SOTOMAYOR: Well, that --
9 that's -- you're any person. You're Texas. You
10 saying you have a right or a cause of action,
11 under your theory of indirect harm, that permits
12 you to attack it under the APA, to attack it
13 under whatever else, you fit right in any person
14 saying that you have a right or a benefit under
15 the APA to attack 1231, a policy?

16 MR. STONE: No, Your Honor. At least
17 two points. One, no more than an individual
18 seeking release under 2241 did. And that was a
19 very good --

20 JUSTICE SOTOMAYOR: It doesn't say any
21 more than an individual. It says that you --
22 does not create any -- and "any" is very broad
23 -- right or benefit that is legally enforceable
24 by any party. It doesn't say any alien party.
25 It doesn't say anything like that.

1 MR. STONE: I agree, Justice
2 Sotomayor. And in Zadvydas, an individual alien
3 through a habeas corpus action was claiming his
4 detention was illegal because of a violation of
5 1231 --

6 JUSTICE SOTOMAYOR: Well, that -- that
7 may be prototypical, but that's not -- the
8 language isn't limited to that situation.

9 MR. STONE: But --

10 JUSTICE SOTOMAYOR: It doesn't say any
11 right or benefit that is legally enforceable by
12 an undocumented alien. It says any party.

13 MR. STONE: But the Court --

14 JUSTICE SOTOMAYOR: You're any party.

15 MR. STONE: -- the Court didn't hold
16 that 2241 -- that act of -- that exercise of
17 jurisdiction illegal. It said 1231 was
18 restricted only to that section, and the use of
19 2241 was permitted. The APA is at least as
20 separate from Section 1231 as the general habeas
21 statute. And more to the point --

22 CHIEF JUSTICE ROBERTS: Counsel, why
23 -- why don't we just spend a little bit of time
24 on remedy before we move to individual
25 questioning, and on that, an important question

1 for me was the one raised by Justice Gorsuch.

2 How did the APA's new vacatur remedy
3 slip by unnoticed from all these administrative
4 law scholars?

5 MR. STONE: It -- I can't speak as to
6 the attention of the administrative law
7 scholarship universe, Mr. Chief Justice, but I
8 can tell you that the -- the vacatur remedy
9 recognized in 706(2) was consistent with
10 then-existing APA practice. And to put a fine
11 point on it, this Court around 1920, reviewing
12 generally speaking Interstate Commerce
13 Commission orders, specifically described the
14 relief that was being sought below and that it
15 sometimes affirmed, sometimes refused, as orders
16 attempting to annul or revoke a given commission
17 rule. Idaho versus United States actually does
18 double work for us here. One, this Court
19 affirmed an order annulling an Interstate
20 Commerce clause -- an Interstate Commerce
21 Commission order. And then, also, Idaho's
22 theory of harm was entirely premised on the
23 federal regulation of a private party in its
24 state. So --

25 CHIEF JUSTICE ROBERTS: Well, as -- as

1 the Solicitor General on the other side pointed
2 out, the courts really haven't dealt with the
3 analysis that raises this question, namely, the
4 one in Professor Harrison's article.

5 MR. STONE: I think --

6 CHIEF JUSTICE ROBERTS: The D.C.
7 Circuit may have been doing it for a long time
8 but sort of did not address the arguments that
9 are being raised today.

10 MR. STONE: And perhaps that might be
11 a reason why, strictly speaking, they aren't
12 precluded by stare decisis, Your Honor, but the
13 fact that the lower courts had --

14 JUSTICE GORSUCH: That they're
15 precluded by stare decisis from a lower court?
16 I mean, lower -- lower courts often do things
17 for long periods of time, unthinkingly or maybe
18 thinkingly and thoughtfully, that turn out to be
19 wrong, and --

20 MR. STONE: I'm sorry, that --

21 JUSTICE GORSUCH: -- this Court
22 doesn't afford stare decisis effect.

23 MR. STONE: I said that it wasn't.
24 I'm sorry.

25 JUSTICE GORSUCH: Oh, I'm sorry.

1 MR. STONE: I -- I must have either
2 misspoken or meant to say it was not.

3 JUSTICE GORSUCH: I -- I'm sure I
4 misheard, General. I'm sorry.

5 MR. STONE: That it does not -- it is
6 not precluded by stare decisis. But it is,
7 again, a thoughtful 80-year history that has
8 essentially informed everything Congress has
9 done subsequently. Congress has enacted
10 subsequent review statutes using the same
11 language, for example, 28 U.S.C. 2342, with a
12 specific administrative review statute --

13 JUSTICE GORSUCH: There are definitely
14 specific administrative review statutes that
15 contemplate this. But let's put those aside for
16 the moment and just look at the APA itself.

17 Isn't it a little odd that -- that
18 Section 706 governs the scope of review and
19 proceeds to tell us to review questions of law
20 de novo, and that's a whole other kettle of
21 fish, whether we do that, but tells us to do
22 that and then goes on and tells us, when we find
23 an unlawful agency action, finding, or
24 conclusion, we should set it aside. We don't
25 think of negating or vacating or erasing

1 findings or conclusions. We -- we -- we put
2 them aside and go ahead and decide the case
3 without them usually.

4 Why -- why wouldn't the same apply to
5 -- to errors of law under a de novo standard of
6 review, especially when 703 does list all the
7 remedial forms available in an APA action,
8 declaratory judgment, injunctions? It -- it
9 would seem like it would be a monster swallowing
10 all of the other remedies that -- that sits in
11 these five words, you know, hold unlawful and
12 set aside. It's in a scope of review section.
13 It's -- just on its face, putting aside our
14 learned friends on the D.C. Circuit on the one
15 hand and our learned friends from the Sixth and
16 the Fourth on the other.

