No. 21-954

In the Supreme Court of the United States

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

v.

STATE OF TEXAS; STATE OF MISSOURI

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

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

Tens of thousands of aliens unlawfully enter the Nation's southern border every month. Many raise meritless immigration claims, including asylum claims, in the hope that they will be released into the United States. Congress has restrained the Executive's discretion in dealing with "alien[s] . . . not clearly and beyond a doubt entitled to be admitted," by providing that those aliens "shall be detained" for removal proceedings. 8 U.S.C. § 1225(b)(2)(A). But for aliens subject to this mandatory-detention requirement "who . . . arriv[e] on land . . . from a foreign territory contiguous to the United States," Congress provides that the Executive "may return [those] alien[s] to that territory" pending removal proceedings. *Id.* § 1225(b)(2)(C).

Promulgated by the previous administration, the migrant protection protocols (MPP) require some asylum applicants to remain in Mexico pending resolution of their claims. Finding the protocols politically uncongenial, the current administration abandoned them on its first day in office through a three-line memorandum. The Secretary of Homeland Security subsequently issued new memoranda reflecting an ostensibly new decision to end MPP, insisting to the court of appeals that these memoranda precluded judicial review of the original termination decision. The questions presented are:

1. Whether 8 U.S.C. § 1225 requires DHS to return eligible aliens to a contiguous foreign territory when it would be otherwise unable to meet its mandatory obligation to detain such aliens.

2. Whether the court of appeals erred by concluding that the Secretary's latest memoranda do not prevent review of the Secretary's initial decision to terminate MPP.

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STATEMENT

I. Statutory and Regulatory Background

"Policies pertaining to the entry of aliens and their right to remain here" are "entrusted exclusively to Congress." *Galvan v. Press*, 347 U.S. 522, 531 (1954). Every year, numerous aliens enter the United States claiming that they are eligible for asylum. Exec. Off. for Immigration Review, Defensive Asylum Applications (Jan. 19, 2022), tinyurl.com/2p95v8hx. Experience has proven that the great majority of these claims are meritless. *Id.* Congress therefore allows the Executive Branch to release into the United States only those aliens seeking admission who "clearly and beyond a doubt [are] entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A). For all others, Congress—as "the Government recognizes"—puts the Executive Branch to one of "four statutory alternatives" that are "exhaustive." Pet. App. 119a. The first three apply to aliens entering the United States; the fourth applies to aliens already present here.

First, Congress imposes a backdrop mandatory-detention obligation: aliens entering the United States applying for admission, including those seeking asylum, who are "not clearly and beyond a doubt entitled to be admitted . . . *shall* be detained" pending removal proceedings. 8 U.S.C. § 1225(b)(2)(A) (emphasis added). "Read most naturally," this section "mandate[s] detention of applicants for asylum until certain proceedings have concluded." *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018).

Second, "[i]n the case of an alien described in [section 1225(b)(2)(A)]"—that is, one subject to the mandatory-detention obligation—"who is arriving on land . . . from a foreign territory contiguous to the United

States," the Executive "may return the alien to that territory." 8 U.S.C. § 1225(b)(2)(C). This authority permits the Executive, in lieu of detention, to return an eligible alien to the country from which the alien entered the United States.

Third, DHS may "parole into the United States" individual aliens "only on a case-by-case basis for urgent humanitarian reasons or a significant public benefit." 8 U.S.C. § 1182(d)(5)(A). Congress imposed this case-by-case requirement to "'specifically narrow[] the executive's discretion' to grant parole due to 'concern that parole ... was being used by the executive to circumvent congressionally established immigration policy.'" Pet. App. 201a n.13 (quoting *Cruz-Miguel v. Holder*, 650 F.3d 189, 199 & n.15 (2d Cir. 2011)); *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, 110 Stat. 3009 (1996) (IIRIRA).

Finally, Congress created a "parallel detention-and-parole scheme that applies to aliens who have *already* entered the United States." Pet. App. 117a. Section 1226(a) "generally governs the process of arresting and detaining" inadmissible aliens already "inside the United States." *Jennings*, 138 S. Ct. at 837. Section 1226(a) permits the Executive to release on bond or conditionally parole aliens detained under that section under certain circumstances. 8 U.S.C. § 1226(a)(2)-(3).

II. Adoption and Implementation of MPP

In 2018, a surge of aliens attempting to unlawfully enter the United States through the southern border created a "humanitarian and border security crisis." Pet. App. 156a. Often lured by human traffickers, many aliens who "lacked meritorious claims for asylum" nonetheless sought entry into the United States by claiming asylum. *Id.* at 157a. Because existing facilities were insufficient

to house the sudden flood of aliens, "illegal aliens with *meritless* asylum claims were being released into the United States," where many "disappeared . . . and simply became fugitives." *Id.*

In December 2018, DHS promulgated MPP to respond to the unfolding border crisis and to prevent individuals from abusing the asylum system. Under MPP, DHS exercised its 8 U.S.C. § 1225(b)(2)(C) authority "to return to Mexico certain third-country nationals . . . arriving in the United States from Mexico for the duration of their removal proceedings." Pet. App. 158a. In addition, the federal government secured "Mexico's agreement to temporarily permit" arriving aliens to remain in Mexico pending those aliens' removal proceedings. *Id.* DHS began implementing MPP in January 2019, and soon after expanded it to the entire southern border. *Id.*

On October 28, 2019, DHS issued a memorandum stating that it "found MPP to be effective." *Id.* at 160a. DHS determined that MPP was "an indispensable tool in addressing the ongoing crisis at the southern border." *Id.* DHS credited MPP with both (1) directly reducing the numbers of aliens unlawfully released into the United States by requiring thousands to remain in Mexico pending further proceedings, and (2) deterring aliens from attempting to cross the border illegally in the first place. *Id.* at 160a-61a. DHS likewise found that after implementing MPP, total border encounters had decreased by 64 percent. *Id.* at 160a. Border encounters with so-called Northern Triangle aliens—who had driven the 2018 surge—decreased by 80 percent. *Id.*[1]

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[1] The "Northern Triangle" refers to El Salvador, Guatemala, and Honduras, which have experienced significant emigration due to domestic instability. Amelia Cheatham, *Central America's*

DHS likewise identified a causal "connection between MPP implementation and decreasing enforcement actions at the border—including a rapid and substantial decline in apprehensions in those areas" most affected. *Id.* Even the present administration's DHS conceded at trial that it was "fair to say that [MPP] probably deterred some individuals from coming to the United States." J.A. 227.

"DHS also found that MPP is restoring integrity to the immigration system." Pet. App. 161a (cleaned up). Due to the reduction in meritless claims, asylum applicants "with meritorious claims [could] be granted relief or protection within months, rather than remaining in limbo for years." *Id.* Conversely, "aliens without meritorious claims—which no longer constitute[d] a free ticket into the United States—[began] to voluntarily return home." *Id.* In short, MPP addressed the "perverse incentives" that aliens had to attempt to enter illegally because it "reduce[d] the incentive for aliens to assert claims for relief or protection . . . as a means to enter the United States during the pendency of multi-year immigration proceedings." *Id.* at 163a. But "[e]ven more importantly, MPP also provide[d] an opportunity for those entitled to relief to obtain it within a matter of months." *Id.*

III. Suspension and Termination of MPP

In late 2020, senior DHS officials "specifically warned" the incoming administration that "the suspension of . . . MPP, along with other policies, would lead to a resurgence of illegal aliens attempting to illegally enter" the United States. *Id.* at 166a. "They were warned

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Turbulent Northern Triangle, COUNCIL FOR FOREIGN RELATIONS (July 1, 2021), https://tinyurl.com/4u8wbk5s.

the increased volume was predictable and would overwhelm Border Patrol's capacity and facilities." *Id.*

Nevertheless, on January 20, 2021, in the first few hours of the Biden Administration, the Executive issued a two-sentence, three-line memorandum announcing it was suspending MPP. *Id.* at 167a (January Decision). Although DHS announced that the suspension was "pending further review of the program," *id.* at 361a, "DHS has not offered a single justification for suspending new enrollments in the program during the period of review." *Id.* at 167a.

DHS began the process of permanently unwinding MPP and its infrastructure almost immediately, even before any meaningful review of the program could have been completed. *Id.* at 207a-08a. DHS would subsequently rely on its immediate dismantling of MPP's infrastructure to explain why its termination of the program was not subject to judicial review. Application for Stay at 35-40, *Biden v. Texas*, No. 21A21 (U.S. Aug. 20, 2021); Opposed Motion for Stay Pending Appeal at 20-23, *Texas v. Biden*, No. 21-10806 (5th Cir. Aug. 17, 2021).

