No.

In the Supreme Court of the United States

JOSEPH R. BIDEN, JR.,
PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns the Migrant Protection Protocols (MPP), a former policy of the Department of Homeland Security (DHS) under which certain noncitizens arriving at the southwest border were returned to Mexico during their immigration proceedings. On June 1, 2021, the Secretary of Homeland Security issued a memorandum terminating MPP. The district court vacated the Secretary's termination decision and remanded the matter to the agency on two grounds: (1) that terminating MPP violates 8 U.S.C. 1225 because DHS lacks capacity to detain all the inadmissible noncitizens it encounters who purportedly must be detained under that provision, and (2) that the Secretary had not adequately explained his decision. The court entered a permanent injunction requiring DHS to reinstate and maintain MPP unless Congress funds sufficient detention capacity for DHS to detain all noncitizens subject to mandatory detention under Section 1225 *and* until the agency adequately explained a future termination.

On October 29, 2021, after thoroughly reconsidering the matter on remand, the Secretary issued a new decision terminating MPP and providing a comprehensive explanation for the decision. The court of appeals nevertheless affirmed the injunction, endorsing the district court's reading of Section 1225 and holding that the Secretary's new decision could not be considered because it had no legal effect. The questions presented are:

1. Whether 8 U.S.C. 1225 requires DHS to continue implementing MPP.

2. Whether the court of appeals erred by concluding that the Secretary's new decision terminating MPP had no legal effect.

PARTIES TO THE PROCEEDING

Petitioners were the defendants-appellants in the court of appeals. They are Joseph R. Biden, Jr., in his official capacity as President of the United States; the United States of America; Alejandro N. Mayorkas, in his official capacity as Secretary of Homeland Security; the United States Department of Homeland Security; Robert Silvers, in his official capacity as Under Secretary of Homeland Security, Office of Strategy, Policy, and Plans; Chris Magnus, in his official capacity as Commissioner, U.S. Customs and Border Protection; U.S. Customs and Border Protection; Tae D. Johnson, in his official capacity as Acting Director, U.S. Immigration and Customs Enforcement; U.S. Immigration and Customs Enforcement; Ur M. Jaddou, in her official capacity as Director, U.S. Citizenship and Immigration Services; and U.S. Citizenship and Immigration Services.*

Respondents were the plaintiffs-appellees below. They are the States of Texas and Missouri.

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* Under Secretary Silvers, Commissioner Magnus, and Director Jaddou are automatically substituted for their predecessors. See Sup. Ct. R. 35.3.

RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

State of Texas v. *Joseph R. Biden, Jr.*, No. 21-cv-67 (Aug. 13, 2021)

United States Court of Appeals (5th Cir.):

State of Texas v. *Joseph R. Biden, Jr.*, No. 21-10806 (Dec. 13, 2021)

Supreme Court of the United States:

Joseph R. Biden, Jr. v. *Texas*, No. 21A21 (Aug. 24, 2021)

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Joseph R. Biden, Jr., President of the United States, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS IN THE CASE

The revised opinion of the court of appeals (Pet. App. 1a-136a) is not yet reported but is available at 2021 WL 5882670. The memorandum opinions and orders of the district court (Pet. App. 137a-213a) are unreported but are available at 2021 WL 3603341 and 2021 WL 5399844. This Court's order denying a stay (Pet. App. 214a) is not yet reported but is available at 2021 WL 3732667. The court of appeals' order denying a stay (Pet. App. 215a-255a) is reported at 10 F.4th 538. The district court's order denying a stay (Pet. App. 256a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

In 8 U.S.C. 1225(b)(2), the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, provides as follows:

> **(2) Inspection of other aliens**
>
> **(A) In general**
>
> Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.
>
> * * *
>
> **(C) Treatment of aliens arriving from contiguous territory**
>
> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

Other pertinent statutory and regulatory provisions are reproduced in the appendix to this petition. Pet. App. 365a-385a.

STATEMENT

This case concerns the Secretary of Homeland Security's decision to stop using a discretionary immigration-enforcement policy first implemented in 2019. That policy, known as the Migrant Protection Protocols (MPP), applied to certain foreign nationals who had transited through Mexico to reach the United States land border. In adopting MPP, the Department of Homeland Security (DHS) invoked 8 U.S.C. 1225(b)(2)(C), which provides that the Secretary "may" return certain noncitizens to Mexico during the pendency of their immigration proceedings.[1]

In June 2021, the Secretary issued a decision terminating MPP. The district court vacated the Secretary's termination decision, concluding that (1) Section 1225 requires DHS to continue using MPP, and (2) the Secretary's decision was insufficiently explained. While that decision was on appeal, the Secretary addressed the deficient explanation by thoroughly reconsidering the matter and issuing a new decision that again terminated MPP. But the court of appeals held that the Secretary's new decision cannot be considered, and affirmed the district court's permanent injunction compelling DHS to maintain MPP. The court of appeals also held that Section 1225 compels DHS to retain MPP unless and until Congress has appropriated funds for DHS to detain virtually every noncitizen who arrives at the border without entitlement to admission. DHS has

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[1] Section 1225 refers to the Attorney General, but those functions have been transferred to the Secretary of Homeland Security. See *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1965 n.3 (2020). This petition uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

thus been forced to reinstate and continue implementing indefinitely a controversial policy that the Secretary has twice determined is not in the interests of the United States.

A. Legal Background

The Executive Branch has broad constitutional and statutory power over the administration and enforcement of the Nation's immigration laws. See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950); see also, *e.g.*, 6 U.S.C. 202(5); 8 U.S.C. 1103(a)(1) and (3). As relevant here, the Executive has long exercised prosecutorial discretion to allocate its limited resources by prioritizing which noncitizens to remove and through what type of proceedings. See *In re E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 521-523 (B.I.A. 2011).

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, refers to a noncitizen who arrives in the United States at a port of entry or between ports as an "applicant for admission." 8 U.S.C. 1225(a)(1). A noncitizen who is "present in the United States [but] has not been admitted" is also deemed "an applicant for admission." *Ibid.*

The INA affords DHS multiple options for processing applicants for admission. Section 1225(b)(2)(A) provides that, if an "immigration officer determines" upon inspecting "an applicant for admission" that he "is not clearly and beyond a doubt entitled to be admitted," then the applicant "shall be detained for a proceeding under [8 U.S.C.] 1229a" to determine whether he will be removed from the United States or is eligible to receive some form of relief or protection from removal, such as asylum. 8 U.S.C. 1225(b)(2)(A). As an alternative to removal proceedings under Section 1229a, certain applicants for admission may be placed in an expedited-

removal process. See *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1964-1966 (2020); see also *E-R-M-*, 25 I. & N. Dec. at 523.