17 MR. STONE: So I think the answer,
18 Your Honor, is to look at both 703 and 706
19 together. I disagree with you that 703 provides
20 remedies, and I think taken sentence by
21 sentence, it's just that it doesn't --

22 JUSTICE GORSUCH: Well, take a look at
23 it again, counsel, and tell me if you really
24 think that, because I look at it, and it talks
25 about venue and forms of proceeding, and the

1 forms of proceeding listed include injunctive
2 relief and declaratory judgments. Those are
3 classic remedial forms of relief or forms of
4 proceeding.

5 MR. STONE: Well, Your Honor, two
6 points. First of all, I don't think anyone has
7 ever thought that Federal Rule of Civil
8 Procedure 2, which provides one form of action
9 -- and this is the same words you here used,
10 form of proceeding -- and it specifies --

11 JUSTICE GORSUCH: That's different.

12 MR. STONE: -- the applicable legal
13 form of action. I don't think anyone thinks --

14 JUSTICE GORSUCH: Forms of proceeding
15 and it lists them as declaratory and injunctive.
16 You -- you'd agree those are remedies?

17 MR. STONE: I agree they are forms of
18 action, Your Honor. I think that -- and, yes,
19 they can --

20 JUSTICE GORSUCH: Remedies?

21 MR. STONE: -- include remedies, yes.

22 JUSTICE GORSUCH: Okay. So those are
23 remedies, declaratory relief, injunctions.
24 There they are in 703. So it's a little odd
25 that there'd be those giant remedies that

1 swallow the whole of 703 lurking over in 706.

2 And then put -- put that aside too.

3 What about 702, which limits the power of
4 certain persons to come into court under the
5 APA, limits them to aggrieved persons who have
6 actually been personally and concretely injured?
7 There, Congress is carefully respecting our
8 standing rules at the front end. Wouldn't it be
9 odd for it to blow a giant hole in our
10 traditional remedial rules at the back end
11 through five words in 706?

12 MR. STONE: I don't think so, Your
13 Honor. Two points, the first being this Court
14 has recognized, I believe in Lujan in 1990, that
15 the APA provides an especially generous sort --
16 form of judicial review. Ordinarily, you have
17 to have some sort of legal right typically, and
18 this provides, as you point out, Justice
19 Gorsuch, both availability for someone suffering
20 a legal wrong as well as a party adversely
21 affected or aggrieved. So I think that's much
22 broader than the traditional form of action.

23 JUSTICE GORSUCH: It's -- it's -- it's
24 not everybody in the world who has a generalized
25 grievance.

1 MR. STONE: Certainly not.

2 JUSTICE GORSUCH: It has to be someone
3 who's specifically harmed, consistent with
4 Article III, right?

5 MR. STONE: That's certainly true.
6 That's certainly true, Justice Gorsuch. The
7 fact that Congress created -- and I'm going to
8 speak specifically to the assumption that
9 vacatur exists on your Article III question and
10 then I could step back --

11 JUSTICE GORSUCH: Oh, yeah. Where
12 does that word appear in the APA?

13 MR. STONE: It comes from "set aside,"
14 as you -- as you previously --

15 JUSTICE GORSUCH: It doesn't appear in
16 the APA, right?

17 MR. STONE: It does not. It comes
18 from --

19 JUSTICE GORSUCH: It's just -- it's
20 just -- it just -- we assume it from those five
21 words.

22 MR. STONE: And from previous
23 practice, Justice Gorsuch, previous practice
24 that had been recognized in this Court more than
25 10 times. As a matter of fact, it had been --

1 had been recognized in this Court in the terms
2 of "annul" or "revoke," synonyms that were
3 recognized by contemporary legal dictionaries at
4 the time as being synonymous with "set aside."

5 JUSTICE JACKSON: And synonyms that
6 relate to the claim at issue in the case. I
7 mean, aren't -- aren't -- what is your thought
8 on my point about the claim at issue in this
9 case being about the agency's invalid exercise
10 of authority because it didn't follow the right
11 procedures?

12 MR. STONE: I agree with you, Justice
13 Jackson, that to the extent the kind of claims
14 that Congress provided for underneath the
15 Administrative Procedure Act included claims
16 that run to the essential invalidity of a thing,
17 that it's -- that it simply is not valid
18 exercise of power.

19 Congress chose to give that power over
20 both orders and rules when it provided for
21 review of agency action, a term defined in
22 statute to include both. And so I agree with
23 you that vacatur is the natural remedy, which is
24 to say vacating the actual thing itself that
25 is -- that is categorically invalid.

1 JUSTICE JACKSON: And it's in Section
2 06, along with the kinds of claims that people
3 can make. What the Court is reviewing and
4 looking for are these kinds of errors by the
5 agency, and we're told that when they exist, you
6 set aside the -- the -- the agency action.

7 MR. STONE: I agree with you. Both
8 706(1) and 706(2) follow the same structure,
9 which is to say the initial words provide the
10 remedy, order, agency action, and then the next
11 component says what the substantive standard you
12 have to meet is.

13 JUSTICE JACKSON: And wouldn't it be
14 odd for the Court to go back to 703? I mean, it
15 seems to me that if you read all of the
16 provisions in order, there's sort of a logical
17 progression of how one brings an action, the
18 form of action you can bring, the venue of the
19 proceeding, that's 702, 703; which actions are
20 reviewable, 704; and then, when we finally get
21 to 706, it's what the court is looking for and
22 the relief that can be provided.

23 MR. STONE: I agree with you. I would
24 only point out 705, which you skipped over --

25 JUSTICE JACKSON: Yes.

1 MR. STONE: -- which provides the
2 ability for a court in interim relief to delay
3 the effective date of agency action.