The Biden Administration's summary suspension of MPP led to the predicted results. As the district court found at trial, after the January Decision, illegal border crossings and enforcement encounters skyrocketed. Pet. App. 170a. As "[d]efendants' data show[ed]," border "encounters jump[ed] from 75,000 in January 2021, when MPP was suspended, to about 173,000 in April 2021." *Id.*

IV. Proceedings Below

On April 13, 2021, Texas and Missouri filed suit in the Northern District of Texas, arguing that the administration's unexplained, three-line suspension of MPP was arbitrary and capricious, *inter alia*, for failing to consider the benefits of MPP, including DHS's own favorable

assessment of the program, the States' reliance interests, or more limited policies within the ambit of the existing program. ECF 1 at 31-36. Respondents alleged that MPP's suspension would necessarily cause the Executive to fail to meet its mandatory-detention obligations under 8 U.S.C. § 1225, and that MPP's suspension therefore violated that provision. *Id.* at 36-38. Respondents also sought a preliminary injunction against the January Decision. ECF 30.

The district court ordered the administration to file the January Decision's administrative record. On May 31, petitioners did so—filing the three-line suspension memorandum and nothing else. Pet. App. 207a n.16. That is, past those three lines, petitioners provided neither explanation nor any supporting materials justifying the January Decision—let alone petitioners' decision to immediately dismantle the infrastructure necessary for the program. *Id.*

Perhaps recognizing that this explanation was plainly insufficient, the next day, June 1, the Secretary announced his decision terminating MPP and released a seven-page accompanying memorandum. *Id.* at 346a-60a ("June Termination"). Like the January Decision, the June Termination failed to consider or discuss many of the deficiencies that respondents had identified in their April complaint, including DHS's failure to acknowledge its prior favorable assessment of MPP. *Id.*; ECF 1 at 31-36.

Two days later, the States amended their complaint to challenge the June Termination on largely the same grounds as the January Decision. J.A. 78-127. Petitioners filed the June Termination's administrative record on June 22. Respondents once again sought a preliminary injunction. ECF 53.

The parties agreed to consolidate the preliminary injunction hearing with trial on the merits under Rule 65(a)(2), ECF 66, which the district court scheduled for July 22. ECF 69 at 1. Less than two days before trial—at 3:27 p.m. on July 20—petitioners filed a "Notice of Filing Corrected Administrative Record," which sought to add the October 2019 assessment to the administrative record. ECF 78. Over respondents' objection, the district court permitted petitioners to supplement the administrative record, but observed that "[t]he delay between the government's acquiring knowledge of the missing document and its filing of notice with the Court comes perilously close to undermining the presumption of administrative regularity." ECF 85 at 3.

On August 13, 2021, the district court issued its final judgment in favor of respondents, holding that the June Termination was unlawful for two reasons. Pet. App. 149a-213a. *First*, the district court held that the June Termination violated the APA in numerous ways, including that DHS had "ignored critical factors" in coming to that decision, such as "the main benefits of MPP," the States' reliance interests, more limited policies within MPP's then-existing scope, and the impact of terminating MPP on petitioners' detention obligations under 8 U.S.C. § 1225. Pet. App. 190a-200a.

Second, the district court held that the June Termination violated 8 U.S.C. § 1225 because that termination directly and necessarily caused petitioners to violate their mandatory detention obligations under that section. *Id.* at 200a-202a. In particular, the district court found that "the termination of MPP has contributed to the current border surge" by recreating the "perverse incentives" that MPP had eliminated. *Id.* at 169a. Relying in part on petitioners' concession at trial that MPP

deterred unlawful entries into the United States, *id.* at 170a, the district court found that MPP directly reduced the number of illegal aliens unlawfully released into the United States. *Id.* at 169a-70a. The district court then found that if the June Termination were permitted to take effect, the "lack of MPP as a tool to manage the influx" of aliens would "mean[] that more aliens [would] be released and paroled into the United States as the surge continues to overwhelm DHS's detainment capacity." *Id.* at 171a.

The district court therefore enjoined DHS, requiring it "to enforce and implement MPP *in good faith*" until DHS could lawfully rescind MPP consistent with both the APA's requirements and DHS's mandatory-detention obligations under 8 U.S.C. § 1225. *Id.* at 212a.

Petitioners sought a stay pending appeal from the Fifth Circuit, which that court denied, *id.* at 215a-53a, though it agreed to expedite petitioners' appeal, *id.* at 11a. Petitioners then sought a stay from this Court, which it denied, stating that "[t]he applicants have failed to show a likelihood of success on the claim that the memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious." *Id.* at 214a.

On September 29, DHS once again announced its intention "to issue in the coming weeks a new memorandum terminating the Migrant Protection Protocols." *Id.* at 28a. DHS stated that, "[i]n issuing a new memorandum terminating MPP, the Department intends to address the concerns raised by the courts with respect to the prior memorandum." *Id.* In total, DHS's announcement stated its intention to terminate MPP four times. *Id.* Nowhere in its announcement did DHS state that it was reconsidering its June Termination, nor did it

suggest that it might choose to retain MPP either as-is or in some more limited form. *Id.*

On October 29, 2021, just two business days before oral argument, DHS issued two new memoranda declaring that the Secretary had once again terminated MPP. *Id.* at 257a-345a. Hours later, petitioners filed with the Fifth Circuit a 26-page Suggestion of Mootness, newly contending that the October Memoranda mooted their own appeal and asking the Fifth Circuit to vacate the injunction accordingly. *Id.* at 11a. Petitioners did not, however, seek to dismiss their appeal. *Id.* at 126a n.19.

The Fifth Circuit refused petitioners' suggestion, concluding both that petitioners' appeal was not moot, *id.* at 33a-53a, and that petitioners' unclean hands precluded them from receiving the equitable remedy of vacatur. *Id.* at 3a, 123a-26a. Both holdings rested on multiple alternative grounds. *Id.* at 33a-55a, 123a-26a. Petitioners never argued to the Fifth Circuit (or, for that matter, the district court) that the simple existence of the October Memoranda satisfied either requirement of the district court's injunction. *See* Suggestion of Mootness and Opposed Motion to Vacate at 9-17.

The Fifth Circuit then affirmed the district court on the merits, again on multiple alternative grounds. *First*, the Fifth Circuit held that, "DHS failed to consider several 'relevant factors' and 'important aspect[s] of the problem' when it made the Termination Decision." Pet. App. 103a. (quoting *Michigan v. EPA*, 576 U.S. 743, 750, 752 (2015)). Those factors included "(1) the States' legitimate reliance interests, (2) MPP's benefits, (3) potential alternatives to MPP, and (4) the legal implications of terminating MPP." *Id.* at 103a-12a. The Fifth Circuit rejected the "bald[] assert[ion] that DHS considered this or that factor—in lieu of showing its work and actually

considering the factor on paper." *Id.* at 112a. "Stating that a factor was considered . . . is not a substitute for considering it." *Id.* at 112a (quoting *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 150, 155 (D.C. Cir. 1986) (internal quotations omitted)).

Second, the Fifth Circuit held that the "Termination Decision also violated the INA." *Id.* at 113a. In reaching that conclusion, the Fifth Circuit recognized that section "1225(b)(2)(A) sets forth a general plainly obligatory rule: detention for aliens seeking admission." *Id.* at 118a. "Section 1225(b)(2)(C) authorizes contiguous territory return as an alternative." *Id.* "Section 1182(d)(5) allows humanitarian parole as another alternative, but that parole can be exercised only within narrow parameters (case-by-case and with a public interest justification)." *Id.* at 118a-19a. "And § 1226(a)'s bond-and-conditional-parole provisions, by their very terms, apply only to aliens" unlike those who are subject to MPP, that are "detained under § 1226(a) itself." *Id.* at 119a. "And even if they did apply elsewhere, bond and conditional parole have restrictions of their own." *Id.* "Because [t]he Termination Decision nonetheless purported to arrogate to DHS a fifth alternative that Congress did not provide"—namely, the *en masse* release of aliens subject to mandatory detention—"DHS contradicted § 1225's statutory scheme." *Id.* at 119a, 123a.

SUMMARY OF ARGUMENT

I. The Fifth Circuit correctly concluded that petitioners may not terminate MPP if doing so would cause DHS to violate its mandatory detention obligations. Congress has directed that the Executive "shall . . . detain" certain aliens seeking admission into the United States pending removal proceedings. 8 U.S.C. § 1225(b)(2)(A). As a general matter, this Court has

specifically instructed that the term "shall" "usually connotes a requirement." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016). And it has specifically held that section 1225 "mandate[s] detention of applicants for asylum until certain proceedings have concluded." *Jennings*, 138 S. Ct. at 842. DHS therefore must detain the aliens described in subparagraph 1225(b)(2)(A).

Apart from detention, Congress provides DHS with two choices that satisfy section 1225's obligations. *First*, DHS may parole individual aliens—and therefore need not detain them—but "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). *Second*, DHS may return certain aliens arriving by land from contiguous territories to the territories from which they entered the United States. *Id.* § 1225(b)(2)(C). But there are no other options: if DHS is to fulfill section 1225's detention mandate, it must avail itself of one of these three choices. MPP is an exercise of this third option—DHS's contiguous-return authority. When DHS cannot detain an alien subject to section 1225's detention mandate and or parole that alien consistent with the case-by-case basis analysis required by subparagraph 1182(d)(5)(A), section 1225 mandates DHS to exercise its contiguous-removal authority to return eligible aliens to Mexico.