DHS encounters substantially more noncitizens described in Section 1225 than it has the capacity to detain. The district found that "Defendants simply do not have the resources to detain aliens as mandated by statute." Pet. App. 169a; see *id.* at 388a (senior DHS official attesting that "the Department simply does not now have * * * sufficient detention capacity to maintain in custody every single person described in 8 U.S.C. § 1225"). In November 2021, for example, DHS's total detention capacity—even including short-term border-patrol facilities—was 34,618. See D. Ct. Doc. 119, at 3 (Dec. 15, 2021). Yet that same month, DHS encountered 86,279 Title 8 applicants for admission at the border. *Id.* Ex. A, at 1; see U.S. Customs & Border Protection, *Southwest Land Border Encounters*, https://go.usa.gov/xtqmr (Dec. 17, 2021) (reporting 671,160 Title 8 encounters in fiscal year 2021).[2]

In addition to DHS's authority under Section 1225 to detain applicants for admission during their removal proceedings, the Secretary is authorized, "in his discretion," to release applicants for admission on parole "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A); see 8 C.F.R. 212.5. Moreover, Section 1226 provides that the Secretary generally may arrest noncitizens and either detain them "pending a decision on whether" they will be removed, or "release" them on "bond" or

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[2] Although DHS may, in some cases, reprogram "funds from other accounts to support increased detention capacity," its ability to do so is "modest" and "diminish[es] the Department's ability to accomplish other priorities of critical importance." Pet. App. 393a.

"conditional parole." 8 U.S.C. 1226(a); see *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 837-838 (2018) (describing Section 1226).

2. Another part of Section 1225—the one at issue here—provides DHS with a further enforcement tool in certain instances: "In the case of an alien described in [Section 1225(b)(2)(A)] who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the [Secretary] may return the alien to that territory pending a proceeding under section 1229a." 8 U.S.C. 1225(b)(2)(C). Congress enacted Section 1225(b)(2)(C) as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 302, 110 Stat. 3009-583, to provide a statutory basis for the government's "long-standing practice" of requiring certain noncitizens arriving on land from Mexico or Canada to await immigration proceedings within those countries. *In re M-D-C-V-*, 28 I. & N. Dec. 18, 25-26 (B.I.A. 2020); see *In re Sanchez-Avila*, 21 I. & N. Dec. 444, 450, 454 (B.I.A. 1996).

Before 2019, the government used that contiguous-territory-return authority primarily on an ad hoc basis to return selected noncitizens—usually Mexican and Canadian nationals—arriving at ports of entry. See Pet. App. 273a & n.12; see also 8 C.F.R. 235.3(d).

B. The Present Controversy

1. In December 2018, then-Secretary Nielsen announced MPP, under which DHS would "begin implementation of" the contiguous-territory-return authority in Section 1225(b)(2)(C) "on a wide-scale basis" along the southwest border. 84 Fed. Reg. 6811, 6811 (Feb. 28, 2019); see Pet. App. 157a-158a. "That same day, [the Government of] Mexico announced its independent de-

cision to accept those returned to Mexico through the program—a key precondition to implementation." Pet. App. 274a. Under MPP, certain non-Mexican nationals arriving by land from Mexico could be "placed in removal proceedings and returned to Mexico to await their immigration court proceedings." *Id.* at 275a; see *id.* at 158a-159a.

MPP was initially piloted at a single port of entry, then gradually expanded across the southwest border. Pet. App. 275a. In April 2020, however, DHS dramatically reduced its use of MPP and instead began expelling inadmissible applicants for admission pursuant to an order of the Centers for Disease Control and Prevention, in light of the COVID-19 pandemic. *Id.* at 162a n.8. Between the start of MPP on January 25, 2019 and January 21, 2021, DHS enrolled roughly 68,000 noncitizens in MPP. *Id.* at 277a.

MPP sparked substantial public criticism and litigation, some of which remains pending. "Among other claims, litigants challenged the program as an impermissible exercise of the underlying statutory authority" and "argued that MPP caused DHS to return noncitizens to Mexico to face persecution, abuse, and other harms." Pet. App. 281a-282a.

2. On January 20, 2021, after President Biden took office, the Acting Secretary of Homeland Security "suspend[ed] new enrollments in [MPP], pending further review of the program." Pet. App. 361a. On February 2, 2021, President Biden issued Executive Order No. 14,010, which directed the Secretary to "promptly review and determine whether to terminate or modify" MPP. 86 Fed. Reg. 8267, 8269 (Feb. 5, 2021). DHS then conducted a thorough review of the significant policy

questions implicated by the program, including its rationales and practical efficacy. See Pet. App. 350a-351a.

After that review, on June 1, 2021, Secretary Mayorkas decided to terminate MPP. Pet. App. 346a-360a. The Secretary explained that his decision was based on several considerations, including the extent of agency personnel and resources required to implement the program, concerns about MPP's operation and effectiveness, the availability of alternative policy approaches for managing irregular migration that he viewed as both more effective and humane, the fact that removal proceedings for MPP enrollees had been suspended for more than 14 months due to COVID-19, and MPP's impact on the United States' bilateral relationship with Mexico. *Id.* at 351a-359a.[3]

3. Respondents, the States of Texas and Missouri, brought this suit under 28 U.S.C. 1331, 1361, and 2201(a) in the Northern District of Texas challenging the Acting Secretary's January 20 suspension of new enrollments in MPP. See Pet. App. 150a. They later amended their complaint to claim that the Secretary's June 1 decision terminating MPP violated the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and the INA. See Pet. App. 151a.

Following a one-day bench trial, the district court entered judgment in favor of respondents. Pet. App. 149a-213a. After finding respondents' claims justiciable, the court concluded that the Secretary's June 1 decision had violated the INA because the court read Section 1225 to *mandate* that DHS return inadmissible ap-

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[3] After the Secretary terminated MPP, this Court vacated as moot a preliminary injunction that had been entered against the program but that this Court had stayed pending its review of the case. See *Mayorkas* v. *Innovation Law Lab*, 141 S. Ct. 2842 (2021).

plicants for admission to Mexico whenever DHS lacks the resources to detain them. See *id.* at 200a-202a. The court also concluded that the Secretary's June 1 decision was inadequately explained in violation of the APA. See *id.* at 190a-200a.