4 CHIEF JUSTICE ROBERTS: Counsel, what
5 --

6 MR. STONE: Delaying the --

7 CHIEF JUSTICE ROBERTS: I'm sorry, go
8 ahead.

9 MR. STONE: I was just going to say
10 that delaying the effective date unquestionably
11 acts on the action itself and is against all the
12 world, and I think that's a strong textual clue
13 Congress intended that sort of remedy.

14 CHIEF JUSTICE ROBERTS: Why don't we
15 move to individual questions.

16 Justice Alito?

17 JUSTICE ALITO: Well, I was quite
18 surprised by the argument based on Aleman
19 Gonzalez. I don't have a proprietary interest
20 in the opinion. However, I understood the issue
21 there to be the meaning of the operation of a
22 statute, not the meaning of an injunction.

23 Have I misread that?

24 MR. STONE: No, Your Honor, and part
25 of the thrust of our argument is what is meant

1 by an order that enjoins or restrains.

2 JUSTICE ALITO: And I also see --
3 admittedly, this is not the slip opinion or the
4 United States report, but it's the Supreme Court
5 Reporter, so probably this is accurate.

6 There's a Footnote 2 which says that
7 at oral government, the government suggested
8 that 1252(f)(1) not only bars class-wide
9 injunctive relief but also prohibits any other
10 form of relief that is "practically similar to
11 an injunction, including class-wide declaratory
12 relief." And we, according to this footnote,
13 specifically reserved decision on that, on that
14 question.

15 Is your -- is your -- is it your
16 understanding that that's actually an accurate
17 footnote and that we took pains in this decision
18 to reserve decision on -- on whether injunction
19 means something that's not formally an
20 injunction but might have the effect of -- an
21 effect that is analogous to an injunction?

22 MR. STONE: I agree entirely, Justice
23 Alito, and would only add that the line between
24 vacatur and declaratory relief that my friend on
25 the other side suggests here and that that note

1 I think suggests that the United States'
2 position might be something else in a subsequent
3 case is another reason why their interpretation
4 should be rejected.

5 JUSTICE ALITO: Now, like Justice
6 Gorsuch, I did not have the -- the benefit of
7 serving many years on the D.C. Circuit and
8 vacating regulations three times before
9 breakfast or however many -- five times -- five
10 times before breakfast, but this does seem to me
11 like a pretty big issue.

12 And, as Justice Kavanaugh mentioned,
13 we have three pages -- we have three pages from
14 the government on this in its opening brief.
15 The argument is based primarily on a law review
16 article, a innovative law review article that
17 appeared in 2020, and then you came back with
18 three pages on this, and then the government
19 expanded their argument to four pages in -- in
20 the reply brief.

21 Now what do we do with this? We --
22 are we supposed -- are we left to do all of the
23 scholarship that would be required to figure out
24 whether this new interpretation is the correct
25 interpretation?

1 But you do say -- and -- and you're
2 right -- that this is not a clear case of stare
3 decisis, so how would you approach -- how would
4 you suggest we approach that?

5 MR. STONE: I don't think it's clearly
6 presented, fairly eclipsed within the questions
7 presented, Your Honor. It's just that the
8 United States made such a colossal argument or
9 an argument with such far-flung consequences
10 that we would have been remiss not to address
11 it. I think this Court can essentially choose
12 to charitably ignore it on that ground. Of
13 course, we believe that the 80 years of practice
14 and for the reasons we outline in our brief,
15 that they're also wrong on the merits.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor?

18 JUSTICE SOTOMAYOR: Yes. We could
19 also assume that it's not encompassed by the
20 question presented and deal just with the 1252
21 issue, correct?

22 MR. STONE: Yes, Justice Sotomayor.

23 JUSTICE SOTOMAYOR: All right. Now,
24 secondly, you said the Guidelines were binding
25 on immigration officers, that that's what the

1 district court held. I'm not sure I understand
2 its holding.

3 Do you understand the district court
4 to have said that the Guidelines are wrong
5 because they impose on immigration officers a
6 bunch of factors to look at before they decide
7 whether to remove someone?

8 MR. STONE: I think my answer is in
9 two parts.

10 JUSTICE SOTOMAYOR: Okay.

11 MR. STONE: The first is that the
12 district court found as a matter of fact that --
13 that -- that as a matter of fact, that
14 individuals applying these items would treat
15 them as mandatory. And then there's a problem
16 with all --

17 JUSTICE SOTOMAYOR: Mandatory to
18 consider, correct?

19 MR. STONE: No, Your Honor. The
20 finding was that they would think that the --
21 the framework provided by the Guidelines was, in
22 fact, mandatory, period.

23 JUSTICE SOTOMAYOR: The framework.
24 The framework says you look at the totality of
25 circumstances, you look at all of these things.

1 If that's all the Guidelines say, would you have
2 a day in court today?

3 MR. STONE: Certainly, Your Honor, in
4 part because the essence of 1226(c), of
5 Congress's considered judgment behind that
6 provision --

7 JUSTICE SOTOMAYOR: So you are going
8 back on what you said to me earlier. You're
9 saying that you believe that this statute, 1226
10 and 1231, take away all discretion to decide
11 whether to remove somebody or not?

12 MR. STONE: No, Your Honor, only
13 discretion whether to detain them pending the
14 decision for removal.

15 JUSTICE SOTOMAYOR: Well, I know you
16 keep going back to that. But the Guidelines are
17 talking about a decision to remove someone, to
18 arrest, detain, or remove. And if a DHS officer
19 looks at the totality of circumstances and says
20 this is a person we're not going to remove, can
21 you argue about that?