Petitioners would prefer not to choose from the options Congress has provided—namely, to detain, individually parole, or return covered aliens. They instead seek the power to release classes of aliens into the United States *en masse*. But Congress foreclosed that possibility by restricting DHS's relevant parole authority to only case-by-case exercises in narrow circumstances. Petitioners' contrary position that DHS

should be allowed to release aliens at its sole discretion "boils down this: We can't do one thing Congress commanded (detain under § 1225(b)(2)(A)), and we don't want to do one thing Congress allowed (return under § (b)(2)(C))." Pet. App. 119a-20a. But Congress—as the entity authorized to set immigration policy— has already spoken, and DHS may not countermand Congress.

Petitioners' counterarguments based on precedent and practice are unavailing. In particular, this Court's opinion in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), recognizes well-established rules regarding prosecutorial discretion, but it does *not* license petitioners to ignore Congress's limits on that discretion. To allow petitioners to ignore section 1225's mandatory-detention obligations on the basis of an unreviewable power to refuse to enforce the law "would make DHS a genuine law unto itself." Pet. App. 122a. Nor does history support petitioners: since at least the 1930s, detention has been the strong norm and parole the exception. DHS does not present textual, contextual, or historical bases to believe Congress meant anything other than what it said in section 1225.

II. The Fifth Circuit also correctly concluded that the October Memoranda neither prevents review of the June Termination nor amounts to valid agency action.

Petitioners blame the court of appeals (at 36, 40) for failing to give the October Memoranda "legal effect." And petitioners acknowledge the effect they desire: to "obviate the need for further litigation about the adequacy of the" June Termination, Pet. Br. 48, and leave respondents where they began: "free to attempt to challenge that new decision," *id.* at 50, but with their objections to MPP's termination unresolved.

Petitioners coyly avoid naming the familiar effect they desire: they wish to moot respondents' challenge. So identified, it is easy to see why petitioners avoided well-worn terminology. The October Memoranda could moot respondents' case only if they both remedied the harms DHS's arbitrary and capricious termination decision inflicted on respondents *and* made absolutely clear that respondents could not reasonably expect them to recur. *Ne. Fla. Ch. of Associated Gen. Contractors of Am. v. City of Jackson*, 508 U.S. 656, 662 (1993).

Petitioners' repeated attempts to end MPP show they have neither addressed respondents' harm nor truly ceased their unlawful actions. Those efforts indicate that petitioners have no intention of either accommodating respondents' legitimate reliance interests regarding MPP or abiding their detention obligations under section 1225. The October Memoranda therefore have no effect on respondents' challenge of the June Termination.

The October Memoranda also do not affect respondents' challenge because they are not valid agency actions. Petitioners assure this Court (at 37, 39) that the Memoranda represented a procedurally sound and good-faith reconsideration of the Secretary's June Termination. But petitioners' assurances ring hollow for two reasons. *First*, DHS can rely only on the administrative record underlying the October Memoranda to establish the Memoranda's legitimacy—and DHS has not produced an administrative record. *Second*, as both the district court and court of appeals observed, petitioners' "unclean hands," "pattern of belated shifts," "eleventh-hour" surprises, and "gamesmanship" have suffused both their efforts to terminate MPP and this litigation. Pet. App. 3a, 47a, 48a, 50a, 125a.

Under these circumstances, this Court should accord petitioners' actions no presumption of regularity.

Just as well. The October Memoranda merely repeat petitioners' now-familiar errors, discounting respondents' reliance interests, misapprehending DHS's detention obligations, and refusing to consider the important benefits MPP provides. Even if the Memoranda were appropriately considered agency action, their putative retermination of MPP is just the latest arbitrary and capricious administrative action by petitioners.

ARGUMENT

I. DHS May Not Rescind MPP When Doing So Would Violate Its Mandatory-Detention Obligations.

The Fifth Circuit correctly held that the federal government may not terminate MPP when doing so will cause it to systemically violate its mandatory-detention obligations under section 1225(b). Pet. App. 113a-23a. No one disputes that there are times when detention demands may outstrip capacity. And no one disagrees that the government ordinarily enjoys discretion in exercising its contiguous-return authority. But DHS must faithfully comply with Congress's mandatory-detention obligations—which means it cannot refuse to use a lawful tool to carry out that obligation merely because it prefers not to do so. That DHS may sometimes be unable to fully comply with Congress's directives does not excuse DHS where it is merely unwilling.

A. Section 1225(b) imposes a mandatory-detention obligation on DHS.

1. The Constitution gives Congress the power "[t]o establish an uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4. "Policies pertaining to the entry

of aliens and their right to remain here" are "entrusted exclusively to Congress." *Galvan*, 347 U.S. at 531. In section 1225(b)(2)(A), Congress has unequivocally spoken: when an "examining immigration officer determines" that an arriving alien is "not clearly and beyond a doubt entitled to be admitted," DHS "shall . . . detain" that alien pending removal proceedings.

This Court has already concluded that this provision and a companion provision, section 1225(b)(1), when "[r]ead most naturally," "mandate detention of applicants for asylum until certain proceedings have concluded." *Jennings*, 138 S. Ct. at 842. "First, certain aliens claiming a credible fear of persecution under § 1225(b)(1) shall be detained for further consideration of the application for asylum. Second, aliens falling within the scope of § 1225(b)(2) shall be detained for a [removal] proceeding." *Id.* (citations and internal quotation marks omitted). Sections 1225(b)(1) and (b)(2) "unequivocally mandate that aliens falling within their scope 'shall' be detained," *id.* at 844, "throughout the completion of applicable proceedings," *id.* at 845.

This Court's conclusion that section 1225(b) creates a mandatory-detention obligation comports with its repeated recognition that the term "shall" "usually connotes a requirement." *Kingdomware*, 579 U.S. at 171. This contrasts with the "word 'may,' which implies discretion." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020). This ordinary rule of statutory construction applies with special force in section 1225, which uses the discretionary "may" 15 times, and the mandatory "shall" 34 times. "When, as is the case here, Congress distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty." *Id.* at 1321. Because Congress has stated that

petitioners "shall" detain aliens, 8 U.S.C. § 1225(b)(1)-(b)(2), that command "create[d] an obligation impervious to . . . discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

2. Petitioners object (at 29-32) that despite Congress's mandatory language, this Court's decision in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), grants DHS the unreviewable discretion to decline to detain or remove aliens as it sees fit. This argument fails for at least three reasons.

First, this Court has already rejected it. In *Jennings*, this Court specifically rejected the argument that the term "shall" in section 1225 conveys discretion—or that the choice between "shall" and "may" is simply "irrelevant." Br. of Respondents at 21, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (No. 15-1204). In *Jennings*, this Court expressly held that, "[r]ead most naturally," the provisions of section 1225 "mandate detention." *Jennings*, 138 S. Ct. at 842. And it recognized that the "express exception to detention" contained in 8 U.S.C. § 1182(d)(5)(A)'s parole authority, "implies that there are no *other* circumstances under which aliens detained under § 1225(b) may be released." *Id.* at 844.

Petitioners' answer (at 33) that *Jennings* merely described section 1225(b)(2)(A) as "authorizing detention" is baseless. The Court in *Jennings* identified the basic difference between a provision granting discretionary authority and one imposing a mandatory obligation when it distinguished *Zadvydas v. Davis*, 533 U.S. 678 (2001). *Jennings*, 138 S. Ct. at 844. The Court in *Jennings* explained that the detention statute relevant to *Zadvydas*, which provided that relevant individuals "may be detained," "suggested discretion, though not necessarily unlimited discretion." *Id.* at 843 (cleaned up). But in

Jennings, the Court agreed with the federal government that section 1225's "repeated 'shall be detained' clearly means what it says, because Congress said 'may' when it meant 'may.'" Br. of Petitioners at 17, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (No. 15-1204). This Court went on to expressly conclude that section 1225(b)'s "requirement of detention" did not allow for the possibility of discretion available in *Zadvydas*. *Jennings*, 138 S. Ct. at 841. Contrary to petitioners' suggestion, the mandatory nature of section 1225(b)'s detention requirements was central to the Court's holding in *Jennings*.

Second, *Castle Rock* does not sweep so far as DHS supposes. As an initial matter, as the Fifth Circuit correctly recognized, "*Castle Rock* is relevant only where an official makes a nonenforcement decision." Pet. App. 122a. But MPP does not dictate *whether* an alien will be removed—only *where* the alien will remain while their removal proceedings are pending: in detention or in Mexico. By the time an alien is enrolled in MPP, removal proceedings have already begun. Dep't of Homeland Security, Court Ordered Reimplementation of the Migrant Protection Protocols (Jan. 20, 2022), http://dhs.gov/migrant-protection-protocols. MPP therefore has nothing to do with any notions of nonenforcement prerogatives that DHS reads into *Castle Rock*.