The district court's order "vacated" the Secretary's "June 1 Memorandum" and "remanded" the matter to DHS "for further consideration." Pet. App. 212a (capitalization and emphasis omitted). The court also entered a nationwide injunction ordering the government to reinstate and "implement MPP *in good faith* until such a time as it has been lawfully rescinded in compliance with the APA **and** until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section [1225] without releasing any aliens *because of* a lack of detention resources." *Ibid.*

4. The government promptly appealed, and the district court declined to stay its injunction pending appeal. Pet. App. 256a. The court of appeals also denied a stay. *Id.* at 215a-255a.

The government then applied to this Court for a stay. The Court denied the application, finding that the government was unlikely to succeed in showing that the Secretary's June 1 memorandum terminating MPP "was not arbitrary and capricious." Pet. App. 214a (citing *DHS* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905-1907, 1910-1915 (2020)). The Court did not mention respondents' claim that the termination of MPP violated the INA.

5. The government thereafter complied with the district court's injunction by undertaking significant (and ongoing) operational and diplomatic-negotiation efforts to reimplement MPP in good faith. Pet. App. 286a; see

D. Ct. Doc. 117 (Dec. 2, 2021). As required by the injunction, DHS is continuing the resource-intensive process of maintaining the program.

Consistent with the district court's remand for "further consideration," Pet. App. 212a, the Secretary also conducted a fresh evaluation process to consider "whether to maintain, terminate, or modify MPP in various ways," *id.* at 286a; see *id.* at 259a. The Secretary's evaluation spanned eleven weeks and considered, among other things, the court decisions and briefs in this and other cases involving MPP; multiple prior assessments of the program, both favorable and unfavorable, from within and outside DHS; records and testimony from congressional hearings on MPP; reports by nongovernmental entities; data on enrollments in MPP, encounters at the border, and outcomes; and the effects of other policies and programs on migration at the southwest border. *Id.* at 259a-260a, 287a-288a. The Secretary also met with "a broad array" of persons "with divergent views about MPP," including DHS personnel "engaged in border management"; elected officials from border States; border sheriffs and other law enforcement officials; and non-profit organizations that provide services at the border. *Id.* at 287a. The Secretary additionally examined each of the considerations the district court had found "insufficiently addressed in the June 1 Memorandum." *Id.* at 259a.

On September 20, 2021, while the Secretary's review was ongoing, the government advised the court of appeals in its opening brief "that the Secretary is reviewing the June 1 Memorandum and evaluating policy options regarding MPP," and that the "result of that review could have an impact on this appeal." Gov't C.A. Br. 9 n.2. On September 29, 2021, the Secretary an-

nounced his intention "to issue a new memo terminating MPP." Pet. App. 11a (brackets and citation omitted); see *id.* at 28a. That same day, the government moved the court of appeals to hold the appeal in abeyance for a few weeks pending the Secretary's decision. Gov't C.A. Motion 3 (Sept. 29, 2021). The court denied that motion. C.A. Order (Oct. 4, 2021).

On October 29, the Secretary issued his new decision terminating MPP. Pet. App. 257a-264a. The decision incorporated a 38-page memorandum exhaustively describing his evaluation process on remand and the reasons for his decision. *Id.* at 265a-345a. The Secretary explained that, along with other arguments for retaining the program, he had "carefully considered what [he] deem[ed] to be the strongest argument in favor of retaining MPP," namely a "significant decrease in [southwest] border encounters" following its implementation. *Id.* at 261a. But he concluded that MPP's "benefits do not justify the costs" given the "endemic" flaws in the program, including extreme violence perpetrated by criminal organizations against some migrants enrolled in MPP, migrants' difficulties in accessing counsel across the border, and the ways in which MPP detracts from "foreign-policy objectives[] and domestic policy initiatives that better align with this Administration's values." *Id.* at 260a-261a; see *id.* at 267a-270a.

The Secretary also found that "[e]fforts to implement MPP have played a particularly outsized role in diplomatic engagements with Mexico," "diverting attention from more productive efforts to fight" transnational crime and smuggling and to "address the root causes of migration." Pet. App. 262a. The Secretary explained that Mexico "w[ould] not agree to accept" returned migrants without "substantial improvements" to

MPP, which would require the agency to devote even more resources to the program. *Ibid.* In the Secretary's judgment, those resources would be better directed to other policies designed to "disincentivize irregular migration while incentivizing safe, orderly, and humane pathways." *Id.* at 267a-268a.

The Secretary therefore again "terminat[ed] MPP." Pet. App. 263a. He "immediately" "supersede[d] and rescind[ed] the June 1 memorandum" and any prior DHS memoranda implementing MPP. *Id.* at 263a-264a. The Secretary also made clear, though, that the government would "continue complying" with the district court's injunction and his new "termination of MPP w[ould] be implemented" only once the injunction was lifted. *Id.* at 264a.

That same day, the government moved the court of appeals to vacate the injunction on the ground that respondents had challenged the Secretary's June 1 decision, which had now been superseded by the October 29 decision as the operative agency action. Gov't C.A. Motion (Oct. 29, 2021). Alternatively, the government's motion asked the court to hold the appeal in abeyance with respect to respondents' statutory claim, and remand in part to the district court to consider whether the Secretary's October 29 decision met the injunction's condition that DHS "rescind[] [MPP] in compliance with the APA." Pet. App. 212a.

6. The court of appeals denied the motion and affirmed the district court's nationwide injunction requiring DHS to maintain MPP. Pet. App. 1a-136a.

The court concluded that respondents' claims were reviewable and not moot. See Pet. App. 15a-102a. In doing so, the court found that the Secretary's rescinded June 1 memorandum, not the subsequent October 29

memorandum, was the operative decision under review. In the court's view, whereas "DHS's June 1 decision to terminate MPP had legal effect," "the October 29 Memoranda and any other subsequent memos" did not; they "simply *explained* DHS's decision." *Id.* at 22a. Relying on D.C. Circuit caselaw governing the statute of limitations for challenging agency action, the court concluded that "[t]he October 29 [decision] did not constitute a new and separately reviewable 'final agency action,'" *id.* at 23a (citing *National Ass'n of Reversionary Prop. Owners* v. *Surface Transp. Bd.*, 158 F.3d 135 (1998)); see *id.* at 23a-30a. The court stated that the only way for DHS to issue a new decision would have been to "dismiss its appeal" (thereby abandoning its challenge to the district court's Section 1225 holding), "restart its rulemaking process," and then "attempt to get Rule 60(b) relief from the district court." *Id.* at 126a n.19.