22 MR. STONE: At that point, I think the
23 1226(c)(1) -- assuming that was the final
24 decision, the 1226(c)(1) obligation is resolved
25 by 1226(a). The problem --

1 JUSTICE SOTOMAYOR: Which says pending
2 removal, okay.

3 MR. STONE: Pending a decision.

4 JUSTICE SOTOMAYOR: All right. So,
5 if -- did the district court anywhere say that
6 the Guidelines categorically prevent DH officers
7 from ever going outside of the priorities?

8 MR. STONE: He -- he made a finding
9 that those three categories were looked at as
10 exclusive. And that's in part backed up by, for
11 example, an internal tool, the ART tool that was
12 promulgated by DHS to its line-level officials,
13 which specifically --

14 JUSTICE SOTOMAYOR: But that has to go
15 to the issue of removal. Everybody has to use
16 Guidelines in determining whether to remove
17 someone.

18 If there are Guidelines to look over
19 where are we spending our money to remove, what
20 are we doing to remove, I don't know why, if
21 that power is within my discretion, I can't set
22 binding, mandatory, whatever you want to call
23 it, Guidelines on my officers to say these are
24 the people that I want to remove and these are
25 the people I don't want to remove.

1 MR. STONE: As I -- as I understood
2 your previous question, Justice Sotomayor, I
3 thought you were asking me whether or not there
4 was something showing that officers did not have
5 the discretion to go outside of the Guidelines.

6 JUSTICE SOTOMAYOR: Right.

7 MR. STONE: There is, in fact, and I
8 believe it's record 11610, it states in bold
9 other priority, as in not one of the three
10 Guidelines components, is no longer permitted.
11 It says that in bold text in internal training.

12 JUSTICE SOTOMAYOR: All right. Then
13 we're back to my point. You are basically
14 trying to sneak into -- you want to cabin
15 removal and say you must remove these people,
16 whether or not you want to or not.

17 MR. STONE: No, Your Honor, we have
18 repeatedly --

19 JUSTICE SOTOMAYOR: So, once you say
20 that, then how can the Guidelines be wrong?
21 Because it's simply a statement that says these
22 aliens we're not going to remove.

23 MR. STONE: Because the Guidelines
24 also say we have the absolute discretion to
25 decide whether to arrest or detain anyone.

1 Congress has -- and, again, I want to make clear
2 we're disclaiming that any of our arguments
3 require the Petitioners to remove any individual
4 in particular.

5 JUSTICE SOTOMAYOR: So, once they
6 decide they're not, and that's what a decision
7 not to arrest or detain means, we're not going
8 to remove you.

9 MR. STONE: I don't think that's
10 accurate, Your Honor. I think -- I think,
11 conceivably, Petitioners could make all three
12 decisions at once. The problem is they have
13 said that every --

14 JUSTICE SOTOMAYOR: Well, at the
15 moment that they make the decision, if they know
16 the person is in jail, they don't put a detainer
17 on them, they don't file a notice to appear, all
18 of those acts says, at this moment today, I'm
19 not removing you.

20 MR. STONE: They have to actually make
21 that decision before their 1226(c) obligation is
22 absolved. In the circumstance where they simply
23 haven't --

24 JUSTICE SOTOMAYOR: Well, but they
25 have by saying we're not going to put a detainer

1 on you.

2 MR. STONE: I think some of the
3 slippage here is the situation where the United
4 States simply hasn't made a decision at all
5 relative to some given alien covered by 1226(c).
6 1226 --

7 JUSTICE SOTOMAYOR: Well, that might
8 be, but I don't know how you would ever know
9 that, because I know the things I see. I know
10 he's here. I know I could put a detainer on
11 him. I choose not to because I'm not going to
12 choose to remove him.

13 MR. STONE: Well, the United States
14 postulated there would be individuals in this
15 category that were part of 1226(c)(1) --

16 JUSTICE SOTOMAYOR: That -- by
17 mistake. That --

18 MR. STONE: -- that they were unaware
19 of.

20 JUSTICE SOTOMAYOR: Exactly, but
21 you're not saying to me, and I think you
22 disavowed earlier, that they have to spend the
23 resources to find everybody who falls into these
24 categories and to affirmatively then say I'm not
25 going to remove you.

1 MR. STONE: They certainly have to
2 make that affirmative statement because of the
3 inter- -- the way that 1226(c) --

4 JUSTICE SOTOMAYOR: Well, they have to
5 -- they have to not remove. Okay. Thank you.

6 MR. STONE: 12 --

7 CHIEF JUSTICE ROBERTS: Justice Kagan?

8 JUSTICE KAGAN: You might get a chance
9 to clarify that because I completely lost the
10 thread, and I apologize, General Stone, but are
11 you saying that 1226(c) applies only once
12 removal proceedings are pending?

13 MR. STONE: We are not. We are saying
14 it applies until a decision regarding removal
15 has been made. So, with the --

16 JUSTICE KAGAN: I don't understand how
17 you can possibly read 1226(a) and (c) to be
18 about anything other than what happens pending
19 removal -- pending the removal decision, in
20 other words, when removal proceedings are
21 ongoing.

22 MR. STONE: In our view, 1226(a)'s
23 "pending a removal decision" does not just begin
24 with a notice to appear. Of course, the removal
25 decision begins when the executive decides

1 whether or not to bring a notice to appear.
2 Until that decision has been made and anywhere
3 along the lines of that initial prosecutorial
4 judgment, all the way through the end of
5 enforcing a -- enforcing an order, at any time,
6 Petitioners can say we made the decision not to
7 -- we made the decision not to remove, and the
8 obligation under 1226(c) comes to an end
9 instantly.

