No. 21-954

IN THE

Supreme Court of the United States

JOSEPH R. BIDEN, JR., ET AL.,

Petitioners,

v.

STATE OF TEXAS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF BIPARTISAN FORMER OFFICIALS OF THE DEPARTMENT OF HOMELAND SECURITY AND THE IMMIGRATION AND NATURALIZATION SERVICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
MIRIAM BECKER-COHEN
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

March 21, 2022

* Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Statutes and Legislative Materials

TABLE OF AUTHORITIES – cont'd

Page(s)

Other Authorities

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICI CURIAE*[1]

Amici are former officials of the Department of Homeland Security and the Immigration and Naturalization Service who served in both Republican and Democratic administrations. *Amici* differ in their views of the Migrant Protection Protocols as a matter of policy, but they all agree that the conclusion of the court below that 8 U.S.C. § 1225 mandates contiguous territory return is at odds with the plain text of the statute, as well as the border management policies of every administration since the contiguous territory return provision was enacted. They also agree that the court's cramped interpretation of the parole statute is at odds with its text, as well as the manner in which the parole authority has been exercised by every administration to manage migrant flows at the border. By depriving the executive branch of the discretion built into the nation's immigration laws, the decision of the court below would produce deeply troubling consequences for the ability of the executive branch to manage the border and shape foreign policy. Accordingly, *amici* have a strong interest in this case.

A full listing of *amici* appears in the Appendix.

---

[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

As *amici* know from their experiences serving in the Department of Homeland Security (DHS) and the Immigration and Naturalization Service (INS), it has been necessary for those agencies to manage large numbers of migrants at the southwest border over the past several decades. Given the broad discretion that our immigration laws give to the executive branch, these policies have varied significantly over time, particularly as presidential administrations have changed from one party to the other. However, no administration—Republican or Democratic—has ever read 8 U.S.C. § 1225 to mandate the return of noncitizens to Mexico while they await adjudication of their immigration cases simply because the federal government lacks sufficient capacity to detain them. Only the court below reached that novel conclusion.

Through a series of interpretive missteps, the court below reasoned that because § 1225(b)(2)(A) states that all noncitizens seeking admission who are not clearly admissible "shall be detained," and DHS indisputably "lacks the resources to detain every alien seeking admission," Pet. App. 119a, DHS must implement contiguous territory return in order to comply with § 1225(b)(2)(A)'s so-called "detention mandate," *id.* at 120a n.18. This interpretation ignores the plain text, structure, and history of § 1225, misconstrues the parole authority in 8 U.S.C. § 1182(d)(5)(A) and the manner in which every administration since 1997 has utilized it, and fails to respect the breadth of prosecutorial discretion the executive branch enjoys when it implements our nation's immigration laws. It would require the current administration and every future administration to continue the Migrant Protection Protocols (MPP) indefinitely, crippling the ability of

DHS to manage the border in a manner that is responsive to changing circumstances, including the nation's foreign policy needs.

There are at least three distinct problems with the decision of the court below.

1. The court below construed § 1225(b)(2)(A) as containing an unyielding "detention mandate," Pet. App. 120a n.18, even though Congress has built multiple discretionary exceptions to that so-called mandate into the Immigration and Nationality Act (INA) itself. Indeed, § 1225(b)(2)(A) could not be a "detention mandate"—and has never been treated as one—because Congress has never appropriated sufficient funds for DHS or INS to detain all arriving noncitizens who are not clearly admissible.

Moreover, even if the court below were correct that § 1225(b)(2)(A) contains such a mandate, the court was still wrong to conclude that a discretionary policy like MPP is mandatory because that interpretation ignores the plain text of § 1225(b)(2)(C). Section 1225(b)(2)(C) states that "the Attorney General *may* return [certain noncitizens] to [a contiguous] territory pending a proceeding under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(C) (emphasis added). This Court has long held that "the word 'may' . . . implies discretion." *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (quoting *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016)). Because there is no other language in § 1225(b)(2)(C) suggesting any plausible alternative construction, this Court should adhere to the plain meaning of the statutory text. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020) ("[W]hen the meaning of the statute's terms is plain, our job is at an end.").

The structure of § 1225 confirms what its text makes clear. Although the court below described contiguous territory return as a "statutory safety valve," Pet. App. 4a, § 1225(b)(2)(C) is in fact best viewed as one of several *discretionary* exceptions to detention pursuant to § 1225(b)(2)(A). *See, e.g.*, 8 U.S.C. § 1182(d)(5)(A) (authorizing DHS to release certain noncitizens on parole). Tellingly, where Congress has sought to require enforcement officers to choose one approach or the other, it has used the mandatory formulation "shall do X or shall do Y." *E.g.*, *id.* § 1226a(a)(5) ("[t]he Attorney General *shall place* an alien detained [as a certified terrorist] in removal proceedings, *or shall charge* the alien with a criminal offense, not later than 7 days after the commencement of such detention" (emphases added)). By contrast, the so-called mandatory detention provision, *id.* § 1225(b)(2)(A), and the contiguous territory return provision, *id.* § 1225(b)(2)(C), are not presented in the disjunctive and use different verbs, "shall" and "may." Other aspects of the structure of § 1225 also demonstrate that Congress knew how to create a mandatory exception or mandatory alternative to detention, *see, e.g.*, *id.* § 1225(b)(2)(B), but for contiguous territory return, it chose not to do so.