The court of appeals went on to affirm the district court's conclusion that the Secretary's explanation for terminating MPP on June 1 had been inadequate. Pet. App. 102a-113a. The court addressed only the rescinded June 1 memorandum; it did not consider the October 29 decision's detailed responses to each of the shortcomings the district court had identified. *Ibid.*

The court of appeals also affirmed the district court's conclusion that the Secretary "violated the INA" by ceasing MPP. See Pet. App. 113a-123a. In the court of appeals' view, Section 1225(b)(2)(A) imposes a "plainly obligatory rule: detention for aliens seeking admission," and Section 1225(b)(2)(C) "authorizes contiguous-territory return as an alternative." *Id.* at 118a. The court observed that "DHS lacks the resources to detain every alien seeking admission to the United States," but reasoned that releasing noncitizens on parole where

DHS lacks capacity to detain them would "ignor[e] the limitations Congress imposed on the parole power." *Id.* at 119a, 122a. Thus, the court concluded, DHS *must* "avail itself" of the contiguous-territory-return authority under Section 1225(b)(2)(C). *Id.* at 120a n.18.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted because the decision below relied on novel and erroneous interpretations of the INA and the APA to compel DHS to maintain indefinitely a discretionary program that the Secretary has twice determined to be contrary to the interests of the United States. If allowed to stand, that decision will continue to severely impair the Executive Branch's constitutional and statutory authority to manage the border and conduct the Nation's foreign policy.

The court of appeals' holding that Section 1225 compels DHS to maintain MPP contradicts the statute's plain text. The court's unprecedented interpretation also suggests that every presidential administration—including the one that adopted MPP—has been in continuous and systematic violation of Section 1225 since the relevant statutory provisions took effect in 1997. And the court affirmed an injunction requiring the Secretary to maintain MPP *permanently* unless Mexico withdraws its consent or Congress appropriates sufficient funds for DHS to detain virtually all applicants for admission who are not clearly admissible.

The court of appeals additionally erred by holding that the Secretary's October 29 decision to terminate MPP had no legal effect. By carefully reconsidering the matter on remand and responding to the shortcomings found by the district court, the Secretary did exactly what an agency is supposed to do when a reviewing court finds its explanation lacking. The court of appeals

ignored bedrock principles of administrative law in denying the Secretary's new decision any effect.[4]

In short, the lower courts have commanded DHS to implement and enforce the short-lived and controversial MPP program in perpetuity. And they have done so despite determinations by the politically accountable Executive Branch that MPP is not the best tool for deterring unlawful migration; that MPP exposes migrants to unacceptable risks; and that MPP detracts from the Executive's foreign-relations efforts to manage regional migration. Worse yet, the court of appeals has effectively precluded consideration of the Secretary's operative explanation of those concerns. This Court should grant certiorari and reverse. And given the importance of the case and the magnitude of the nationwide injunction's ongoing interference with the Executive Branch's conduct of immigration and foreign policy, the United States respectfully submits that the Court should hear and decide the case this Term.

I. THE DECISION BELOW IS INCORRECT

A. The Court Of Appeals Erred In Holding That Section 1225 Compels The Secretary To Use His Discretionary Contiguous-Territory-Return Authority

The court of appeals held that Section 1225 mandates the indefinite use of MPP based on the following logic: First, Section 1225(b)(2)(A) requires DHS to detain applicants for admission who are not clearly admissible "pending removal proceedings." Pet. App. 115a. Second, as the district court found and no one disputes,

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[4] In addition, the lower courts lacked jurisdiction to grant injunctive relief under 8 U.S.C. 1252(f)(1). This Court is considering the scope of Section 1252(f)(1) in *Garland* v. *Aleman Gonzalez*, No. 20-322 (oral argument scheduled for Jan. 11, 2022).

"DHS lacks the resources to detain every alien seeking admission to the United States." *Id.* at 119a; see p. 5, *supra*. Third, the court of appeals stated that the INA's parole provisions give the agency only "limited authority" to make selective releases. Pet. App. 14a; see *id.* at 13a-15a, 116a-118a, 120a-121a. Therefore, the court concluded, DHS must "avail itself of" the "authorized alternative" of contiguous-territory return to avoid violating Section 1225(b)(2)(A)'s purported detention mandate. *Id.* at 120a n.18. That reasoning cannot be reconciled with the text, structure, or history of Section 1225.

1. The court of appeals' decision contradicts the plain text of Section 1225(b)(2)(C).

a. Section 1225(b)(2)(C) states that, when DHS encounters an applicant for admission who is not clearly entitled to be admitted (the class "described in subparagraph [1225(b)(2)(A)]"), and who is arriving on land from Mexico or Canada, the Secretary "*may* return" the applicant to Mexico or Canada pending his removal proceedings. 8 U.S.C. 1225(b)(2)(C) (emphasis added). The first question presented here is whether the Secretary may decide not to use that authority.

"To ask the question is nearly to answer it." *Rodriguez* v. *FDIC*, 140 S. Ct. 713, 716 (2020). This Court has consistently "emphasized that the 'word "may" clearly connotes discretion.'" *Halo Elecs., Inc* v. *Pulse Elecs., Inc.*, 579 U.S. 93, 103 (2016) (quoting *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 136 (2005)); see, *e.g.*, *Weyerhaeuser Co.* v. *United States Fish & Wildlife Serv.*, 139 S. Ct. 361, 371 (2018). Congress's use of the word "may" in Section 1225(b)(2)(C) thus unmistakably indicates that contiguous-territory return is always a discretionary tool that the Secretary has permission to use, but never one that he is compelled to use.

b. Even the court of appeals acknowledged that Section 1225(b)(2)(C) is "obviously * * * discretionary." Pet. App. 120a n.18. But the court nonetheless held that it becomes mandatory whenever DHS lacks the capacity to satisfy Section 1225's purported detention "mandate." *Ibid.* The court believed that DHS cannot manage its limited detention capacity by releasing inadmissible applicants for admission on parole or otherwise, as the agency has done for decades. *Ibid.* Instead, the court held that DHS *must* "return under § 1225(b)(2)(C)." *Id.* at 120a. In other words, according to the court of appeals, Section 1225(b)(2)(C) is a "safety valve to address [the] problem" of inadequate detention capacity. *Id.* at 4a.

That reasoning is incorrect. Even if the court of appeals' criticisms of DHS's longstanding detention and parole practices had merit—and they do not, see pp. 19-23, *infra*—those criticisms would not affect the legality of the Secretary's decision to stop programmatic use of the *discretionary* contiguous-territory-return authority. The court's conclusion that DHS is "violating" a detention mandate in Section 1225(b)(2)(A), Pet. App. 120a n.18, could conceivably support, at most, an order requiring DHS to detain more people—not an order compelling the Secretary to utilize a separate enforcement tool that Congress said he "may" use.