10 JUSTICE KAGAN: I guess the question
11 is, where does the -- the -- it start in your
12 view? In other words, prior to the government
13 initiating removal proceedings, do you think
14 1226 applies?

15 MR. STONE: Yes. That's in 12 --

16 JUSTICE KAGAN: Okay. Because 12 --
17 -- that seems to me a pretty hard argument to
18 make and not consistent with our precedent. I
19 mean, Demore v. Kim addresses this issue pretty
20 precisely, and it just says that this is -- what
21 this is about is it's about while removal
22 proceedings are pending, while they're taking
23 place.

24 MR. STONE: At a minimum, Your Honor,
25 first of all, Demore doesn't speak to the

1 situation where there's an individual required
2 to be detained about which the United States
3 hasn't yet made a decision. 1226(c) says -- or
4 (c)(1) says when it applies in some terms, when
5 an alien is released. 1226(d) directs the
6 Attorney General, or now the federal executive,
7 to create a system in order to know when these
8 individuals -- individuals are going to be
9 released. And then that obligation ends in
10 1226(a) when they've made a decision pending
11 removal. That could be --

12 JUSTICE KAGAN: Okay. I mean, I guess
13 what -- what -- what -- what I'm drawing from
14 this is that even putting aside the does "shall"
15 really mean "shall" argument, that -- that --
16 that you're reading the "shall" to kick in at a
17 place where we've never understood it to kick in
18 before.

19 MR. STONE: I don't believe that this
20 Court's passed one way or another on that
21 question. But even if not, that would be a
22 small subset -- subset of individuals. And
23 these Guidelines claim the power to treat
24 detention as discretionary for individuals in
25 removal proceedings as well.

1 JUSTICE KAGAN: And if I could ask
2 about 1231 a similar question, which is, like,
3 even putting aside all the Castle Rock issues,
4 especially in a context in which we know that
5 DHS can't really do what -- what -- whatever the
6 "shall" means, but, even putting that aside, if
7 you look at the language of 1231, it's the
8 Attorney General "shall detain" the alien. It
9 doesn't say anything about shall remove. It
10 doesn't say anything about shall apprehend,
11 shall arrest. It just says "shall detain." And
12 -- and, again, these Guidelines don't say
13 anything about detention.

14 MR. STONE: First, I believe that on
15 -- by speaking as to arrest and detainer, they
16 do, but that's a small point compared to the
17 rest of your question, Justice Kagan. 1231(a)
18 -- or 1231(a)(1) specifies the circumstances
19 under which the detention obligation exists,
20 which is only where the United States has used
21 its prosecutorial discretion to bring a notice
22 to appear, to prosecute that all the way to a
23 final removal -- an order of removal, and then
24 they have a final order of removal.

25 Only then do Petitioners have an

1 obligation to detain, and under no circumstances
2 release for a subset of individuals, that alien.
3 If at any point they choose to discontinue
4 proceedings, they're not bringing them in the
5 first place, 1231 at no point attaches.

6 JUSTICE KAGAN: But -- but -- but it
7 seems to me that you're reading 1231 to impose
8 an obligation on DHS to go apprehend people, and
9 1231 specifically does not use that language.
10 It's used in lots of other places in this
11 statute. But 1231 only imposes an obligation to
12 detain certain people who have orders of removal
13 already made. It doesn't obligate anybody to do
14 anything with respect to finding them.

15 MR. STONE: At a minimum, Your Honor,
16 1226(c)'s "take into custody" certainly means to
17 arrest, but as far as -- I think, in context,
18 1231(a)(2)'s "shall detain" and then the "under
19 no circumstances" language should be best read
20 as a mandatory requirement of both acquiring an
21 individual, of arresting them, as well as
22 detaining, in part because, for example, in the
23 Fourth Amendment context, this Court understands
24 detention or if someone's been asking if they're
25 detained as significant for purposes of an

1 arrest --

2 JUSTICE KAGAN: And reading in context
3 to insert a different word, which actually is an
4 extraordinarily onerous obligation on DHS, to go
5 around finding people, everybody that -- who has
6 had orders of removal put in that -- where they
7 don't have the faintest idea where they are, I
8 mean, talking about distorting the agency's
9 priority. And you're basically saying it
10 doesn't really say that. It's just we're
11 reading this in context to imply it.

12 MR. STONE: Your Honor, I think
13 "detained" can be fairly meant -- and for some
14 of the resources that we cite in our brief, can
15 be fairly understood to also mean arrest. If
16 someone has to be detained, it can --

17 JUSTICE KAGAN: Well, then we would
18 have a question about why be -- why this statute
19 uses "arrest" and "apprehend" all over the place
20 and not in that section.

21 MR. STONE: Certainly. Certainly,
22 Your Honor. I might also point out that there's
23 the -- the second sentence, the individuals --
24 under no circumstances. Petitioners agree that
25 that is mandatory. There is a complete overlap

1 between those --

2 JUSTICE KAGAN: They do agree that
3 that's mandatory because that's a person that
4 they know where the person is, and -- and so
5 they don't have to do anything to apprehend that
6 person. We already have them. We're not
7 releasing them. And -- and that -- the language
8 in the statute is very different and makes that
9 completely clear, and they're complying with
10 that language.

11 MR. STONE: Respectfully, Your Honor,
12 I don't think that's accurate. I think before
13 my friends on the other side noted they don't
14 always know where a 1226(c)(1) individual is.
15 Every single individual --

16 JUSTICE KAGAN: I was talking about
17 1231.

18 MR. STONE: Yeah -- I understand,
19 Justice Kagan. Every individual covered by
20 1226(c)(1) who has a final order of removal
21 falls into that second sentence.