2. The court below also propounded a deeply flawed interpretation of the parole statute, which permits applicants for admission to be temporarily released on parole "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." *Id.* § 1182(d)(5)(A). If the court below had given the parole statute its proper weight in the statutory scheme, it would have recognized that parole is a viable alternative to detention or contiguous territory return—indeed, one that DHS and its predecessor agency have used for decades to manage the southwest border.

The fundamental error of the court below was its conclusion that, in the case of insufficient detention capacity (which again, has been the case during *all* of *amici's* tenures at INS and DHS due to limited funding from Congress), any release of more than a small number of noncitizens on parole is necessarily an "*en masse*" release, Pet. App. 120a, and thus conflicts with the individualized evaluation § 1182(d)(5)(A) requires. That is wrong for two reasons.

First, the term "case-by-case" does not mean "a small number"; rather, the term merely requires individualized application of the parole criteria to each noncitizen being considered for release.

Second, as *amici* know from their experiences serving in DHS and INS, even when capacity restraints limit the total number of arriving noncitizens who can be detained, immigration officers still can and do determine *which* noncitizens to release on a case-by-case basis. Indeed, DHS's current regulations set forth specific criteria for that case-by-case analysis, including ensuring that paroled noncitizens "present neither a security risk nor a risk of absconding." 8 C.F.R. § 212.5(b). And for years following Congress's enactment of the "case-by-case" requirement for parole, DHS and its predecessor agency complied with that requirement while still exercising their discretion to release on parole large, designated classes of noncitizens. Under the logic of the court below, every single one of those administrations—Republican and Democratic—violated § 1225 and § 1182(d)(5)(A). That simply is not so.

3. Finally, the court below failed to respect the significant enforcement discretion that Congress has long conferred on the executive branch in the realm of immigration policy. *See, e.g.*, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950)

(immigration is an area that touches on the nation's foreign affairs in which "flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program" (quoting *Lichter v. United States*, 334 U.S. 742, 785 (1948)). That discretion extends to detention decisions. As *amicus* former INS General Counsel Bo Cooper explained in an INS legal opinion: "As detaining aliens is an exercise of the coercive authority of a law enforcement agency over liberty, legal concepts of enforcement discretion apply despite the fact that detention is not a strictly 'prosecutorial' decision." *INS Exercise of Prosecutorial Discretion*, Legal Op. No. 99-5 (INS), 2001 WL 1047687, at *10. High-level INS and DHS officials from both Republican and Democratic administrations, including several *amici*, have expressed similar views in guidance documents issued over the past twenty-five years.

Contiguous territory return illustrates why executive discretion in this realm is so important: it necessarily requires the United States to send noncitizens into the territory of a foreign sovereign and thus has the potential to have significant implications for the nation's foreign policy. Indeed, even the administration that first implemented MPP recognized this principle, formally implementing MPP only after negotiating certain terms of the program with Mexico and obtaining that nation's affirmative consent.

In sum, the decision of the court below ordering the federal government to reimplement MPP defied statutory text, structure, and history, ignored the parole practices of every administration in recent history, and disrespected the well-established principles of prosecutorial discretion embedded in our nation's immigration laws. This Court should reverse.

ARGUMENT

I. Contiguous Territory Return Is a Discretionary Policy, and No Plausible Reading of 8 U.S.C. § 1225 Could Render It Mandatory Under Any Circumstances.

The court below concluded that contiguous territory return becomes mandatory whenever the federal government lacks capacity to detain every noncitizen seeking admission at the southwest border who is not clearly admissible. The text, structure, and history of § 1225 plainly refute that conclusion.

A. The first interpretive error of the court of appeals was to construe 8 U.S.C. § 1225(b)(2)(A) as an unyielding "detention mandate," Pet. App. 120a n.18. Under 8 U.S.C. § 1225(b)(2)(A), if an "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." While the word "shall" typically indicates a requirement, this Court has long held that principles of prosecutorial discretion can affect the proper interpretation of that term. *See, e.g.*, *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005) (explaining that a "well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes"); *see also In re E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011) (holding that the term "shall" in 8 U.S.C. § 1225(b)(1)(A)(i) incorporates principles of prosecutorial discretion, making expedited removal discretionary).

These decisions rest on the basic logic that enforcement officials cannot possibly investigate and charge every individual who might have violated the law, notwithstanding mandatory language in the relevant

statutes. For instance, a typical petty larceny statute reads, "Whoever steals . . . the property of another . . . *shall* be guilty of larceny, and . . . if the value of the property stolen . . . does not exceed two hundred and fifty dollars, *shall* be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars." Mass. Gen. Laws Ann., ch. 266, § 30(1) (West 2008) (emphasis added). But "[n]o one considers that such a law absolutely requires police to investigate or prosecutors to charge every time they have even minimal evidence of such a theft." *Amicus* David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 Yale L.J. Online 167, 182 (2012). That simply is not how law enforcement functions in the criminal or immigration context, given resource limitations and the trust that our system of government puts in law enforcement officials to make sound judgments about when sanction is warranted. *See id.* (explaining that despite the use of the word "shall" in § 1225, the provision does not contain a "categorical mandate").