Respondents have not sought an order obligating DHS to actually return anyone to Mexico, likely because the courts lack jurisdiction to command the Secretary to employ his discretionary authorities—including the contiguous-territory-return authority. See 8 U.S.C. 1252(a)(2)(B)(ii) (depriving courts of jurisdiction to review "any * * * decision or action of the" Secretary "the authority for which is specified under this subchap-

ter to be in [his] discretion"). Respondents should not be permitted to sidestep that jurisdictional bar by repackaging their statutory theory as a complaint about the termination of MPP.

2. Moreover, the court of appeals' "safety valve" construction, Pet. App. 4a, is refuted by Section 1225(b)(2)(C)'s context. The available historical evidence suggests that even the Congress that enacted IIRIRA did not appropriate adequate funds for the Executive Branch to detain all noncitizens described in Section 1225. Compare, *e.g.*, IIRIRA § 386(a), 110 Stat. 3009-653 (directing an increase in immigration-detention facilities to "at least 9,000 beds" during fiscal year 1997), with U.S. Border Patrol, *Southwest Border Sectors: Total Encounters By Fiscal Year*, https://go.usa.gov/xeJCM (showing over 1.3 million noncitizens apprehended that year just at the southwest border between ports of entry). Nothing suggests that Congress viewed contiguous-territory return as an *obligatory* solution to that problem, and the words Congress chose—"may return"—show the opposite.

The court of appeals' contrary construction is especially implausible because contiguous-territory return by definition involves sending noncitizens into the territory of a foreign sovereign. That step requires the foreign sovereign's consent, see Pet. App. 274a, 325a, and thus necessarily requires negotiations implicating foreign relations. Cf. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations."). The court of appeals did not explain why, in situations where the Executive lacks adequate detention capacity, Congress would have conferred on Mexico

the effective power to decide whether or not the Secretary employs contiguous-territory return.

Instead, as the Board of Immigration Appeals has explained, Congress enacted Section 1225(b)(2)(C) simply to provide a statutory basis for the Executive Branch's prior ad hoc practice of returning selected noncitizens to Mexico or Canada, see *In re M-D-C-V-*, 28 I. & N. Dec. 18, 25-26 (B.I.A. 2020), shortly after the Board had held that the practice required express authorization. See *In re Sanchez-Avila*, 21 I. & N. Dec. 444, 464-466 (B.I.A. 1996). It would be startling if Congress had buried in that provision a mandate to overhaul the Executive's border-management practices and dictate its foreign policy. "Congress does not," after all, "'hide elephants in mouseholes.'" *Cyan, Inc.* v. *Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1071 (2018) (citation omitted). And it would be even more startling for such a mandate to have gone unnoticed for a quarter of a century.

3. Section 1225(b)(2)(C)'s discretionary character would resolve the first question presented even if the court of appeals were correct that DHS's longstanding detention and parole practices are inconsistent with the INA. But the court was mistaken.

a. As an initial matter, the court of appeals drew its sweeping conclusions about DHS's practices without the benefit of a relevant record. The agency decision that respondents challenged in this APA case was the June 1 termination of MPP. See D. Ct. Doc. 48, at 46 (June 3, 2021) (first amended complaint). Indeed, respondents emphasized that they were "not challenging" DHS's "parole policies." D. Ct. Doc. 103, at 63 (Aug. 20, 2021). As a result, the administrative record and the

parties' trial evidence were not directed to how many applicants for admission are paroled and why.

b. Perhaps in part because of that limited record, the court of appeals' analysis misapprehended both the relevant law and DHS's policies.

i. The court of appeals began with the premise that because Section 1225(b)(2)(A) uses the word "shall," it imposes a judicially enforceable command requiring DHS to detain every noncitizen who falls within its terms. Pet. App. 115a-116a. But this Court has long held that even such "seemingly mandatory legislative commands" do not displace "the deep-rooted nature of law enforcement discretion." *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 760 (2005) (Scalia, J.); see, *e.g.*, *Richbourg Motor Co.* v. *United States*, 281 U.S. 528, 534 (1930) ("Undoubtedly, 'shall' is sometimes the equivalent of 'may' when used in a statute prospectively affecting government action."). Thus, a state law instructing that officers "shall arrest" an individual who violates a restraining order did not "truly ma[k]e enforcement of [such] orders *mandatory*," because "'insufficient resources'" and "'sheer physical impossibility,'" among other factors, required enforcement discretion. *Castle Rock*, 545 U.S. at 760 (citation omitted); see *City of Chicago* v. *Morales*, 527 U.S. 41, 59, 62 n.32 (1999).

So too here, where DHS lacks the physical capacity to implement Section 1225 as the inflexible "mandate" the court of appeals perceived. Pet. App. 120a n.18. The court did not explain how it can be a *statutory* violation for an agency to fail to do something that Congress has not funded it to do. See, *e.g.*, *Morton* v. *Ruiz*, 415 U.S. 199, 230-231 (1974).

The court of appeals stated (Pet. App. 115a-116a) that its reading of Section 1225(b)(2)(A) was supported

by *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 837 (2018). But *Jennings* rejected an argument by noncitizens that Section 1225 compelled their *release*, see *id.* at 844-846; the Court did not determine how DHS should implement Section 1225(b)(2)(A) when it cannot detain all inadmissible applicants for admission. See *id.* at 842 (stating that Section 1225(b) "*authorize*[*s*] detention until the end of applicable proceedings") (emphasis added).

The court of appeals also dismissed traditional principles of enforcement discretion, reasoning that the Secretary's decision to parole or otherwise refrain from detaining a noncitizen is not "a nonenforcement decision." Pet. App. 122a. The court appeared to rely on the fact that the affected noncitizens will be subject to immigration-enforcement proceedings regardless, and the only question is whether they are detained pending those proceedings. *Ibid.* But enforcement discretion encompasses not just choices about whether to enforce, but also choices about *how* to enforce. Cf. *Arizona* v. *United States*, 567 U.S. 387, 396 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials."). And in deciding not to detain a noncitizen pending removal, the Secretary elects not to use a particular statutory enforcement tool in the face of limited resources—a classic matter of enforcement discretion.

ii. Even setting aside traditional principles of enforcement discretion, the court of appeals' conclusion that Section 1225(b)(2)(A) mandates detention is refuted by other provisions of the INA that expressly authorize release. Most obviously, Congress granted the Secretary "discretion" to "parole into the United States temporarily under such conditions as he may prescribe

only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission." 8 U.S.C. 1182(d)(5)(A).

The court of appeals stated that Section 1182(d)(5)(A) does not permit DHS to parole large numbers of noncitizens that it lacks capacity to detain. Pet. App. 120a. But Congress charged *the Secretary* with determining, "in his discretion," whether the parole of specific persons —such as those whom DHS cannot detain due to insufficient appropriations and who do not pose a danger or a flight risk—would be a "significant public benefit." 8 U.S.C. 1182(d)(5)(A).