Petitioners insist (at 31-32) that *Castle Rock* exempts them from section 1225(b)(2)(A)'s mandatory-detention obligation because *Castle Rock* guarantees DHS sole authority over "not just choices about whether to initiate proceedings at all, but also *how* to enforce the law." This is merely petitioners' argument against the mandatory nature of section 1225(b)(2)(A)'s detention provision at one remove. If Congress may impose a mandatory-detention obligation on DHS, then whatever residual

discretion DHS has regarding *how* to abide by that obligation cannot include a decision *not* to abide by it. Indeed, DHS's claim that it may use supposed discretion on how to implement a law to decide not to implement that law at all amounts to a "pick-and-choose power [that] is completely insulated from judicial review." Pet. App. 122a. DHS has no such power. *See generally Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 325 (2014) ("*UARG*") (noting that even where an agency has enforcement discretion, it "has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms").

Finally, *Castle Rock*'s observations on enforcement discretion addressed "the deep-rooted nature of law-enforcement discretion" in the context of Colorado's domestic-violence protective-order law. 545 U.S. at 761. But no such tradition exists in the immigration context. *In re Sanchez-Avila*, 21 I. & N. Dec. 444, 457 (1996). After all, in section 1225, "Congress contemplated that aliens seeking admission to the United States, who did not appear to be clearly admissible, in the ordinary course would be detained in custody for further proceedings." *Id.* As *Sanchez-Avila* noted, "[i]t is not surprising that the statute was drafted in this manner because, when enacted in 1952, detention in the exclusion context was the norm." *Id.* For that matter, the Government misapprehends (at 4, 32-33) the history of its own detention practices. "[P]rior to 1907 there was no provision permitting bail for *any* aliens during the pendency of their deportation proceedings." *Demore v. Kim*, 538 U.S. 510, 523 n.7 (2003). "In fact, detention in exclusion proceedings had a long history before 1952. The Immigration Act of 1917 . . . provided for 'boards of special inquiry' at sea and land border ports 'for the prompt determination of all cases

of immigrants detained at such ports under the provisions of law.'" *Sanchez-Avila*, 21 I. & N. Dec. at 457. Put simply, history reveals there is no "deep-rooted nature of law enforcement discretion" in this context.

3. Petitioners also suggest that the INA generally codified prior parole practices that, pre-INA, allowed the Executive to parole aliens in cases of "great hardship and long delay." Pet. Br. 32-33 (quoting WILLIAM C. VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS 74-75 (1932)). But petitioners' own authority makes clear that, as with the modern statutory scheme, "[t]he statutes and rules [extant in 1932] make no provision for the release on bail of aliens applying for admission while their cases are under consideration." VAN VLECK, *supra* at 74. Moreover, petitioners' historical account conspicuously ignores the most relevant historical event: by passing IIRIRA in 1996, Congress deliberately cabined the Executive's parole authority precisely because Congress believed the Executive used that authority to evade congressionally mandated detention. *Cruz-Miguel*, 650 F.3d at 199 & n.15. Even if petitioners could show a history of discretion, Congress's decision to restrict that discretion renders that history irrelevant.

B. DHS may not rescind MPP when doing so will cause it to violate section 1225(b)'s detention mandate.

As petitioners agreed before the Fifth Circuit, Pet. App. 119a, the Executive can comply with its mandatory section 1225(b) detention obligations as regards an alien eligible for enrollment in MPP only through one of three

exhaustive options.[2] It can detain the alien; it can parole the alien on a case-by-case basis for urgent humanitarian reasons or significant public benefit; or it can exercise its contiguous-removal authority to return the alien to Mexico pending his removal proceedings—*e.g.*, MPP.

Where DHS cannot detain an MPP-eligible alien or to individually parole that alien for an urgent humanitarian reason or significant public benefit, DHS must exercise the only option it has remaining to comply with section 1225's mandatory obligation and return that alien to the contiguous territory through which he entered. Because MPP enables DHS to comply with these exhaustive statutory alternatives, DHS cannot terminate MPP until it can do so without violating its obligations under section 1225(b). Neither the fact that DHS's contiguous-return authority is optional under other circumstances nor that DHS possesses a strictly limited parole authority changes that conclusion.

1. DHS must use its contiguous-removal authority if it cannot otherwise fully comply with its detention obligations.

a. All parties agree that DHS cannot detain all the aliens that section 1225(b)(2)(A) requires it to detain. But because DHS has two other options to satisfy section 1225(b)(2)(A)'s obligations, it must exhaust those options before failing to comply at all.

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[2] As the Fifth Circuit acknowledged, section 1225(b)'s obligations may be satisfied by a fourth option as well: release on bond or conditional parole under section 1226(a). Section 1226(a)'s authorities are irrelevant to MPP because that section and MPP apply to mutually exclusive groups of aliens. Section 1226(a) applies only to aliens already present in the United States, while only those seeking to enter the United States are eligible for MPP. Pet. App. 118a, 122a.

That is because the relevant provisions—and particularly subparagraphs 1225(b)(2)(A) and (b)(2)(C)—are written in the disjunctive. Petitioners can therefore comply through "any combination" of these options. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018); *see also Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 504 (1979). MPP enables DHS to comply with its section 1225 obligations by exercising one of its applicable statutory options, its contiguous-return authority, by returning eligible aliens to Mexico. Because DHS must comply with federal law if it is able, it cannot terminate MPP so long as, as the district court found, "termination of MPP necessarily leads to the systemic violation of section 1225." Pet. App. 202a.

b. Petitioners make five arguments in response, which "boil[] down to this: We can't do one thing Congress commanded (detain under § 1225(b)(2)(A)), and we don't want to do the one thing Congress allowed (return under § 1225(b)(2)(C))." Pet. App. 119a-20a. None has merit.

First, petitioners insist (at 19-20) that they are never required to exercise their contiguous-return authority because Congress directed that DHS "may" do so, and the term "may" typically implies discretion.[3] It is "obviously true that § 1225(b)(2)(C) is discretionary." Pet. App. 120a n.18. But that discretionary authority, along with the "may" conferring it, must be read together with section 1225(b)(2)(A), rather than in isolation. *Ala. Ass'n*

[3] This understanding of an always discretionary "may" is in tension with petitioners' argument (at 29-33) that Congress *also* conferred discretion on DHS when it provided that relevant "alien[s] shall be detained" pending removal proceedings. Petitioners offer no explanation for why Congress used both the terms "shall" and "may" in adjacent subparagraphs to the same effect.

of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485, 2488 (2021).

Because subparagraph 1225(b)(2)(A) is mandatory, and (b)(2)(C) offers a permissible alternative to (b)(2)(A)'s otherwise-mandatory obligation, if petitioners cannot satisfy (b)(2)(A)'s requirements, they must employ (b)(2)(C). Petitioners violate (A)'s mandate when they "refus[e] to avail" themselves "of (C)'s authorized alternative" and then "complain[] that they do[n't] like [their] options." Pet. App. 120a n.18. Put another way, each part of section 1225 "informs the grant of authority" in 1225(b)(2) as a whole. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488. When an agency has both (1) an obligation to do something, and (2) a discretionary tool that offers a potential means to fulfill the obligation, the discretionary tool becomes mandatory when it is the *only* method of discharging the mandatory obligation.

To argue otherwise, petitioners divorce subparagraph (C) from subparagraph (A) of the same statutory section, and "focus[] on § 1225(b)(2)(C) in isolation." Pet. App. 79a. But that violates a basic axiom of statutory interpretation: every part of a statute must be read together because even the same term used in the same statute "may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *UARG*, 573 U.S. at 320.

Not only are (b)(2)(A) and (b)(2)(C) contained in the same statutory paragraph (*i.e.*, (b)(2)), but they explicitly cross-reference each other. *See* 8 U.S.C. § 1225(b)(2)(A) ("[s]ubject to subparagraphs (B) and (C)"); *id.* § 1225(b)(2)(C) ("[i]n the case of an alien described in subparagraph (A)"). Through these cross-references, section 1225 establishes beyond doubt that the contiguous-territory-return authority in (b)(2)(C) is an

alternative to the mandatory-detention regime of (b)(2)(A). *See id.* Petitioner's argument (at 20) is not faithful to these statutory alternatives.

Second, petitioners cite (at 21-22, 24-26) historical context and historical practice, which they insist demonstrate that Congress must have meant to allow, but not require, the detention of aliens described in subparagraph 1225(b)(2)(A). Per petitioners (at 21), Congress was "well aware that INS lacked the capacity to detain all removable noncitizens" "[w]hen developing IIRIRA." But the Executive's longstanding belief that it could exempt classes of aliens from the immigration laws was precisely *why* Congress passed IIRIRA. Congress's awareness of a prior and consistent practice of illegal executive refusals to detain aliens is a compelling reason to *enforce* mandatory-detention requirements as written, not to allow petitioners to continue disregarding these requirements "by a sort of intellectual adverse possession." *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 265 (1987).

Third, petitioners point (at 22-23) to precedent including *Sanchez-Avila*, 21 I. & N. Dec. at 457, and *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999). Neither supports petitioners.

Sanchez-Avila held that section 1225 "contemplated that aliens seeking admission to the United States, who did not appear to be clearly admissible, in the ordinary course would be detained in custody for further proceedings." 21 I. & N. Dec. at 457. Thus, "[t]he language of [present-day section 1225(b)] stating that an alien 'shall be detained for further inquiry' . . . clearly indicates" an intent to require the detention of these aliens. *Id.* As *Sanchez-Avila* noted, "[i]t is not surprising that the statute was drafted in this manner because, when enacted in

1952, detention in the exclusion context was the norm." *Id.* And *Sanchez-Avila* confirms the Executive has long known that the contiguous-territory authority may be required to satisfy an otherwise-mandatory detention obligation. *Id.* at 450, 451.