Those principles are especially applicable to the so-called "detention mandate" of § 1225(b)(2)(A) because Congress did not circumscribe DHS's authority to later *release* noncitizens taken into detention pursuant to that provision. In this manner, 8 U.S.C. § 1225(b)(2)(A) stands in stark contrast to 8 U.S.C. § 1226(c), as § 1225(b)(2)(A) merely states that "the alien shall be detained" while § 1226(c) states both that the executive "shall take into custody [certain noncitizens convicted of crimes]" and that it "may release [those noncitizens] *only if*" necessary for witness protection purposes (emphasis added). *See also INS Exercise of Prosecutorial Discretion*, Bo Cooper, Legal Op. No. 99-5 (INS), 2001 WL 1047687, at *11 (explaining

that "[a]n INS decision to release an alien whom the agency otherwise might seek to detain" constitutes "an unreviewable act of enforcement discretion under the INA," and that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 removed that discretion *only* "with respect to the agency's enforcement discretion to release *criminal aliens*" by modifying 8 U.S.C. § 1226(c) and § 1231(a)(2) (emphasis added)).

Moreover, where Congress both fails to appropriate sufficient funds for a federal agency to fulfill an apparent mandate *and* builds explicit discretionary exceptions to that mandate into the statutory scheme, the only reasonable interpretation is that the so-called mandate does not function as an unyielding command. Such is the case here. For decades Congress has failed to appropriate sufficient funds to DHS or its predecessor agency to detain every single noncitizen awaiting removal proceedings under 8 U.S.C. § 1229a. Congress typically appropriates funds for "approximately 34,000 detention beds nationwide with some modest fluctuation from year to year," Pet App. 323a, yet this past year, for instance, U.S. Customs and Border Protection (CBP) apprehended more than 1.7 million migrants along the southwest border, CBP, *Southwest Land Border Encounters* (Jan. 24, 2022), cbp.gov/newsroom/stats/southwest-land-border-encounters#. Detention of every one of those arriving noncitizens is a physical impossibility—it would require Congress to increase detention funding roughly five-fold.[2]

[2] Or potentially even more, given that some of those approximately 34,000 detention beds need to be used for noncitizens encountered through interior enforcement, as opposed to at the border.

That, of course, is why Congress built multiple discretionary exceptions to detention for § 1225 immigrants into the statutory scheme. Contiguous territory return is just one of those discretionary exceptions: under 8 U.S.C. § 1225(b)(2)(C), "the Attorney General may return [certain noncitizens] to [a contiguous] territory pending a proceeding under section 1229a of this title." Critically, and as described in further detail below, Congress also provided that applicants for admission may be temporarily released on parole "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). For decades—including after Congress amended the parole statute to add the "case-by-case basis" requirement in 1996, *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, 3009-689—the federal government has used this authority to manage arriving noncitizens at the southwest border, releasing into the community applicants for admission who do not pose a danger or a flight risk, often in large numbers.

B. Moreover, even assuming *arguendo* that the court below were correct that § 1225(b)(2)(A) contains a "detention mandate," Pet. App. 120a n.18, the inability to fulfill that mandate could not transform a discretionary policy like MPP into a mandatory one. The statutory provision authorizing MPP uses plainly discretionary language, providing that "the Attorney General *may* return [certain noncitizens] to [a contiguous] territory pending a proceeding under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(C) (emphasis added). None of the administrations in which *amici* have served ever read the "may" in § 1225(b)(2)(C) as a "must," even though none of those administrations ever had sufficient funding to detain every arriving noncitizen who was not clearly admissible.

This Court's cases reinforce the correctness of that interpretation. This Court has long held that "the word 'may' . . . implies discretion." *Jennings*, 138 S. Ct. 844 (2018) (quoting *Kingdomware Techs.*, 579 U.S. at 171); *see United States v. Rodgers*, 461 U.S. 677, 706 (1983) ("[t]he word 'may,' when used in a statute, usually implies some degree of discretion"); *Haig v. Agee*, 453 U.S. 280, 294 n.26 (1981) ("'may' expressly recognizes substantial discretion"); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (the word "may" is "permissive"). And time and again, this Court has rejected invitations to read "may" as "must," emphasizing that "[i]t is only where it is necessary to give effect to the clear policy and intention of the Legislature, that such a liberty can be taken with the plain words of a statute." *Thompson v. Carroll*, 63 U.S. 422, 434 (1859).

Here, the statutory history provides no basis for taking that "liberty . . . with the plain words of [the] statute," *id.* Congress authorized contiguous territory return in IIRIRA merely to codify a longstanding *discretionary* and largely ad hoc policy of returning certain arriving noncitizens to Mexico. *See In re M-D-C-V-*, 28 I. & N. Dec. 18, 26 (BIA 2020) (noting that § 1225(b)(2)(C) was passed to codify the government's "prior practice under previously existing statutes and regulations"); Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444, 445 (Jan. 3, 1997) (Supplementary Information) ("This simply adds to statute and regulation a long-standing practice of the Service."). Respondents do not point to any evidence in the legislative record that so much as suggests that the addition of § 1225(b)(2)(C) to the INA, with the explicit usage of the term "may," somehow transformed that longstanding discretionary authority into a mandatory program.

Nor do they account for that purported change going unnoticed by the executive without any response from Congress for nearly twenty-five years.