In exercising that authority, the Executive Branch has—across many administrations—considered resource constraints in determining when and how to use parole. See, *e.g.*, Memorandum from Matthew T. Albence, U.S. Immigration and Customs Enforcement (ICE), *Implementing the President's Border Security and Interior Immigration Enforcement Policies* 3 (Feb. 21, 2017), https://go.usa.gov/xtqtW; Memorandum from Marcy M. Forman and Victor X. Cerda, ICE, *ICE Transportation, Detention and Processing Requirements* 2 (Jan. 11, 2005), https://go.usa.gov/xtqtK. The Executive Branch's consistent constructions of the INA's parole provisions are entitled to judicial deference. See, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999). Indeed, the Secretary's parole determinations are discretionary decisions insulated from judicial review by 8 U.S.C 1252(a)(2)(B)(ii).

The court of appeals stated, without citation, that DHS's longstanding parole practices are inconsistent with Section 1182(d)(5)(A) because parole decisions are not made on a "case-by-case basis." Pet. App. 120a-121a. That is incorrect. DHS's parole regulations re-

quire "case-by-case" decisions, including a threshold determination that a noncitizen "presents neither a security risk nor a risk of absconding" and a further determination that parole is appropriate, including because "continued detention is not in the public interest." 8 C.F.R. 212.5(b). In making those determinations, DHS must of course account for its actual detention capacity. But that does not make its decisions any less case-by-case.[5]

4. If any doubt remained, the radical implications of the court of appeals' reasoning would confirm that the court erred. As the government explained below, and as the court of appeals did not dispute, its construction of the INA conflicts with the construction of every presidential administration since IIRIRA went into effect in 1997. The court's holding requires DHS to implement an explicitly discretionary program so long as it lacks the physical capacity to detain all applicants for admission who are not clearly admissible—a circumstance that lies largely outside the agency's control. And respondents have identified no administration that ever

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[5] The Secretary is also authorized to release certain noncitizens on bond or conditional parole. See 8 U.S.C. 1226(a). The court of appeals believed that Section 1226(a) is irrelevant here because it applies only to noncitizens "already in the United States," whereas MPP and Section 1225(b)(2) concern noncitizens "apprehended at the border," Pet. App. 104a (emphasis omitted), and because DHS does not release noncitizens potentially eligible for contiguous-territory return on bond or conditional parole, *id.* at 105a. But the text of Section 1226 permits DHS to detain, and then release on bond or conditional parole, arriving noncitizens who are arrested shortly after crossing the border between ports of entry. And DHS *has* traditionally used those authorities in that context. See *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10,312, 10,323 (Mar. 6, 1997).

attempted to use Section 1225(b)(2)(C) to return all non-detained inadmissible applicants for admission to Mexico or Canada. To the contrary: Until 2019, Section 1225(b)(2)(C) was deployed principally in a limited, ad hoc manner. See Pet. App. 273a & n.12.

On the court of appeals' reading, even the administration that initiated MPP was in violation of Section 1225 while the program was in effect, because MPP did not attempt to cover all noncitizens who are statutorily eligible for contiguous-territory return. See, *e.g.*, Pet. App. 159a (describing classes of noncitizens not amenable to return under MPP, including all Mexican nationals). DHS enrolled approximately 68,000 people in MPP while it was operational, compared to the 1 million noncitizens that it processed under Title 8 at the southwest border in that same period. See *id.* at 277a; see also *id.* at 323a-324a. The court of appeals' interpretation thus contradicts not only the statutory text and context, but also a quarter century of practice spanning five presidential administrations.

B. The Court Of Appeals Erred In Holding That The Secretary's October 29 Termination Decision Had No Legal Effect

The district court vacated the Secretary's June 1 memorandum and remanded to the agency for further consideration because it concluded that the Secretary had not adequately explained his decision. As is routine following such a holding, the Secretary reconsidered the matter and issued a new decision specifically addressing the shortcomings perceived by the district court. Yet the court of appeals held that the new decision cannot even be considered because it had no legal effect. In so doing, the court ignored hornbook princi-

ples of administrative law and relied on novel theories that even respondents had not advocated.

1. In *DHS* v. *Regents of the University of California*, 140 S. Ct. 1891 (2020), this Court explained that, when an agency's "grounds" for a challenged action "are inadequate, a court may remand for the agency to do one of two things." *Id.* at 1907. "First, the agency can offer 'a fuller explanation of the agency's reasoning *at the time of the agency action*.'" *Ibid.* (quoting *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 654 (1990)). When an agency selects this route, it "may elaborate" on its original reasons "but may not provide new ones." *Id.* at 1908. "Alternatively, the agency can 'deal with the problem afresh' by taking *new* agency action." *Ibid.* (quoting *SEC* v. *Chenery Corp.*, 332 U.S. 194, 201 (1947)). "An agency taking this route is not limited to its prior reasons." *Ibid.*

In *Regents*, the agency selected the first path, resting on the initial decision "while elaborating on its prior reasoning" in a supplemental memorandum. 140 S. Ct. at 1908. But this Court found that the supplemental memorandum bore "little relationship" to the prior one, and accordingly declined to consider the agency's new rationales on the ground that they amounted to "impermissible *post hoc* rationalizations." *Id.* at 1908-1909.

In this case, DHS followed the teaching of *Regents* by selecting the alternative path. After the district court vacated the Secretary's June 1 decision and remanded to DHS, the agency explicitly chose to "'deal with the problem afresh' by taking *new* agency action." *Regents*, 140 S. Ct. at 1908 (quoting *Chenery*, 332 U.S. at 201). Even as DHS pursued its appeal, which was necessary to challenge the court's erroneous reading of Section 1225 in a final judgment, the Secretary com-

menced a new and thorough evaluation process, culminating in the October 29 decision in which he "supersede[d] and rescind[ed] the June 1 memorandum" and in its place again "terminat[ed] MPP." Pet. App. 263a. The October 29 decision accordingly rested on several "new reasons" that were "absent from" the June 1 decision, *Regents*, 140 S. Ct. at 1908, and expressly addressed each of the "considerations that the District Court [had] determined were insufficiently addressed in the June 1 memo," Pet. App. 259a. In short, "by its own terms," the October 29 decision "implement[ed] a new policy." *Regents*, 140 S. Ct. at 1908.