Aguirre-Aguirre merely held that INS was entitled to deference under *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837 (1984). 526 U.S. at 424-25. It is unclear to what petitioners ask this Court to defer, given that they "failed to mention" any "Chevron issue" in their briefing before either the Fifth Circuit or the district court. Pet. App 43a-44a. Applying well-established forfeiture rules, the court of appeals "'decline[d] to consider whether any deference might be due.'" *Id.* at 43a (quoting *HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2180 (2021). Petitioners forfeited any claim to deference from this Court. *Cf. Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976) (issues forfeited in the lower courts are not "before" this Court).

Fourth, petitioners insist (at 21) that even if DHS violated (b)(2)(A)'s mandatory-detention obligations by releasing aliens required to be detained, that violation "could conceivably support, at most, an order limiting DHS's parole or bond releases—not a separate order compelling the Secretary to employ a separate enforcement tool that Congress said he 'may' use." That argument, too, is forfeited. It may be the case that if DHS could demonstrate that it was willing and able to detain all aliens that it is required to detain, a court could only obligate DHS to comply with section 1225. But petitioners did not claim they were so willing or attempt to show they were so able before either court below. In fact, as the district court found, the record demonstrates the opposite—that DHS will systemically violate section 1225

if it terminates MPP. Pet. App. 202a. What a counterfactual DHS might do with greater detention capacity and a willingness to use it cannot rescue petitioners.

Finally, petitioners state (at 21-22) that resource constraints prevent them from fully complying with section 1225(b)'s detention mandate. From there, petitioners ask this Court to infer (at 22-23) that because Congress did not appropriate the money to enable DHS to detain every alien covered by section 1225(b), DHS remains free to refuse to use its contiguous-removal authority to satisfy the detention mandate even when it lacks any other way of doing so.

That is a non sequitur. Respondents assume that DHS lacks the resources to detain every alien seeking admission to the United States—though petitioners assiduously failed to explain to the district court the scope or basis of any such shortfall.[4] But petitioners ignore both their own admission that MPP deters unlawful crossings and the fact that individuals enrolled in MPP need not be detained. Both of these effects of MPP reduce, rather than aggravate, any financial shortfall standing between DHS and compliance with Congress's statutory commands.

Nor does this Court permit the Executive Branch to discharge its federal-law obligations by blaming Congress for failing to appropriate sufficient money to meet those obligations. For example, in the government contracting context, "if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor

[4] For example, even though the district court sought "an understanding or baseline of [DHS]'s overall detention capacity" in order to determine whether DHS could expand that capacity, J.A. 218-19, petitioners claimed ignorance of any such baseline. *Id.* at 220 ("I'm not sure of what that number is.").

is entitled to payment even if the agency has allocated the funds to another purpose or assumes other obligations that exhaust the funds." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 189 (2012). So too when a statute obliges the federal government to pay certain funds that are subsequently not appropriated. *Maine Cmty. Health Options*, 140 S. Ct. at 1323. Nor does failure to appropriate adequate funds to completely fulfill a statutory obligation mean that "Congress had no intent, either when the statute was enacted or later" that an agency should execute a command "expressly and clearly" conveyed to the best of its ability. *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 198 n.21 (1946).

c. As a last resort, petitioners insist (at 26-28) that the Fifth Circuit's interpretation of subparagraph 1225(b)(2)(C) would interfere with the United States' foreign relations. But as the Fifth Circuit correctly observed, "the mere fact that *some* foreign-relations issues are in play" does not suffice. Pet. App. 132a. Congress too "has an important role in . . . aspects of foreign policy;" even in that context, petitioners "may be bound by any number of laws Congress enacts." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 17 (2015). "The Executive may disregard 'the expressed or implied will of Congress' only if the Constitution grants him a power 'at once so conclusive and so preclusive' as to 'disabl[e] the Congress from acting upon the subject.'" *Id.* at 62 (Roberts, C.J., dissenting) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring)). The President has no such power here: Congress, not the President, has the power to "establish an uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4.

Though petitioners had an opportunity before the district court to demonstrate any potential foreign-policy problems that reimplementing MPP might case, petitioners offered only the vague assertion that following Congress's instructions "could have a significant adverse impact on U.S. foreign policy." Pet. App. 411a. Once again, petitioners fail to reckon with their own prior statements. In October 2019, petitioners determined that the "*disruption* of MPP would adversely impact U.S. foreign relations." J.A. 188 (emphasis added). Petitioners attempted to rebut that conclusion in their stay application to this Court through extra-record declarations, Pet. App. 133a-34a n.7, but "[b]ecause the declarations were not before the district court when it decided the injunction issue, and because [petitioners] g[ave] no argument why [the court of appeals] should consider them despite that," the Fifth Circuit declined to consider them. *Id.* This Court should do the same.

Finally, any foreign-relations problems associated with termination of MPP "are entirely self-inflicted." *Id.* at 133a. "DHS could have simply informed Mexico throughout the negotiating process that its ability to terminate MPP was contingent on judicial review"—especially as there was "no question DHS was on notice about . . . legal issues" regarding its plans to terminate MPP. *Id.* "Mexico is capable of understanding that DHS is required to follow the laws of the United States." *Id.* at 133a, 207a. But instead of exercising the caution associated with sensitive foreign-relations issues, petitioners hastily suspended and began dismantling MPP even as they were made aware of respondents' claims that such actions were illegal. If such haste causes foreign-policy challenges for petitioners, they have only themselves to blame.

2. DHS cannot parole aliens on a categorical basis to escape its detention obligations.

Unable to detain and unwilling to return aliens eligible for MPP, petitioners propose that two sources of parole authority, subparagraph 1182(d)(5)(A) and subsection 1226(a), permit DHS to release tens of thousands of detention-mandated aliens into the United States. Subparagraph 1182(d)(5)(A) authorizes individual parole on a case-by-case basis for narrow reasons; subsection 1226(a) does not apply to individuals eligible for MPP. Neither justifies petitioners' dogged refusal to employ its contiguous-return authority to avoid violating its mandatory-detention obligation.

a. Petitioners challenge the Fifth Circuit's conclusion that they cannot parole aliens *en masse* under subparagraph 1182(d)(5)(A). Subparagraph 1182(d)(5)(A) provides only limited humanitarian-parole authority, authorizing "parole . . . only on a case-by-case basis for urgent humanitarian reasons or a significant public benefit." 8 U.S.C. § 1182(d)(5)(A). Subparagraph 1182(d)(5)(A)'s implementing regulations reiterate that parole may only be granted on a case-by-case basis. 8 C.F.R. § 212.5(a). The requirement that a power must be exercised on a case-by-case basis generally precludes the exercise of that power on a categorical basis. *E.g.*, *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985); *FBI v. Abramson*, 456 U.S. 615, 631 (1982).

i. Petitioners first take issue (at 34) with the district court's finding that MPP's termination forced petitioners "to release and parole aliens into the United States because [petitioners] simply do not have the resources to detain aliens as mandated by statute." Pet. App. 169a; *see also id.* at 201a n.7. This Court reviews such findings

for clear error, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021), and petitioners provide no reason to upset the district court's findings.

First, petitioners complain (at 34, 35) that the district court lacked a sufficiently developed record to find that ending MPP would result in DHS illegally releasing aliens into the United States. If that is true, it is petitioners' own fault: they have long been on notice that respondents believed petitioners' decision to rescind MPP would "necessarily cause the Executive to fail to meet its statutory obligations to detain or otherwise return aliens pending removal proceedings." J.A. 122. Respondents argued as much when they first sought a preliminary injunction on May 14, claiming that "[i]nstead of detaining . . . aliens or returning them to Mexico, Defendants are paroling them into the United States. But parole is available 'only on a case-by-case basis for urgent humanitarian reasons or a significant public benefit,' not on a classwide basis." ECF 30 at 20.

If additional material regarding DHS's parole practices would have aided the district court in evaluating the predictable effects of the January Decision or June Termination, it was incumbent on the Secretary to consider those materials in reaching his decisions and on petitioners to include those materials in the administrative record. Courts must review "the whole record," 5 U.S.C. § 706, in reviewing agency action—that is, "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). To the extent there are documents that, as petitioners insist, would tend to support their assertions that ending MPP would not result in the illegal release of aliens, that is a concession either that the Secretary failed to consider

these materials in his decision or that DHS failed to produce a complete administrative record in violation of the APA. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020); *cf. FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 469 (1984) (discussing potential remedies for an inadequate administrative record).