C. The structure of § 1225 confirms the discretionary nature of contiguous territory return. If Congress had intended that § 1225(b)(2)(C) serve as a "statutory safety valve," Pet. App. 4a.—that is, a mandatory alternative to detention pursuant to § 1225(b)(2)(A)—it would have written those two statutory provisions in the disjunctive as alternative but equally mandatory options, using the verb "shall" for both. Indeed, other subsections of the INA use precisely that formulation. *See, e.g.*, 8 U.S.C. § 1226a(a)(5) ("The Attorney General *shall place* an alien detained [as a certified terrorist] in removal proceedings, *or shall charge* the alien with a criminal offense, not later than 7 days after the commencement of such detention." (emphases added)). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 432 (1987).

Even § 1225 itself makes clear that Congress knew how to craft a mandatory exception or mandatory alternative to § 1225(b)(2)(A)'s so-called "detention mandate" if it wanted to do so. Nestled between § 1225(b)(2)(A) and § 1225(b)(2)(C) is § 1225(b)(2)(B), which states that § 1225(b)(2)(A) "*shall not* apply to [three enumerated classes of noncitizens]." 8 U.S.C. § 1225(b)(2)(B) (emphasis added). The language of § 1225(b)(2)(B) is decisively *non*discretionary—that is, individuals described therein are *not permitted* to be processed and detained pursuant to § 1225(b)(2)(A). Certainly, if Congress invoked the "shall" formulation in a neighboring provision to ensure certain

noncitizens were excluded from § 1225(b)(2)(A), it could have used that same formulation to establish contiguous territory return as a mandatory alternative to § 1225(b)(2)(A) to be used whenever detention under § 1225(b)(2)(A) was not physically possible. It chose not to do so.

D. Finally, the fact that a program like MPP necessarily requires the consent of a foreign nation also undermines the conclusion of the court below that Congress somehow meant "must" when it said "may" in the contiguous territory return provision. *See* 8 U.S.C. § 1225(b)(2)(C). If MPP were mandatory, then Congress apparently gave foreign nations like Mexico the power to singlehandedly veto a mandatory U.S. immigration program. Congress does not legislate in that fashion.

In fact, MPP was first implemented only after negotiations with Mexico, resulting in Mexico's issuance of a statement agreeing to "authorize the temporary entrance of certain foreign individuals coming from the United States who entered that country at a port of entry or who were detained between ports of entry, have been interviewed by U.S. immigration authorities, and have received a notice to appear before an immigration judge." Secretaria de Relaciones Exteriores, *Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act* (Dec. 20, 2018); *see* Pet'r Br. 26-27. Mexico could freely withdraw that consent, as it is under no international law obligation to accept non-Mexican nationals into its territory. *See* Br. of Former DHS Sec'y Jeh C. Johnson and Former Ambassador to Mexico Roberta S. Jacobson as *Amici Curiae*. If the court below were correct that contiguous territory return is mandatory, then DHS's ability to comply with

a statutory command would depend entirely on the actions of a foreign nation.

So far as *amici* are aware, nowhere else in the immigration laws has Congress *mandated* a policy that relies entirely on the acquiescence of a foreign sovereign. If contiguous territory return were the one place where Congress decided to do that, it would have used exceedingly clear language—language that would not go misunderstood for a quarter century by five different presidential administrations.

II. The Court Below Misconstrued the Text of the Parole Authority in 8 U.S.C. § 1182(d)(5)(A) and the Manner in Which DHS and Its Predecessor Agency Have Utilized Parole for a Quarter Century.

In addition to misreading the text, structure, and history of § 1225, the court below also misconstrued the operation and scope of the parole authority in 8 U.S.C. § 1182(d)(5)(A)—a discretionary alternative to detention or contiguous territory return that has been used on a case-by-case basis to manage migrants at the southwest border by every administration in which *amici* served.

A. Section 1182(d)(5)(A) authorizes the release of applicants for admission "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." Significantly, the statute places no cap on the number of noncitizens that may be released pursuant to its terms. Nor does it define the terms "urgent humanitarian reason" or "significant public benefit."[3]

---

[3] Indeed, when Congress was considering IIRIRA, it rejected a House version of the parole provision that would have explicitly limited the definitions of "humanitarian parole" and "public

Rather, it grants significant discretion to immigration officials to determine as a matter of policy what constitutes an "urgent humanitarian reason[]" or "significant public benefit" and to decide "on a case-by-case basis" whether those criteria apply, *i.e.*, whether a factor that DHS considers to be an "urgent humanitarian reason[]" or "significant public benefit" is present in a particular individual's case. 8 U.S.C. § 1182(d)(5).

Consistent with that clear statutory language, DHS and INS have for years issued regulations describing scenarios under which release on parole "would generally be justified," provided the noncitizens released "present neither a security risk nor a risk of absconding." 8 C.F.R. § 212.5(b). Currently, those scenarios include ones involving noncitizens with "serious medical conditions," *id.* § 212.5(b)(1), pregnant women, *id.* § 212.5(b)(2), certain categories of minors, *id.* § 212.5(b)(3), noncitizens who will be witnesses in official proceedings, *id.* § 212.5(b)(4), and noncitizens "whose continued detention is not in the public interest as determined by" "the Secretary or his designees . . . in the exercise of discretion," *id.* § 212.5(a), (b)(5). Given the broad language of the parole statute, those criteria could plausibly expand or contract under future administrations, altering the number of noncitizens detained pursuant to § 1225(b)(2)(A). But regardless of the scope of the specific criteria themselves, it is the *application* of those

---

interest parole," instead leaving the definitions of those terms up to the executive branch. *See* H.R. 2202, 104th Cong. § 524 (1995) (limiting "humanitarian parole" to situations involving medical emergencies, organ transplants, or the imminent death of a close family member in the United States, and limiting "public interest parole" to situations in which "the alien has assisted the United States government in a matter[] such as criminal investigation, espionage, or other similar law enforcement activity").

criteria and evaluation of *which* noncitizens to release on parole that fulfills the "case-by-case" requirement of § 1182(d)(5)(A).