22 JUSTICE KAGAN: Thank you.

23 MR. STONE: So, if they're --

24 JUSTICE KAGAN: Thank you, General.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: I have a few
4 questions. So, first, on the resource
5 constraints issue that's been raised, I'm just
6 trying to figure out how this will play out if
7 you were to prevail. So the government says we
8 don't have the money to comply. Then -- then
9 what do you do?

10 MR. STONE: I don't think we even have
11 final agency action at that point to sue over,
12 let alone that we could point at 1226(c) or
13 1231.

14 JUSTICE KAVANAUGH: So nothing
15 changes?

16 MR. STONE: If the government said
17 that they didn't have -- they didn't have money
18 to comply and then continued ignoring this
19 Court's order, we might be able to put together
20 some sort of de facto rule --

21 JUSTICE KAVANAUGH: Well, it's not
22 ignoring it; it's just we don't have -- if -- if
23 they say we don't have the money to comply with
24 the -- with the court's order or the statute as
25 written, as construed by you, the "shall" --

1 MR. STONE: I agree that presents a
2 difficult hypothetical, Justice Kavanaugh. But,
3 in this case, where there are findings of fact
4 regarding persistently underused detention
5 ability, it's a much harder case where there's a
6 world where, as a matter of fact, Petitioners
7 are using in their own best judgment all of the
8 resources they have. I think that's a much
9 harder case. It would be a harder case at least
10 on redressability grounds. That's not this
11 case, and there are findings of fact in this --
12 on this record supported by ample evidence that
13 --

14 JUSTICE KAVANAUGH: If you play it out
15 and you go into district court, the district
16 court would have to issue an order then
17 essentially mandating arrests.

18 MR. STONE: Certainly not, Your Honor.
19 We're only seeking vacatur of the Guidelines.
20 Now --

21 JUSTICE KAVANAUGH: No, here. I'm
22 talking about, if you win here, then the
23 government doesn't do anything because it says
24 we don't have the money to do anything, then you
25 try some action. I guess you already said there

1 wouldn't be final agency action then.

2 MR. STONE: I don't believe there
3 would be --

4 JUSTICE KAVANAUGH: Okay. So that's
5 --

6 MR. STONE: -- final agency action
7 after that.

8 JUSTICE KAVANAUGH: Okay. Second, the
9 hypothetical raised by the government which I
10 don't think has been raised -- would -- could a
11 state challenge the President's exercise of war
12 powers, for example, being a violation of -- of
13 the Constitution or the war powers resolution?
14 They raise that as a -- an issue that your
15 theory would lead to.

16 MR. STONE: I don't believe so, Your
17 Honor, in part because, for example --

18 JUSTICE KAVANAUGH: Why not?

19 MR. STONE: Well --

20 JUSTICE KAVANAUGH: There would
21 definitely be cost to the state from its people
22 going into a foreign war, so why couldn't the
23 state then challenge under your theory here?

24 MR. STONE: At a minimum, the
25 President -- the President isn't an agency, so

1 the President typically -- neither is Congress
2 --

3 JUSTICE KAVANAUGH: So that you'd
4 bring -- you'd bring something against the
5 Secretary of Defense, as was -- has been done
6 before?

7 MR. STONE: I -- I think almost
8 certainly political question doctrine then also
9 to some extent ends up coming --

10 JUSTICE KAVANAUGH: I don't know about
11 that after Zivotofsky, but that's a different
12 argument.

13 Okay. So I'll go on to my next
14 question. Justice Kagan raises a good point
15 about the problem of government programs getting
16 shut down quickly. Now, first, that -- that can
17 only happen -- this is a helpful question to
18 you, but that can only happen if you not only
19 have standing, but you have a successful claim
20 on the merits, likelihood of success on the
21 merits, correct?

22 MR. STONE: That's correct.

23 JUSTICE KAVANAUGH: Okay. And if you
24 -- you know, I think the follow-up question was
25 you might get a judge with an idiosyncratic view

1 of a particular issue and that -- that can shut
2 down a government program, but you can seek an
3 immediate -- the government can seek an
4 immediate appeal in that circumstance or an
5 emergency motion, correct?

6 MR. STONE: Not only can but
7 frequently does and sought it in this Court.

8 JUSTICE KAVANAUGH: We are aware.
9 Yeah. Okay. And -- okay. The last question is
10 on the set aside, I just want you to say more.
11 I -- I have obviously shown what I think about
12 that, but the set-aside argument is not just new
13 as I understand it, but it was wrong from the
14 beginning is your point and that 706 deals with
15 remedies not just in 706(2) but 706(1) as a
16 remedy. Just say a couple sentences about why
17 you think it's wrong from the beginning, not
18 just wrong because a few judges like me did it
19 for years on the D.C. Circuit.

20 MR. STONE: Certainly, Justice
21 Kavanaugh. So contemporary legal dictionaries,
22 indeed, even the dictionary, Merriam-Webster's,
23 on which Petitioners cite in its E definition,
24 define -- defined "set aside" to mean annul or
25 to overrule, that's in (1)(b) of their

1 definition. That -- that fits comfortably with
2 the history recognized in this Court prior to
3 and leading up to the Administrative Procedure
4 Act. That definition pairs 706(2)'s whole
5 unlawful and set aside, which has the vacatur
6 remedy we've been discussing, along with 706(1),
7 which is a -- which unquestionably provides a
8 remedy to order agency action unreasonably
9 withheld.

10 So the textual clues, the intertextual
11 clues and history from this Court and
12 administrative practice prior to and leading up
13 to the APA all point in the same direction that
14 courts have properly been issuing vacatur under
15 706(2) since the beginning.