The court of appeals nevertheless rejected that conclusion. The court reasoned that the Secretary had made only a single "*Termination Decision*," and that respondents are challenging that decision—"not the June 1 Memorandum, the October 29 Memoranda, or any other memo." Pet. App. 22a. In the court's view, "DHS's Termination Decision is analogous to the judgment of a court, and its memos are analogous to a court's opinion explicating its judgment." *Ibid.* But the court of appeals cited no administrative-law authority for that characterization, and it is wrong. Unlike in *Regents*, DHS expressly chose not to "rest on the [June 1 decision] while elaborating on its prior reasoning," 140 S. Ct. at 1908, and instead issued a *new* decision "rescind[ing] the June 1 memorandum" and other prior actions related to MPP. Pet. App. 263a-264a.

The court of appeals offered no sound justification for ignoring that choice. The court suggested that the Secretary's explanations for the October 29 decision are merely *post hoc* rationalizations, Pet. App. 44a-45a, but this case bears no resemblance to those in which the Court has rejected agency explanations on that ground.

See, *e.g.*, *Regents*, 140 S. Ct. at 1908 (second agency memorandum expressly "'decline[d] to disturb the [initial] memorandum's rescission' and instead 'provide[d] further explanation'") (citation omitted; first and third set of brackets in original); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (arguments of "appellate counsel[ ]"); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 419 (1971) ("litigation affidavits").

The court of appeals' conclusion is particularly misplaced given the nature of the APA violation identified by the district court. The district court invalidated the June 1 decision as arbitrary and capricious because it believed the Secretary had "ignored critical factors" and given "arbitrary" reasons. Pet. App. 191a, 195a. The *only* way to remedy those deficiencies was to issue a decision that reflected consideration of additional factors—as the Secretary did here.

2. The court of appeals' decision violates core APA principles because it leaves DHS no viable pathway for providing that additional consideration and explanation.

At times, the court seemed to suggest that DHS could issue a new decision only by adopting a different *conclusion* about whether to terminate MPP. See Pet. App. 22a ("The June 1 Memorandum—just like the October 29 Memoranda and *any other subsequent* memos—simply explained DHS's [termination] decision.") (emphasis altered). But at least since *Chenery*, it has been hornbook law that when a court finds an agency's original explanation lacking, the agency on remand may "reexamine[] the problem, recast its rationale, and reach[] the same result." 332 U.S. at 196. The federal reporters are filled with decisions that, like *Chenery*, considered "additional explanations" made by

an agency "on remand from a court, even if the agency's bottom-line decision itself d[id] not change." *Regents*, 140 S. Ct. at 1934 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

At other times, the court of appeals suggested that DHS had acted improperly by reconsidering its decision while also pursuing an appeal. *E.g.*, Pet. App. 125a-126a & n.19. But the court cited no law or precedent precluding an agency from taking that course. And that dual-track approach was particularly necessary here: The district court's judgment "remanded" the matter to DHS "for further consideration," *id.* at 212a, and that judgment was not stayed pending appeal. While DHS could address the court's failure-to-explain holding by issuing a new decision on remand, the agency had to pursue its appeal to obtain review of the district court's unprecedented interpretation of Section 1225 and the portion of the injunction requiring DHS to maintain MPP in perpetuity unless Congress increases its detention capacity.

If the court of appeals objected to DHS's issuance of a new decision while the appeal was pending, then it could have remanded for the district court to address that decision in the first instance (as DHS requested, see p. 12, *supra*). Instead, the court of appeals held that the new memorandum *cannot* be considered because it had no legal effect. That was error.

The court of appeals attempted to downplay its overreach by stating that it "need not decide" whether the October 29 decision was based on "*post hoc* rationalizations." Pet. App. 45a. But the essential premise of the court's ruling was that the Secretary's October 29 decision had no legal effect. The court reasoned that "DHS's June 1 decision to terminate MPP had legal

effect" but "[t]he June 1 Memorandum—just like the October 29 Memoranda and any other subsequent memos—simply *explained* DHS's decision." *Id.* at 22a. The opinion is replete with other pronouncements to the same effect. See, *e.g.*, *id.* at 11a ("The October 29 Memoranda did not purport to alter the Termination Decision in any way; they merely offered additional reasons for it."); *id.* at 23a ("The October 29 Memoranda did not constitute a new and separately reviewable 'final agency action.'"); *id.* at 125a (describing the October 29 decision as a "new memo (but not a full-on new agency action)"). In light of those pronouncements, there is no doubt that the court's opinion improperly precludes the October 29 decision from satisfying the injunction's condition that DHS "lawfully rescind[ ]" MPP "in compliance with the APA." *Id.* at 212a.

3. The court of appeals' holding that the October 29 decision had no legal effect depended heavily on what the court termed the "reopening" doctrine, Pet. App. 23a-30a, which no party had briefed. The D.C. Circuit formulated that doctrine to determine the triggering event for the statute of limitations governing challenges to agency action in "situations where an agency conducts a rulemaking or adopts a policy on an issue at one time, and then in a later rulemaking restates the policy or otherwise addresses the issue again without altering the original decision." *National Ass'n of Reversionary Prop. Owners* v. *Surface Transp. Bd.*, 158 F.3d 135, 141 (1998) (*NARPO*). "[W]hen the later proceeding explicitly or implicitly shows that the agency actually reconsidered the rule, the matter has been reopened and the time period for seeking judicial review begins anew." *Ibid.*

The reopening doctrine is inapposite here, where the district court vacated the agency's original decision and remanded to the agency, and the agency expressly issued a new decision after a new evaluation process. And even if the reopening doctrine were relevant, the Secretary's October 29 decision unmistakably reopened the June 1 decision. In concluding otherwise, the court of appeals considered a variety of factors, such as whether the agency issued an "explicit invitation to comment on a previously settled matter." Pet. App. 26a (quoting *NARPO*, 158 F.3d at 142). Such factors may assist a court in ascertaining whether an agency has *implicitly* reopened a prior decision during a subsequent notice-and-comment rulemaking. But the D.C. Circuit has recognized that where, as here, an agency "explicitly" reconsiders a prior decision, there is "no need to quibble about the precise quantum of evidence sufficient to show" reopening. *Public Citizen* v. *Nuclear Regulatory Comm'n*, 901 F.2d 147, 151 (D.C. Cir.), cert. denied, 498 U.S. 992 (1990). The Secretary explicitly reopened the decision whether to terminate MPP "[p]ursuant to the [d]istrict [c]ourt's remand," and determined anew "that MPP should be terminated." Pet. App. 259a-260a.