The court below acknowledged that parole is an exception to the so-called "detention mandate" of § 1225(b)(2)(A), Pet. App. 120a n.18, but it reasoned that the requirement that parole be exercised "on a case-by-case basis" precludes the "power to parole aliens *en masse*," *id.* at 120a. And it further concluded that the federal government would necessarily engage in such *en masse* parole in the absence of MPP due to its insufficient detention capacity, *id.*

This is wrong for multiple reasons. First, the court below mistakenly presumed that "case-by-case" parole assessments necessarily must result in a small number of parolees. But that is not what "case-by-case" means. Rather, "case-by-case" means "[o]n the basis of, or according to, each individual case," or "so as to consider each case separately, taking into account its individual circumstances and features." *Case-by-case*, *Oxford English Dictionary*, https://www-oed-com/proxygt-law.wrlc.org/view/Entry/421463?redirectedFrom=case-by-case&print (last visited Feb. 16, 2022); *see, e.g.*, *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999) (statutory language "with respect to an individual" requires analysis "on a case-by-case basis"). Nothing in that definition precludes the parole of a large volume of noncitizens so long as each noncitizen's case is considered individually.

The court below also mistakenly presumed that the termination of MPP would necessarily result in automatic release on parole of the *exact same noncitizens* that otherwise would have been placed in MPP, amounting to "*en masse*" adjudication in violation of the "case-by-case" requirement in § 1182(d)(5)(A). Pet. App. 120a; *see id.* at 119a (stating that by terminating

MPP, DHS is "left with a class of people: aliens it apprehended at the border but whom it lacks the capacity to detain"). But that is not how parole works. Individuals do not cross the border with the label "cannot detain." *See* David A. Martin, *Judicial Imperialism and the "Remain in Mexico" Ruling*, Lawfare (Feb. 22, 2022), https://www.lawfareblog.com/judicial-imperialism-and-remain-mexico-ruling.

Rather, with respect to the release on parole of noncitizens arriving at the southwest border and awaiting removal proceedings, CBP and Immigration and Customs Enforcement (ICE) provide guidance to their regional offices on how to perform case-by-case parole assessments in various circumstances. As *amici* know from their experiences serving in INS and DHS and visiting these field offices, "[a]t any given time, each field office has *some* space for detention and a (usually) larger pool of apprehended violators," and each field office therefore "makes choices based on individual characteristics—in order to use wisely the detention space it does have." *Id.* Indeed, "immigration agencies have protocols and standard forms to guide the required interview and to capture case-specific information useful in deciding whom to release." *Id.*; *see, e.g.*, U.S. Immigration & Customs Enforcement, *ICE Directive No. 1102.1: Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*, at 3 (Dec. 8, 2009), ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf (requiring ICE officers to conduct interviews to determine eligibility for parole of certain arriving noncitizens and to "uniformly document their parole decision-making processes using the attached *Record of Determination/Parole Determination Worksheet*"). Collecting this individualized information is critical—not only to ensure compliance with § 1182(d)(5)(A), but also

because such "information can . . . help locate those who do not appear for the hearing (or for removal, if denied admission)." Martin, *Judicial Imperialism*, *supra*. These detailed interview and documentation schemes do not amount to parole "*en masse*" of all "overflow" noncitizens, nor do Respondents point to any evidence suggesting that the termination of MPP would alter these procedures in any way.

Moreover, the idea that DHS would somehow automatically parole all MPP-eligible noncitizens who it could not detain in the absence of the program ignores the fact that the criteria that DHS uses to determine whom to release on parole are wholly distinct from the criteria that it uses to determine whom to place in MPP. For instance, before paroling any noncitizen, DHS regulations require an evaluation of whether that individual "present[s] . . . a security risk []or a risk of absconding," 8 C.F.R. § 212.5(b), but they do not require those same determinations before placing noncitizens in MPP.

B. The decision of the court below is not only at odds with the text of the parole statute, but also with decades of practice by the executive branch. Indeed, the executive branch has exercised its discretionary authority to release arriving noncitizens from detention pending adjudication of their right to remain in the United States for over a century. *See, e.g.*, *Ekiu v. United States*, 142 U.S. 651, 661 (1892) (releasing noncitizen to "a more suitable place than the steamship" pending determination of her admissibility); *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (committing Russian-born woman "to the custody of the Hebrew Society" while determining whether she was a U.S. citizen). Congress codified that practice for the first time in the Immigration and Nationality Act of 1952, granting the Attorney General the explicit authority to

grant parole "for emergent reasons or for reasons deemed strictly in the public interest." Act of June 27, 1952, Pub. L. No. 82-414, 66 Stat. 163, 188; *see Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958) (referring to § 1182(d)(5) as "a codification of the administrative practice pursuant to which petitioner was paroled").