Second, petitioners cast aspersions (at 34) on the quality of the evidence that the district court relied on in making its findings. But the district court based its findings based on *DHS's own documents*. In particular, the district court relied on petitioners': (1) 2019 assessment of MPP, Pet. App. 169a (citing J.A. 187); (2) public statements that "[c]ontinued detention of a migrant who has more likely than not demonstrated credible fear" is categorically "not in the interest of resource allocation or justice," *id.* at 169a (citing J.A. 70 n.7); and (3) record statements that "[t]he number of asylum seekers who will remain in potentially indefinite detention pending disposition of their cases will be almost entirely a question of DHS's detention capacity, and *not whether the individual circumstances* of individual cases warrant release or detention." *Id.* at 201a (citing AR 184). By contrast, as the district court pointed out, "a perusal of the *entire* administrative record shows *zero* evidence of DHS's detention capacity," *id.* at 199a, let alone that such capacity prevents mass paroles into the country.

Events since the district court's order have confirmed the district court's findings: following the January Decision and June Termination, petitioners have resumed paroling aliens *en masse* into the United States. Petitioners' status reports filed pursuant to the district court's injunction indicate that in February alone, DHS paroled 13,413 applicants for admission under section

1225 into the United States and—"whether paroled or otherwise"—released 55,043 applicants for admission under section 1225. ECF 133 at 4-5. In January alone, those numbers were 18,567 and 62,573. ECF 129 at 4-5. It is impossible to believe, and petitioners do not seriously argue, that DHS has paroled or released these aliens based on case-by-case determinations of urgent humanitarian reasons or significant public benefit. Despite their purported implementation of MPP in good faith, DHS is presently releasing into the country tens of thousands of individuals per month through parole and otherwise. These are indeed the systemic violations that the previous administration, district court, and Fifth Circuit predicted. ECF 129 at 4-5; ECF 133 at 4-5.

ii. Petitioners next dispute (at 35-36) the Fifth Circuit's conclusion that DHS cannot "parole every alien it cannot detain." Pet. App. 120a. Petitioners require such a power to resolve their conundrum: if they may systemically grant parole instead of either detaining *or* returning MPP-eligible aliens, petitioners' argument goes, then they cannot be judicially required to either detain or return those aliens.

Petitioners implicitly recognize that subparagraph 1182(d)(5)(A)'s "case-by-case basis" requirement forecloses the sweeping, thousands-by-thousands parole authority petitioners want. They therefore instead rely (at 36) on past DHS practice, asserting that DHS has for decades simply paroled aliens when it lacks sufficient capacity to detain them.

If true—and DHS neither raised nor proved that factual assertion in either court below, nor does it rely on any record evidence to support it—that extraordinary admission is in the nature of a confession rather than a defense. Such a practice "does not, by itself, create

power," *Medellin v. Texas*, 552 U.S. 491, 532 (2008), and DHS's claim to such a power is contradicted by subparagraph 1182(d)(5)(A)'s text, IIRIRA's historical context, and Congress's history of circumscribing DHS's parole authority.

Subparagraph 1182(d)(5)(A)'s text is unusually clear: it permits DHS to parole aliens only based on individualized determinations, and only for urgent humanitarian reasons or significant public benefit. As the Fifth Circuit observed, "[d]eciding to parole aliens *en masse* is the opposite of *case-by-case* decisionmaking." Pet. App. 5a, 120a. While an agency ordinarily "has the authority to rely on rulemaking" to categorically resolve "certain issues of general applicability," Congress can withhold that authority. *Lopez v. Davis*, 531 U.S. 230, 243-44 (2001). IIRIRA did so.

Indeed, petitioners continue to overlook that Congress passed IIRIRA specifically to curtail the Executive's improper exercise of parole authority to release classes of aliens rather than individual aliens. After "the executive branch on multiple occasions purported to use the parole power to bring in large groups of immigrants," "Congress twice amended 8 U.S.C. § 1182(d)(5) to limit the scope of the parole power and prevent the executive branch from using it as a programmatic policy tool." Pet. App. 13a-14a (citing Pub. L. No. 96-212, 94 Stat. 102, 108 (adding 8 U.S.C. § 1182(d)(5)(B)); Pub. L. No. 104-208, 110 Stat. 3009, 3009-689 (adding subparagraph 1182(d)(5)(A)). "By enacting [IIRIRA], Congress 'specifically narrowed the executive's discretion' to grant parole due to 'concern that parole . . . was being used by the executive to circumvent congressionally established immigration policy.'" Pet. App. 201a n.13 (quoting *Cruz-Miguel*, 650 F.3d at 199 & n.15).

Additional historical context confirms that DHS cannot exercise its parole authority under subparagraph 1182(d)(5)(A) to grant relief to categories of aliens instead of individuals. Before IIRIRA, federal immigration authorities enjoyed a parole power "under such conditions as [the Attorney General] may prescribe for emergent reasons or for reasons deemed strictly in the public interest." Pub. L. No. 414 c. 477, Title II, c. 2, § 212, 66 Stat. 182. As the First Circuit summarized, that pre-IIRIRA parole authority was understood to be "close to plenary," even though "[t]he legislative history of the parole statute demonstrate[d] clearly that Congress intended such largesse to be extended infrequently, where exigent circumstances obtained." *Amanullah v. Nelson*, 811 F.2d 1, 6 (1st Cir. 1987) (citing H.R. Rep. No. 1365, 82d Cong., 2d Sess., 1952, *reprinted in* 1952 U.S.C.C.A.N. 1653, 1706).

Congress made clear as early as 1965 that the parole authority should be used narrowly. *See* H.R. 2580, 89th Cong., 1st sess., H. Rept. 945, Aug. 6, 1965, p. 15-16; H.R. 2580, 89th Cong., 1st sess., S. Rept. 748, Sept. 15, 1965, p. 17. These "parole provisions" were "designed to authorize the Attorney General to act only in emergent, individual, and isolated situations, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside of the limit of the law." *Id.*

The Executive nonetheless continued to abuse its parole authority to release classes of aliens into the United States, and Congress remained concerned that "parole ha[d] been used increasingly to admit entire categories of aliens who do not qualify for admission under any other category in immigration law." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, Mar. 4, 1996, at 140. Congress

therefore determined that "further, specific limitations on [the Executive's] discretion . . . [were] necessary," *id.*, and it amended subparagraph 1182(d)(5)(A) to make clear that parole "should not be used to circumvent Congressionally-established immigration policy or to admit aliens who do not qualify for admission under established legal immigration categories." *Id.* at 141.

In other words, after long experience with Executive Branch intransigence, Congress expressly foreclosed DHS from exercising its parole authority under subparagraph 1182(d)(5)(A) on a categorical basis. To describe petitioners' argument—that DHS's historical disregard of legislative restrictions on its historical parole power justifies a present disregard of legislative restrictions on its present parole power—is to refute it.

b. Petitioners' alternative claim to a collective parole power through 8 U.S.C. § 1226(a)'s bond-and-condition parole provisions fares no better. Petitioners seem to acknowledge (at 35) that subsection 1226(a) does not apply to aliens newly arriving to the United States. And as this Court has already recognized, subsection 1226(a) governs the arrest, detention, and release of aliens who are already "present in the country." *Jennings*, 138 S. Ct. at 838. "Section 1226 generally governs the process of arresting and detaining that group of aliens," *i.e.*, those already "inside the United States." *Id.* For *arriving* aliens, section 1225 instead applies. Neither side disputes that only aliens apprehended at the border are eligible for MPP—so whatever the scope of DHS's subsection 1226(a) authorities, they cannot be used to parole MPP-eligible aliens in lieu of either detention or contiguous return. Moreover, even if subsection 1226(a) *could* apply, the record contains "no indication that [it] is DHS's practice or its plan" to grant bond-or-conditional

parole to aliens who would otherwise be subject to MPP. Pet. App. 118a, 121a. As petitioners do not challenge that alternative basis for the Fifth Circuit's conclusion regarding subsection 1226(a), *cf.* Pet. Br. 35, the arguments they do make cannot upset the Fifth Circuit's judgment.

* * *

Subparagraph 1225(b)(2)(A) requires detention of covered aliens. A subset of those aliens are eligible for MPP. For each eligible alien, Congress has given DHS three choices alone: detain him, parole him on an individualized and specific determination, or return him to Mexico. If allowed to terminate MPP, DHS will, as the district court found, systemically disregard those three lawful options in favor of unlawfully releasing whichever aliens it wants on whatever bases it finds appropriate. Congress did not give DHS that choice. Petitioners therefore cannot terminate MPP under these circumstances.

II. The Fifth Circuit Correctly Determined That the October Memoranda Do Not Prevent Review of the June Termination.

The Fifth Circuit correctly concluded that the June Termination was arbitrary and capricious, Pet. App. 102a-13a, and that the Secretary's October Memoranda did not prevent review of the June Termination, *id.* at 125a. Again reversing course from their arguments below, *id.* at 50a, petitioners no longer argue that the June Termination complied with the APA. Pet. Reply 10-11.

Instead, they fault the court of appeals (*e.g.*, 16, 37, 40) for failing to accord the October Memoranda "legal effect." Per petitioners (at 37), the court of appeals should have regarded the October Memoranda as an independent decision to terminate MPP which superseded the June Termination. Because this independent

decision would "obviate the need for further litigation about the adequacy of the" June Termination, Pet Br. at 48, respondents could only "attempt to challenge that new decision." *Id.* at 50.