The court of appeals faulted DHS for announcing on September 29 that it "intend[ed] to issue in the coming weeks a new memorandum terminating" MPP, which the court perceived as a sign that the Secretary had prejudged the issue. Pet. App. 28a. But that announcement was itself the product of weeks of analysis following the district court's August 13 remand. And the announcement was not a final decision; it simply reflected the Secretary's present "[i]ntention" to terminate MPP again. *Ibid.* That announcement allowed the government to give the court of appeals notice of the forthcom-

ing decision while it continued to work through the issue, and seek to hold the case in abeyance before the completion of briefing and well before oral argument. See Gov't C.A. Motion (Sept. 29, 2021); cf. Pet. App. 49a-50a (faulting DHS for issuing the October 29 decision shortly before argument). But the court denied that request.

The October 29 decision, in turn, "did not purport to justify a predetermined outcome." *Fisher* v. *Pension Benefit Guar. Corp.*, 994 F.3d 664, 670 (D.C. Cir. 2021). Rather, the Secretary "once more assessed whether MPP should be maintained, terminated, or modified in a variety of different ways." Pet. App. 259a. In doing so, he fully considered all relevant "arguments, evidence, and perspectives presented by those who support re-implementation of MPP, those who support terminating the program, and those who have argued for continuing MPP in a modified form." *Id.* at 259a-260a; see *id.* at 287a-343a. The court of appeals failed to justify its refusal to accept the Secretary's account of his decisional process. See *Overton Park*, 401 U.S. at 415 (describing the "presumption of regularity" owed to agency action).

4. In denying the government's prior motion for a stay, this Court relied solely on the district court's conclusion that the June 1 memorandum had failed to explain adequately the Secretary's decision to terminate MPP. See Pet. App. 214a. The Secretary has now conducted a fresh evaluation and issued a new decision comprehensively addressing the district court's concerns. The court of appeals seriously erred in affirming the district court's injunction without even considering—or permitting the district court to consider—that new decision.

II. THE DECISION BELOW WARRANTS REVIEW, AND THE COURT SHOULD HEAR THE CASE THIS TERM

This Court should grant the petition for a writ of certiorari and set the case for argument this Term. The court of appeals' decision has enormous legal and practical consequences, and there are compelling reasons for the Court to review it promptly.

A. The decision below "deeply intrudes into the core concerns of the executive branch," *Adams* v. *Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978) (per curiam), by affirming an injunction that profoundly circumscribes the Executive Branch's constitutional and statutory authority over discretionary immigration decisions and the conduct of foreign relations. See *Arizona*, 567 U.S. at 396 (noting the Executive's authority to make "discretionary" immigration decisions "that bear on this Nation's international relations").

By compelling DHS to reinstate a programmatic policy of returning noncitizens to Mexico, the lower courts improperly dictated the exercise of the Executive's statutory discretion. See 8 U.S.C. 1225(b)(2)(C). In addition, as the Secretary has explained and other senior government officials have attested, MPP necessarily implicates the United States' bilateral relationship with the Government of Mexico. See Pet. App. 325a-327a; *id.* at 393a-394a (senior DHS official attesting that "[i]mplementation of MPP" requires "significant coordination with, and cooperation from, the Government of Mexico"); *id.* at 418a-421a (senior State Department official attesting the same). By requiring the Executive to engage in ongoing negotiations with a foreign sovereign over the contours of a border-wide immigration program, the lower courts effected a major and "unwarranted judicial interference in the conduct of foreign

policy" and executive prerogative. *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013); see *Harisiades*, 342 U.S. at 588-589. The injunction forces the Executive to prioritize MPP negotiations over other collaborative efforts that the Secretary believes will yield better results in managing immigration and border security.

The lower courts' disruption of the separation of powers is particularly prejudicial because of MPP's immense practical significance for the agencies involved. Implementing MPP requires systemic operational adjustments, and significant resources, from both DHS and the Executive Office for Immigration Review (EOIR), which adjudicates the removal proceedings of individuals in MPP. See, *e.g.*, Pet. App. 310a-312a; *id.* at 406a-407a (declaration of EOIR's Principal Deputy Chief Immigration Judge). Requiring the government to dedicate its resources to MPP necessarily detracts from other initiatives that the Secretary has determined would better manage border security and the processing of applicants for admission. See *id.* at 327a-340a.

The lower courts' unprecedented construction of Section 1225 also threatens broader disruptions. As explained above, the injunction would preclude DHS from *ever* ending MPP unless it acquired sufficient immigration-detention capacity to avoid "releasing *any* aliens because of a lack of detention resources." Pet. App. 212a (emphasis altered). Moreover, although respondents' challenge is limited to MPP, the court of appeals' opinion includes wide-ranging dicta purporting to superintend the Executive's discretion over many aspects of federal immigration detention, including the scope of the parole power. See *id.* at 116a-118a, 120a-

121a. The court's ruling thus threatens disruption far beyond the confines of this case.

B. This Court has repeatedly granted petitions for writs of certiorari to address "important questions" of "federal power" over "the law of immigration and alien status." *Arizona*, 567 U.S. at 394; see, *e.g.*, *Trump* v. *Hawaii*, 138 S. Ct. 2392 (2018); *United States* v. *Texas*, 136 S. Ct. 2271 (2016) (per curiam). The Court did so just last Term in a case involving a nationwide, preliminary injunction *against* MPP, in an interlocutory posture and without a circuit conflict. See *Wolf* v. *Innovation Law Lab*, 141 S. Ct. 617 (2020) (No. 19-1212). A writ of certiorari is amply warranted to review the court of appeals' affirmance of a final judgment enjoining the government to preserve MPP indefinitely.

C. Finally, the government respectfully submits that the Court should set this case for argument this Term. The district court's extraordinary injunction compelling the Executive to negotiate with a foreign sovereign and implement a nationwide, discretionary immigration program has been in place since August and will remain in place until this Court intervenes. The court of appeals' unprecedented construction of Section 1225 threatens further significant disruption in other cases where parties seek to upend the government's policies regarding immigration detention and parole. Delaying review until next Term would likely postpone resolution of those critical issues until sometime in 2023. In the meantime, the government would be forced to continue negotiating with Mexico to maintain a controversial program that it has already twice determined is no longer in the best interests of the United States. "Our constitutional system is not supposed to work that way."

Regents, 140 S. Ct. at 1932 (Alito, J., concurring in the judgment in part and dissenting in part).

To facilitate consideration of this case this Term, the government is filing this petition just over two weeks after the decision below, which will enable the Court to consider the petition at its February 18 conference. If the Court grants this petition, it should order expedited briefing so that the case can be heard in the Court's April sitting. See, *e.g.*, *Department of Commerce* v. *New York*, 139 S. Ct. 953 (2019); Stephen M. Shapiro et al., *Supreme Court Practice* 13-5, 14-13 & n.25 (11th ed. 2019).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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