The INA as originally enacted did not contain separate sections providing for the admission of refugees. Thus, beginning in the 1950s, the executive branch began relying upon the parole authority to address large numbers of refugees seeking entry. Andorra Bruno, Cong. Rsch. Serv., R46570, *Immigration Parole* 2 (Oct. 15, 2020). Even after the 1965 amendments to the INA added a "conditional entry" provision for the admission of refugees, *see* Pub. L. No. 89-206, § 3, 79 Stat. 911, 913, the executive branch continued to use its parole authority to release arriving refugees from Cuba, Vietnam, Indochina, and other areas throughout the 1960s and 1970s. H.R. Rep. No. 89-945, at 15-16 (1965).

Congress responded by passing the Refugee Act of 1980, which added a provision to the INA providing for a separate refugee admission process and also added a subsection to the parole statute barring the parole of "an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title." Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 108 (codified at 8 U.S.C. § 1182(d)(5)(B)).[4]

---

[4] The court below cited this amendment limiting the use of parole for refugees without explanation. *See* Pet. App. 117a. But this amendment is not relevant to this case. The individuals

After the enactment of the Refugee Act of 1980, the executive largely ceased relying on the parole statute to address refugee situations, but it continued to release from detention significant numbers of arriving noncitizens as part of its southwest border management strategy, relying on § 1182(d)(5)(A)'s delegation of "broad, discretionary authority," Bruno, *supra*, at 1. So too in the years following the 1996 enactment of IIRIRA, which added the requirement that parole be granted on a "case-by-case basis." Pub. L. No. 104-208, § 601, 110 Stat. 3009-689.

Indeed, as *amici* know firsthand, every single administration since 1997 (when IIRIRA went into effect) has relied upon its § 1182(d)(5)(A) authority to grant parole on a "case-by-case basis" and release noncitizens arriving at the southwest border who meet the standards for parole set by DHS and its predecessor agency. This is so despite the fact that contiguous territory return was also codified in IIRIRA as another alternative to detention pursuant to § 1225(b)(2)(A). Indeed, contiguous territory return was never implemented on a large-scale, programmatic basis until the introduction of MPP in January 2019. *See* Pet. App. 273a n.12 ("Prior to MPP, DHS and the former INS primarily used Section 235(b)(2)(C) on an ad-hoc basis to return certain Mexican and Canadian nationals who were arriving at land border ports of entry.").

The widespread use of the parole authority by DHS and its predecessor agency to manage even large *classes* of noncitizens of particular nationalities post-1996 reflects the fact that "[a]lthough parole

---

eligible for MPP are not refugees applying for automatic entry from abroad based on their nationalities; they are primarily asylum seekers who are detained after crossing the border and whom DHS may later release from detention on parole.

determinations must be made on an individualized basis, the authority has long been interpreted to allow for designation of specific classes of aliens for whom parole should be favorably considered, so long as the parole of each alien within the class is considered on a discretionary, case-by-case basis." Jeh Charles Johnson, Sec'y of Homeland Sec., *Families of U.S. Armed Forces Members and Enlistees*, at 1 (Nov. 20, 2014), dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf. This understanding of the parole authority has been adopted by both Republican and Democratic administrations, recognizing that the statute's "case-by-case" language only requires individualized evaluation, not some artificial limit on the specific number of parolees.

For instance, in 2007, when U.S. Coast Guard apprehensions of Cuban migrants reached an all-time high, Secretary of Homeland Security Michael Chertoff established the Cuban Family Reunification Parole (CFRP) program in order to discourage Cuban nationals from undertaking dangerous journeys by sea to the United States and to help meet the U.S. commitment on legal Cuban migration levels under the 1994 accord known as the U.S.-Cuban Migration Agreement, under which the United States agreed to permit at least 20,000 Cuban nationals to migrate legally to the United States each year. *See* Bruno, *supra*, at 10-11; *Cuban Family Reunification Parole Program Fact Sheet* (Aug. 26, 2016), uscis.gov/sites/default/files/document/fact-sheets/CFRP_Fact_Sheet_8.26.2016.pdf.

Similarly, in 2014, Secretary of Homeland Security Jeh Johnson established a class-based parole program known as the Central American Minors (CAM) program for certain minor children from El Salvador, Guatemala, and Honduras who were found ineligible for refugee status. *See Central American Minors*

(CAM) Parole Program, USCIS (Sept. 14, 2021), uscis.gov/CAM. Under the program, in order to grant parole, U.S. Citizenship and Immigration Services (USCIS) was required to "find that the individual [was] at risk of harm in his or her country and that the applicant merit[ed] a favorable exercise of discretion." *An Examination of the Administration's Central America Minors Refugee/Parole Program*: *Hearing Before the Sen. Comm. on the Judiciary, Subcomm. on Immigration and the Nat'l Interest*, 114th Cong. 1-5 (2015) (written testimony of Joseph Langlois, Assoc. Dir., Refugee, Asylum and Int'l Operations, USCIS).

Thus, even these class-based parole programs for individuals outside of the United States—distinct from the discretionary paroling of arriving noncitizens held in detention pending removal proceedings—specifically provided for the implementation of case-by-case assessments under IIRIRA's amendments.