Petitioners insinuate here what they announced below: the legal effect petitioners desire is for the October Memoranda to moot respondents' challenges to the June Termination. Though they now conspicuously avoid the term "moot" at all costs, that is the only reason that a purported second termination decision would "obviate" litigation regarding a first termination decision while simultaneously placing respondents precisely where they began: "free to attempt to challenge" DHS's termination decision. *Id.* at 50.

The court of appeals correctly rejected petitioners' arguments that the October Memoranda mooted respondents' claims. Having sought that result several times previously through "repeated[] . . . gamesmanship in [their] decisionmaking," Pet. App. 47a, petitioners cannot shoulder the "formidable burden of showing that it is absolutely clear" that their "wrongful behavior could not be reasonably expected to recur." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Without that showing, even if this Court regarded the October Memoranda as an independent decision to terminate MPP, respondents could nonetheless continue their challenge to the June Termination.

But this Court need not, and should not, construe the October Memoranda as an independent decision to terminate MPP. Having come "perilously close to undermining the presumption of administrative regularity" before the district court, ECF 85 at 3, and having "continued its tactics on appeal" to the point where the Fifth Circuit concluded that petitioners acted with unclean

hands, Pet. App. 3a, 48a, petitioners are no longer due a presumption of regularity. Instead, as the Fifth Circuit found, the October Memoranda are post hoc attempts to support petitioners' longstanding commitment to ending MPP. Such after-the-fact rationalizations carry no legal significance. And finally, even if this Court took the October Memoranda at face value, they would still be invalid. Those Memoranda reflect many of the same failings that rendered both the January Decision and June Termination arbitrary and capricious in the first place.

A. The October Memoranda do not prevent review of the June Termination.

The Court should hold that the October Memoranda do not prevent review of the June Termination for at least three reasons. *First*, the only legal effect they could have would be to moot respondents' challenge to the June Termination. Petitioners refuse to characterize their argument as such because they would bear the heavy burden of demonstrating that they voluntarily ceased their wrongful conduct—and they demonstrably have not. *Second*, the October Memoranda do not have a legal effect because they are not proper administrative actions in the first place. Petitioners' repeated gamesmanship deprives their actions of the presumption of administrative regularity, and absent that presumption, the October Memoranda contain nothing but post hoc rationalizations for the June Termination. *Third*, petitioners' late-found argument that the Memoranda satisfy the district court's injunction in part by their very existence is not properly before the Court.

1. The October Memoranda do not moot litigation regarding the June Termination.

a. Even given the legal effect petitioners assert, the October Memoranda do not moot respondents' challenge to the June Termination. The October Memoranda acknowledge that they do not, standing alone, affect respondents' existing injunction. As those memoranda explain, "the termination of MPP will be implemented as soon as practicable after a final judicial decision to vacate the injunction" in this case. Pet. App. 264a, 270a. By their own terms, the Memoranda are "one part nullity and one part impending." *Id.* at 35a. That is, because "the Memoranda do [not] purport to do anything until the injunction ends," they have no legal effect while the injunction remains in force, as it presently does. *Id.* at 36a.

Petitioners insist (at 49) that DHS has delayed implementation of the October Memoranda to ensure compliance with the district court's injunction. That explanation carries an inherent contradiction: petitioners cannot explain "how a legal effect *that has yet to occur*" could comply with an injunction now. Pet. App. 36a. Indeed, under petitioners' theory, because they are still subject to the district court's injunction, the October Memoranda still have no legal effect and therefore cannot comply with anything.

b. The Fifth Circuit also concluded that petitioners "ha[d] not carried [their] 'formidable burden' of showing" that the October Memoranda mooted the case by "remov[ing] the States' injuries by curing the Termination Decision's APA defects." Pet. App. 45a (citing *Already, LLC*, 568 U.S. at 90-91). Correctly so: not only have petitioners failed to cure their unlawful conduct, they have continued it.

As this Court recognized in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jackson*, "a defendant [can]not moot a case by repealing the challenged [action] and replacing it with one that differs only in some insignificant respect." 508 U.S. at 662. Instead, petitioners must address "[t]he gravamen" of respondents' claims. *Id.* Petitioners' position only makes sense if respondents were challenging petitioners' earlier *memoranda*. But respondents do not: respondents challenge the arbitrary and capricious *termination* of MPP.

And on that account petitioners are no better than they began. For example, respondents faulted the June Termination for the Secretary's failure to consider respondents' legitimate reliance interests in MPP's continued operation or to provide for alternative means of meeting the Executive's section 1225 detention obligations. J.A. 116. Yet the October Memoranda airily dismiss the notion that respondents retain any legitimate reliance interests in MPP's operation and presume the Executive may broadly release aliens notwithstanding section 1225's mandate. Pet. App. 318a, 321a.

Indeed, petitioners do not directly challenge the Fifth Circuit's rejection of their mootness arguments. To the contrary, they studiously avoid reference to the term "moot"—likely because their litigation tactics place them squarely within any number of exceptions to the mootness doctrine. Their reticence, however, takes them outside the proper scope of this Court's appellate jurisdiction, which conveys "power . . . to correct wrong judgments, not to revise opinions," *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945)—a limit to which this Court has "adhered with some rigor," *Camreta v. Greene*, 563 U.S. 692, 704 (2011).

2. The October Memoranda are not valid administrative action.

Even if the October Memoranda *could* have an effect outside the mootness context (which does not apply), they still amount to nothing because the Memoranda are nothing more than improper, post hoc rationalizations for terminating MPP. While petitioners insist (at 38-39) that the Memoranda announce a new decision entitled to a presumption of regularity, their litigation conduct has vitiated that presumption. And without it, nothing supports the self-serving assertion that the October Memoranda constitute new agency action.

a. Petitioners acknowledge (at 41-42) that the October Memoranda seek to justify terminating MPP using reasons not considered in the January Decision or June Termination. But this Court has repeatedly held that an agency's decisions must be supported, if at all, by the record before it at time it made the decision. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). And it has cautioned that post hoc rationalizations cannot cure a defective earlier administrative decision—let alone insulate that decision from further review. *Regents*, 140 S. Ct. at 1907-09.

This Court reiterated the principle that an agency action stands or falls based on how the agency explains its decision *at the time* most recently in *Regents*—a case that strongly resembles this one. There, as here, DHS offered "new reasons" that were "absent from" the memorandum explaining an earlier decision. 140 S. Ct. 1908. Specifically, Secretary Nielsen attempted to elaborate on DHS's reasons to terminate DACA, yet this Court rejected those additional grounds as mere post hoc rationalizations for that termination. *Id.* And the Court chided DHS for its "belated justifications," which "forc[ed] both

litigants and courts to chase a moving target." *Id.* at 1909.

b. Petitioners' argument that the October Memoranda reflect a new decision to terminate MPP—and therefore not one doomed either by *Regents* or by the June Termination's flaws—first rests on petitioners' unadorned say-so. Petitioners fault the Fifth Circuit for failing to "take the Secretary's new decision at face value." Pet. Br. 43. As petitioners would have it, both that court and respondents must accept petitioners' "description of [their] own action[s] in these circumstances." *Id.* at 40. But the label petitioners assign to their administrative actions cannot control; after all, "courts have long looked to the *contents* of the agency's action, not the agency's self-serving *label*." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019). Instead, petitioners must identify in the administrative record a sufficient basis to establish that the October Memoranda documented the Secretary's authentic reconsideration regarding whether to terminate MPP.

Petitioners have no such record on which they can rely. Indeed, because DHS produced the October Memoranda after the close of briefing in the Fifth Circuit—timing that Court described as "more than a little suspicious," Pet. App. 50a, and which was wholly within their control—petitioners have no one to blame for this failure but themselves. Recognizing as much, petitioners gamely claim (at 42-43) that they are entitled to a presumption of regularity for their actions, and that such presumption obligated the court of appeals to regard the October Memoranda as a bona fide reconsideration regarding MPP.

Petitioners ask more of the presumption of regularity than it can bear. As both courts below recognized,

petitioners have engaged in bad-faith litigation and administrative misconduct. The Fifth Circuit alternately described petitioners' conduct as "unclean hands," a "pattern of belated shifts," "eleventh-hour" surprises, "gamesmanship," throwing a "last-minute wrench" into the proceedings, and playing "a game of heads I win, tails I win, *and* I win without even bothering to flip the coin." Pet. App. 3a, 47a, 48a, 50a, 125a. Even before then, the district court found that petitioners' conduct—including "[t]he delay between the government's acquiring knowledge" that DHS's 2019 assessment of MPP was not in the record "and its filing of notice with the Court"—came "perilously close to undermining the presumption of administrative regularity." Pet. App. 152a. That conduct has only persisted on appeal. *Id.* 35-52a.

Most egregiously, DHS announced on September 29, 2021, that it "intend[ed] to issue in the coming weeks a new memorandum terminating" MPP. *Id.* at 28a. By petitioners' telling (at 39, 44), this announcement accompanied a fresh examination of the Secretary's position regarding MPP. That characterization is hard to square with the announcement itself, which stated DHS's intention to terminate MPP no fewer than four distinct times. Pet. App. 28a. Petitioners suggest (at 44) that DHS's announcement allowed for the possibility that the Secretary "could have . . . adjusted" his position "as [he] continued to refine his assessment and draft the memorandum." But he did not reconsider his position: though the Secretary arrived at the outcome that DHS had announced in advance, the agency waited for nearly a month to publish the October Memoranda, informing the Fifth Circuit only two days before scheduled argument. Pet. App. 257a-345a.