16 JUSTICE KAVANAUGH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 JUSTICE BARRETT: Just a quick one on
20 vacatur. I mean, I -- I agree with Justice
21 Alito this is a huge issue, and -- and, frankly,
22 I wasn't expecting the 706 briefing. I thought
23 we were just going to get briefing about the
24 1252(f)(1) issue. But, you know, this Court,
25 when it comes to jurisdiction, gives little

1 weight to drive-by jurisdictional rulings, you
2 know, and the Solicitor General pointed out that
3 this is not an issue -- we might think of these
4 as drive-by remedial rulings because it's not an
5 issue that this Court or -- or maybe even the
6 lower courts have analyzed in depth.

7 If I think you're wrong about the
8 original meaning of the APA or what people
9 expected "set aside" meant at that time and
10 these are all drive-by remedial rulings, do you
11 lose?

12 MR. STONE: If you think I'm wrong,
13 then I think you'd have to ask whether or not
14 you thought it was fairly within the question
15 presented. I agree that the lower courts'
16 rulings don't bind this Court and this Court's
17 previous rulings. I think the fact this Court
18 has -- has affirmed vacatur many, many times
19 should give you pause before thinking that we're
20 wrong. But, yes, I'd agree with that point.
21 You could rule against us on the merits.

22 JUSTICE BARRETT: Thanks.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: Yes. So, on the

1 merits, it was very clarifying to me in your
2 exchanges with Justice Sotomayor and Justice
3 Kagan that you said you're not challenging the
4 removal determination, that you're saying this
5 is really about detention, as the statute says,
6 and that you're interpreting Section 1226(c) to
7 require the detention of certain criminal
8 non-citizens before DHS decides to initiate
9 removal proceedings. Am I right about that?

10 MR. STONE: And arrest, which we think
11 both of those come from take into custody. But,
12 yes.

13 JUSTICE JACKSON: But it's before --
14 before.

15 MR. STONE: Yes.

16 JUSTICE JACKSON: You said, when they
17 make the decision not to remove someone, then
18 that -- then their duty dissipates and they can
19 let them go.

20 MR. STONE: It attaches once the --
21 the individual is released and it dissipates as
22 soon as they make a decision.

23 JUSTICE JACKSON: The reason why
24 that's troubling me so, and you mentioned the
25 Fourth Amendment at one point, the reason why

1 that's troubling me so is that isn't the
2 executive branch's authority to take people into
3 custody because they're going to effectuate
4 their removal, that you get to arrest and detain
5 this person based on your decision?

6 And -- and -- and I'm sort of thinking
7 about a hypothetical situation in which it might
8 take the government nine months, a year, or
9 whatnot, to make a decision as to whether or not
10 to remove such a person. Is it your view that
11 once this person has served their criminal
12 sentence in state court and they're about to be
13 released, the government -- federal government
14 has to, per the statute, come in and detain that
15 person even if they haven't decided to remove
16 them and they could hold them, I suppose,
17 indefinitely until they make that determination?

18 MR. STONE: Two parts. The first part
19 is a very direct yes. But the second part is
20 perhaps in certain extreme circumstances there
21 might be an as-applied constitutional challenge.

22 That having been said, to me, the idea
23 that the federal government hasn't decided
24 whether to prosecute but will detain someone
25 sounds analogous to that the federal government

1 believes someone has committed a crime and has
2 probable cause and arrests them and then
3 may perhaps choose later to let them go if they
4 decide to null prosse.

5 JUSTICE JACKSON: Yeah, but we don't
6 -- but, under our criminal system, don't you
7 have a limited amount of time as the government
8 to decide whether or not to prosecute someone,
9 that you might arrest them based on probable
10 cause, but then the government's got to pretty
11 promptly arraign them, meaning charge them and,
12 you know, start the prosecution. You can't just
13 indefinitely hold people.

14 And so what -- what I'm worried about
15 is that your conception of this is that the
16 government has to come in even before they've
17 decided whether or not they're going to remove
18 this person and -- and detain them and,
19 apparently, according to this very detailed
20 statute, there's no limit from Congress as to
21 how long this person can be detained prior to
22 the determination of bringing charges? That
23 just seems totally anathema to what we've
24 thought of in terms of valid exercises of
25 government detention power.

1 MR. STONE: Three points, Your Honor,
2 the first being that this Court has held
3 previously that exercises of detention over
4 non-citizens can be constitutionally tolerable
5 even when they're constitutionally intolerable
6 against citizens.

7 The second being it may very well be
8 the case there could be an as-applied
9 constitutional challenge in an extreme case here
10 for some --

11 JUSTICE JACKSON: Well, wouldn't --
12 wouldn't Congress have to be clear that that's
13 what that was actually trying to do? I mean, I
14 would think constitutional avoidance would
15 counsel us to read their statute not to -- to
16 even, you know, create the kind of
17 constitutional problem you're talking about.

18 And there is a very legitimate way to
19 read it, which is the way that many of the
20 Justices have been pointing out and that the
21 Solicitor General points out, which is this
22 applies to detention once the determination has
23 been made. That makes it similar to criminal,
24 that makes it consistent with the Constitution,
25 everything that we've -- we've said.

1 MR. STONE: I think it applies to both
2 arrest and detention from take into custody.
3 But not to lose the forest for the trees,
4 Justice Jackson, even if, in fact, this
5 Court held that that's the duration permissible
6 begins only with a notice to appear, the final
7 memorandum would still be unlawful because it
8 says essentially that Petitioners have the
9 unbridled, absolute discretion to arrest or
10 detain or not arrest or not detain anyone under
11 any circumstances, including individuals who
12 have, in fact, committed actions that subject
13 them to mandatory detention under 1226(c).