C. Neither Respondents nor the court below point to any evidence that the 1996 amendment to the parole statute deprived the executive branch of its longstanding discretion to parole people covered by § 1225, thus requiring the implementation of MPP. The best Respondents can muster is a series of cherry-picked lines from *Jennings v. Rodriguez* stating that "[r]ead most naturally, §§ 1225(b)(1) and 1225(b)(2) . . . *mandate detention* of applicants for admission until certain proceedings have concluded." BIO 25 (quoting *Jennings*, 138 S. Ct. at 842 (emphasis added by Respondents)); *see id.* ("[Section 1225(b)(1) and (b)(2) . . . unequivocally *mandate* that aliens falling within their scope 'shall' be detained." (quoting *Jennings*, 138 S. Ct. at 844 (emphasis added by Respondents)). But *Jennings* was emphasizing the "mandatory" nature of detention under § 1225 only for purposes of concluding that the statute does not give noncitizens detained pursuant to

§ 1225 the right to bond hearings during the course of their detention. *Jennings*, 138 S. Ct. at 848. If those statements in *Jennings* were taken as absolutes, even MPP itself would be a violation of § 1225 because contiguous territory return, of course, is distinct from detention. More to the point, *Jennings* explicitly acknowledged the parole authority in § 1182(d)(5)(A) as an "express exception to detention" pursuant to § 1225. *Id.* at 844. This statement is conspicuously absent from Respondents' brief in opposition to certiorari and the decision of the court below.

In sum, the court below was wrong to assume that "case-by-case" determinations of parole cannot be made in the face of insufficient detention capacity, leaving MPP as the only legal alternative to § 1225(b)(2)(A)'s so-called "detention mandate." Not only does that interpretation defy the statutory text, it also runs counter to the longstanding usage of parole and the border management policies of all of the administrations in which *amici* served.

III. Congress Has Long Conferred Significant Discretion on the Executive Branch in Immigration Enforcement Matters, Including for Issues Related to Detention.

The court below also failed to respect the significant enforcement discretion that Congress has long conferred on the executive branch in the realm of immigration. The court's transformation of a discretionary option into a mandatory policy frustrates that congressional plan and makes it exceedingly difficult for presidents to make changes in immigration and foreign policy, even as circumstances on the ground might warrant it.

By giving the executive the authority to establish "national immigration enforcement policies and

priorities," 6 U.S.C. § 202(5), and the power to "perform such other acts as he deems necessary for carrying out his authority" under the immigration laws, 8 U.S.C. § 1103(a)(3), Congress has ensured that the executive branch will have the discretion necessary to effectively implement the nation's immigration laws. As this Court has recognized, "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). Indeed, because Congress has made a substantial number of noncitizens deportable but has never appropriated sufficient funds to make removal on such a scale possible, the executive branch necessarily must exercise this discretion.

The same goes for the detention authority: Congress has stated that a substantial number of noncitizens "shall be detained" under § 1225(b)(2)(A), but as discussed above, in the past quarter century, it has never appropriated sufficient funds for DHS to detain every single applicant for admission who is covered by that statutory provision. Thus, the immigration scheme put in place by Congress fundamentally depends upon the executive branch to exercise its discretion and to make decisions about where the nation should focus its limited resources. A critical exercise of that discretion in the detention context is making decisions about when and how to use the broad discretionary exceptions to detention requirements—exceptions like the parole authority and contiguous territory return itself—that Congress has created.

The court below ignored these principles of discretion. It reasoned that the termination of MPP constituted "*mis*enforcement," Pet. App. 122a, rather than an exercise of enforcement discretion. But that is simply wrong. Although noncitizens released on parole rather than returned to Mexico are still involved

in immigration enforcement proceedings—*i.e.*, the adjudication process outlined in 8 U.S.C. § 1229a—enforcement discretion by its nature involves more than just the decision whether or not to remove someone. It also includes decisions about *how* to effectuate a person's removal, including whether or not to detain that person during the pendency of proceedings.

DHS and INS officials from both Republican and Democratic administrations have long recognized that prosecutorial discretion in the immigration context includes the discretion to make detention decisions. For instance, *amicus* former INS General Counsel Bo Cooper explained in a 2001 legal memorandum to the Commissioner of INS: "As detaining aliens is an exercise of the coercive authority of a law enforcement agency over liberty, legal concepts of enforcement discretion apply despite the fact that detention is not a strictly 'prosecutorial' decision." *INS Exercise of Prosecutorial Discretion*, Legal Op. No. 99-5 (INS), 2001 WL 1047687, at *10. *Amicus* and former INS Commissioner Doris Meissner made a similar point: "In the immigration context, the term ['prosecutorial discretion'] applies not only to the decision to issue, serve, or file a Notice to Appear (NTA), but also to a broad range of other discretionary enforcement decisions, including . . . maintaining an alien in custody." *Exercising Prosecutorial Discretion* (Nov. 17, 2000), 2000 WL 33596819, at *1; *see also, e.g.*, *Amicus* Julie L. Myers, Ass't Sec'y of Homeland Sec., *Prosecutorial and Custody Discretion*, at 1 (Nov. 7, 2007), ice.gov/doclib/foia/prosecutorial-discretion/custody-pd.pdf (highlighting "the importance of exercising prosecutorial discretion when making administrative arrest and custody determinations for aliens who are nursing mothers"); John Morton, Dir. of ICE, *Exercising Prosecutorial Discretion Consistent with the Civil*

Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, at 2 (June 17, 2011), ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf ("In the civil immigration enforcement context, the term 'prosecutorial discretion' applies to a broad range of discretionary enforcement decisions, including but not limited to . . . deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition.").