In short, petitioners have pressed litigation until they have suffered or felt they were likely to suffer adverse decisions, sought to unilaterally vacate those adverse decisions through strategically timed memoranda designed to moot respondents' claims, and continued to dismantle MPP despite their litigation reversals. An ordinary onlooker would no longer assume that petitioners hewed to the administrative straight and narrow, and this Court is "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019).

c. Without a presumption of regularity, petitioners' conduct demonstrates that the administration has always intended to terminate MPP, regardless of any impediments to that outcome. Take DHS's own declarants, who attested that the agency began dismantling MPP in January 2021, immediately following the unreasoned January Decision. Pet. App. 207a-08a. Though denominated a suspension, DHS reacted to the January Decision by immediately undertaking difficult-to-reverse actions—demonstrating that DHS had already rejected the possibility that it would be dissuaded from terminating MPP by public input, an examination of the agency's past assessments of MPP's effectiveness, any proposed narrower alternatives to MPP, stakeholder reliance interests, or any of the other myriad legitimate concerns an agency must address when considering administrative action. *Regents*, 140 S. Ct. at 1913-15. That is, DHS began effectively terminating MPP months before the June Termination because that termination was a foregone conclusion.

d. Petitioners present two counterarguments, neither of which has merit. *First*, petitioners fret (at 41) that treating the October Memoranda as post hoc

rationalizations would preclude DHS from ever taking administrative action regarding MPP unless the agency decided to preserve the program. As the court of appeals acknowledged, the opposite is closer to the mark. DHS could have actually "taken new action." It just *did* not. DHS is free to approach MPP with fresh eyes whenever it is prepared to consider all relevant factors in its potential decision prior to arriving at a conclusion. *See Regents*, 140 S. Ct. at 1913-15; Pet. App. 124a-25a.

Finally, petitioners incorrectly assert (at 43-44) that faulting DHS here would invalidate any agency action where the agency has previously announced a tentative conclusion. An agency may, consistent with the APA, announce preliminary findings or tentative conclusions—after all, that is what a Notice of Proposed Rulemaking does. But as the Fifth Circuit found, DHS's September 29 announcement was anything but tentative. Pet. App. 29a. It repeatedly asserted a single conclusion: that DHS would once again terminate MPP. *Id.* at 28a. Neither the record nor common sense support the counterintuitive notion that such an unequivocal statement communicates a tentative conclusion.

In sum, if the October Memoranda potentially *could* have produced legal effects other than to moot the injunction—and they could not—the Memoranda do not because they are not a new agency action: they are only post hoc attempts to justify a prior agency decision.

3. Any argument that the October Memoranda satisfied the injunction is not properly before the Court.

Petitioners fare no better by suggesting in the alternative (*e.g.*, at 50) that rather than obviating the need for further litigation about the June Termination, the October Memoranda satisfy one of the district court's two

conditions for rescinding MPP. Petitioners never raised this argument below, so this Court may disregard it as forfeited. *Kingdomware*, 579 U.S. at 173 (citing *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 37 (2015)).

But even if petitioners had not forfeited that argument, this Court would not be the proper forum for it in the first instance. A litigant's satisfaction of an injunction's terms can provide a basis to reopen a judgment under Rule 60(b)(5). *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (citing *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992)). Such a motion falls distinctly within the district court's responsibility to superintend over its own injunctions, *Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961), and leaving such questions in the trial courts both reflects the discretionary nature of equitable relief and respects the role of the trial court within the federal judicial hierarchy. 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. § 2961 (3d ed. 2008). This Court has accordingly directed litigants to press such arguments first in district court. *E.g.*, *FDA v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 10, 11 (2020).

At a minimum, petitioners should have first sought relief before the Fifth Circuit, which held jurisdiction over this case when the Secretary issued the October Memoranda. Petitioners conspicuously did not. To the contrary, petitioners' suggestion of mootness asked the court of appeals (albeit in the alternative) to hold petitioners' appeal in abeyance so that the district court could "reconsider" respondents' APA claims "anew." Suggestion of Mootness, at 20, 22. Petitioners therefore understood at least at one point that the district court was the proper forum for its changed-circumstances argument.

Petitioners think (at 48) it implausible that the lower courts will grant them relief. But this argument wrongly assumes that the trial court will ignore its "continuing obligation to assess the efficacy and consequences of its order" in the light of changed circumstances. *Brown v. Plata*, 563 U.S. 493, 542 (2011). This Court does not—and should not—presume that lower federal courts will be so cavalier.

B. If accepted as a reconsideration of the Secretary's decision to terminate MPP, the October Memoranda are arbitrary and capricious.

Even if this Court accepted at face value petitioners' claims that DHS reconsidered its June Termination and decided in good faith again to terminate MPP, that decision cannot cure the June Termination's flaws for a basic reason: it repeats them. Just as the June Termination proved arbitrary and capricious on numerous grounds, the Secretary's October Memoranda violate basic administrative-law principles.

"The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). This requirement imports multiple procedural obligations. Courts must ensure that "the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.* "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The agency must consider the reliance interests of those

affected by a contemplated decision, *Regents*, 140 S. Ct. at 1913-15, and must consider less-disruptive policies in the light of those interests. *Id.* Petitioners failed to offer anything more than pretextual or post hoc explanations of their actions. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947). On the present record, this Court cannot uphold any October Termination for both procedural and substantive reasons.

1. On the procedural front, the tardiness of petitioners' revelation of the October Memoranda deprives the Court of the necessary record to assess its validity. As noted above, an administrative decision can be supported only on the administrative record assembled by DHS, *Volpe*, 401 U.S. at 419-20—typically shortly after the filing of complaint or petition for review. There is no such record regarding the October Memoranda—and thus no basis to support DHS's actions. And the record associated with the June Termination does not support the Secretary's decision to rescind MPP, as petitioners implicitly acknowledge by abandoning their defense of the June Termination on the merits. Pet. Reply 9-10 ("[W]hatever the merits of the lower court's conclusion, the government no longer needs relief from that portion of the injunction.").

2. The Secretary's October Memoranda fail to substantively satisfy the arbitrary and capricious standard in at least four ways. *First*, the October Memoranda, Pet. App. 288a-93a, fail to consider key benefits of MPP. For example, they extensively discuss conditions for migrants in Mexico, *id.*, but omit the hardships befalling aliens who make the dangerous journey to the southern border, *id.* The Secretary similarly acknowledged that MPP "is likely . . . to contribute[] to a decrease in migrant flows," *id.* at 260a, but omitted the harms avoided by

deterring migrants without meritorious asylum claims from traveling to the United States, *id.* at 288a-93a. These substantial harms include labor trafficking, extortion, abandonment of minors, and sexual violence. ROA.773, 776, 481.

Second, the October Memoranda purports to "rest[] upon factual findings that contradict those which underlay [DHS's] prior policy," but fail to provide the "more detailed justification" required under those circumstances. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516-17 (2009). For example, the October Memoranda contain completely different numbers regarding *in absentia* removal orders than those contained in the June Termination's administrative record to show MPP resulted in a high rate of *in absentia* removals. Pet. App. 302a n.7. But Petitioners did not explain the discrepancy or contest the Fifth Circuit's conclusion "that *in absentia* removal rates were similar prior to MPP." Pet. App. 109a. Similarly, "when MPP was first announced the Department observed that 'approximately 9 out of 10 asylum claims from Northern Triangle countries are ultimately found non-meritorious." Pet. App. 307a. Though the October Memoranda acknowledge that petitioners "do[] not have a record of the methodology used to generate this . . . statistic," they nonetheless disagree with it and change policy because, in petitioners' view, MPP resulted in too few asylum grants. Pet. App. 307a.

Third, while *Regents* requires DHS to actually consider respondents' financial injuries and other reliance interests, 140 S. Ct. at 1913, the October Memoranda did the opposite. Without explaining what inquiry they made, petitioners breezily assert that "the Secretary is unaware of any State that has materially taken any action in reliance on the continued implementation . . . of

MPP." Pet. App. 318a. But as this Court is well aware, the States "bear[] many of the consequences of unlawful immigration," which "must not be underestimated." *Arizona v. United States*, 567 U.S. 387, 397 (2012).

Fourth, though the October Memoranda purport to address compliance with section 1225's detention mandate, Pet. App. 319a-25a, it relies on incorrect legal conclusions, including that "[s]ection 1225 does not impose a near-universal detention mandate," and that section 1182(d)(5)(A)'s parole authority permits DHS to parole nearly all aliens subject to section 1225's mandatory-detention obligation. Pet. App. 321a-22a. That is wrong for reasons already discussed.

Any of these flaws would be sufficient to set aside an October Termination even if it were otherwise effective. Petitioners' attempts to rely on an October decision by the Secretary to cure any problem with—and thus end litigation regarding—the June Termination therefore fail.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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