14 So, even if -- even if we stipulated
15 that that was how the Court were to interpret
16 1226(a), that the detention period ends upon the
17 -- doesn't attach until the beginning of a
18 notice to removal proceeding, which I think
19 doesn't follow from the statute's text, even
20 stipulating that --

21 JUSTICE JACKSON: But -- I'm sorry --
22 can I just say one more thing? And I know we're
23 running low on time.

24 The statute's text in (a) says, "...
25 pending a decision on whether the alien is to be

1 removed from the United States." And, as
2 Justice Kagan pointed out in -- in Demore, we
3 made very clear that there -- that that's a
4 process, that it starts with the -- the -- the
5 DHS's determination that they're going to seek
6 removal and it ends ultimately with an order of
7 removal. So it seems to me that (a) is talking
8 about detention during the duration of that
9 period.

10 What you're saying is they can detain
11 them prior to the United States' determination
12 that they're even going to seek the person's
13 removal and -- and I guess indefinitely until
14 they make that decision?

15 MR. STONE: The problem, Your Honor,
16 is that pending a determination about whether
17 someone is to be removed itself in that passive
18 voice contemplates the possibility that will be
19 a negative determination. Otherwise, Congress
20 would have said something like you must detain
21 these individuals for the duration of their
22 removal proceedings or something to indicate
23 removal proceedings had already begun. That's
24 just not the text.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Rebuttal, General Prelogar.

3 REBUTTAL ARGUMENT OF GENERAL ELIZABETH B.

4 PRELOGAR ON BEHALF OF THE PETITIONERS

5 GENERAL PRELOGAR: Thank you,

6 Mr. Chief Justice.

7 On 1252(f)(1), my friend fundamentally
8 misunderstands the difference between a
9 declaratory judgment and vacatur. If the
10 district court here had entered a declaratory
11 judgment, we would have still had the
12 enforcement priorities and DHS would have been
13 entitled to rely on those while it continued to
14 pursue its appeal rights. It's not a course of
15 remedy.

16 Vacatur stands in an entirely
17 different posture because the district court
18 voided the Guidelines, and that prevented DHS
19 officials from being able to continue to rely on
20 those while the case was litigated, and that is
21 precisely contrary to the judgment that Congress
22 made in 1252(f)(1).

23 On the merits, make no mistake it is
24 impossible for DHS to comply with each and every
25 "shall" in the INA if that is truly a judicially

1 enforceable duty. I don't think that my friend
2 can reasonably contest that point.

3 Justice Kavanaugh, you asked what the
4 consequences of that would be on the ground.
5 Here's what I think it would mean. If this
6 Court actually said that "shall" displaces all
7 enforcement discretion, then DHS would be under
8 a judicially enforceable obligation to take
9 enforcement action against whomever it first
10 encounters on the ground who might be subject to
11 one of these provisions.

12 But there are non-citizens out there
13 who have criminal convictions for serious
14 offenses like murder and sex offenses that --
15 that wouldn't qualify under a "shall" because of
16 the court's categorical approach, and that means
17 we wouldn't have the resources or ability to go
18 after those individuals who are threats to
19 public safety, national security, and border
20 security. That is a senseless way to run an
21 immigration enforcement system, and it is not
22 the statute that Congress enacted.

23 On standing, my friend has articulated
24 no limits on the -- the circumstances that would
25 permit a state to sue. He gestured at the idea

1 that maybe it's when states have relinquished
2 their sovereignty to the federal government.
3 But that explains every exercise of the federal
4 government's powers. It's always pursuant to
5 the enumerated powers -- powers where there has
6 been that relinquishment of sovereignty.

7 He agrees that even one more
8 non-citizen or one fewer, one dollar of indirect
9 costs on taxing and spending would get states
10 into court, and that would be an indirect effect
11 of every single federal government policy
12 because the national government and the states
13 share sovereignty over the same people.

14 And what means is that anytime we
15 regulate with respect to the people of the
16 states, the states will be able to point at
17 those kinds of indirect, incidental downstream
18 effects on their own taxing and spending. That
19 has not provided a basis for standing if you
20 look at our history and tradition, and the Court
21 should make that limit clear.

22 Finally, I think it's worth taking a
23 step back here. We think the district court
24 committed a lot of different independent errors,
25 any one of which would entitle us to relief,

1 and it gives the Court options about how to
2 resolve this case.

3 But I think it's worth pausing on
4 the consequences of the district court's very
5 broad conception of standing here and its claim
6 of remedial authority. Under the versions of
7 state standing that the lower courts have been
8 accepting, it means that states can challenge
9 the federal government with any policy with
10 which they disagree. All 50 state Attorneys
11 General can come to court. They can file
12 multiple suits, as they frequently do, in
13 multiple jurisdictions. And, at that point, the
14 federal government has to run the table. We
15 have to win each and every one of those cases,
16 as we did here with these enforcement guidelines
17 in the Sixth Circuit.

18 But, if the states can persuade even
19 one single district judge in a forum of their
20 choosing to be skeptical of the federal
21 government's position, then that judge can claim
22 authority to issue a universal remedy that is
23 going to immediately put the federal
24 government's policies on hold. And that puts --
25 that resolves the issue for everyone everywhere

1 and puts the government in the position where it
2 frequently has to seek emergency relief from
3 this Court, as the Court well knows. As members
4 of the Court have recognized, that requires
5 high-stakes decision-making with very little
6 time and in a situation where it has stymied the
7 ability of the Court to rely on lower courts to
8 vet the issues and give them consideration
9 because one district judge has claimed authority
10 to resolve the issue for the nation.

11 And I think that that is bad for the
12 executive branch. I think it's bad for the
13 American public. And I think it's bad for
14 Article III courts. So we would encourage this
15 Court to say that and to reverse.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. The case is submitted.

18 (Whereupon, at 12:20 p.m., the case
19 was submitted.)
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