Even the administration that first implemented MPP recognized that detention determinations pursuant to § 1225(b)(2)(A) fall squarely within the prosecutorial discretion of DHS. In a guidance document implementing MPP, Secretary Kirstjen M. Nielsen explained that following an assessment by USCIS of "whether the alien, if returned to Mexico, would be more likely than not persecuted in Mexico on account of a protected ground," USCIS should convey the outcome of that assessment to ICE, "when appropriate, . . . for purposes of [aiding ICE in] making *discretionary custody determinations* for aliens who are subject to detention and may be taken into custody pending removal proceedings." *Guidance for Implementing Section 235(b)(2)(c) of the Immigration and Nationality Act and the Migrant Protection Protocols* (Jan. 28, 2019), 2019 WL 365514, at *2-3 (emphasis added).

Moreover, that same DHS also tailored MPP to apply only to *certain* arriving noncitizens (not just anyone for whom the government lacked a detention bed) and repeatedly referred to its decision "whether to return the alien to the contiguous country from which he or she is arriving" as an "exercise[e] [of] prosecutorial discretion." Kirstjen M. Nielsen, Sec'y of Homeland Sec., *Policy Guidance for Implementation of the Migrant Protection Protocols*, at 3 (Jan. 25, 2019),

dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf. Thus, by the logic of the court below, MPP itself—the very program that the court concluded was "mandatory"—violates § 1225 because it does not result in the automatic return to Mexico of every noncitizen who cannot be detained.

The refusal of the court below to honor principles of executive discretion in § 1225 also poses a threat to the federal government's ability to capably manage foreign affairs. As *amici* know from their experiences in INS and DHS, immigration is an area that touches on the nation's diplomatic relations and thus must adapt to frequently changing conditions on the ground—it is a field in which "flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *Knauff*, 338 U.S. at 543 (quoting *Lichter*, 334 U.S. at 785); *see Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (noting that immigration policy is "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations and the war power" (alterations adopted and quotation marks omitted)). Contiguous territory return illustrates why such flexibility is so important: it necessarily requires the United States to send noncitizens into the territory of a foreign sovereign.

Significantly, Mexico could withdraw its consent to accept non-Mexican nationals from the United States at any point. If this Court were to mandate the implementation of MPP, it would essentially elevate MPP above all other diplomatic objectives with Mexico. The same would be true for Canada. This would significantly hamper the ability of the executive branch to achieve its objectives, tying the hands of the very officials to whom Congress explicitly granted

significant leeway through the discretionary language of the contiguous territory return provision and the broader tradition of executive discretion in matters of foreign affairs.

* * *

In sum, the decision of the court below defied statutory text, structure, and history, ignored the parole practices of every administration in recent history, and disregarded the principles of prosecutorial discretion embedded in our nation's immigration laws. Letting that decision stand would frustrate Congress's plan to give executive officials an array of different tools to manage the southwest border and would cripple the ability of the current administration—and future administrations—to manage that border in a capable and responsive manner.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court below.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
MIRIAM BECKER-COHEN
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

March 21, 2022 * Counsel of Record

APPENDIX:

LIST OF *AMICI*

Bo Cooper
Partner, Fragomen, Del Rey, Bernsen & Loewy, LLP
General Counsel, INS, 1999-2003

Seth Grossman
Vice President of People and External Affairs & Counselor to the President, American University
Counselor to the Secretary of Homeland Security, DHS, 2013; Deputy General Counsel, DHS, 2011-2013; Chief of Staff to the General Counsel, DHS, 2010-2011

Stephen H. Legomsky
John S. Lehmann University Professor Emeritus, Washington University School of Law
Senior Counselor to the Secretary of Homeland Security, DHS, 2015; Chief Counsel, USCIS, DHS, 2011-2013; Advisor to the Commissioner of INS and Chair of the Commissioner's Policy Advisory Group, 1990-1993

David A. Martin
Warner-Booker Distinguished Professor of International Law Emeritus, University of Virginia School of Law
Homeland Security Advisory Council, DHS, 2015-2018; Principal Deputy General Counsel, DHS, 2009-2010; General Counsel, INS, 1995-1998

(list continued on next page)

Doris Meissner
Senior Fellow and Director, U.S. Immigration Policy Program, Migration Policy Institute
Commissioner of INS, 1993-2000; Executive Associate Commissioner of INS, 1981-1986; Acting Commissioner of INS, 1981-1982

Lynden Melmed
Partner, Berry Appleman & Leiden LLP
Chief Counsel, USCIS, DHS, 2007-2009

Julie Myers Wood
CEO, Guidepost Solutions
Assistant Secretary of Homeland Security, ICE, DHS, 2006-2008

Leon Rodriguez
Partner, Seyfarth Shaw LLP
Director, USCIS, DHS, 2014-2017

C. Stewart Verdery
CEO & Founder, Monument Advocacy, LLC
Assistant Secretary of Homeland Security, Border & Transportation Security Policy and Planning, DHS, 2003-2005

Paul Virtue
Partner, Mayer Brown LLP; Adjunct Professor of Law, Howard University School of Law
General Counsel, INS, 1998-1999; Executive Associate Commissioner for Programs, INS, 1997-1998; Deupty General Counsel, INS, 1988-1997

† Current institutional affiliations are listed for identification purposes only.