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, ET AL.

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

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

This case concerns the Migrant Protection Protocols (MPP), a former policy of the Department of Homeland Security (DHS) that began in 2019, under which certain noncitizens arriving on land at the southwest border were returned to Mexico pending their immigration proceedings. On June 1, 2021, the Secretary of Homeland Security issued a memorandum terminating MPP. The district court vacated the Secretary's June 1 memorandum and remanded the matter to the agency on two grounds: (1) that terminating MPP violates 8 U.S.C. 1225 because DHS lacks capacity to detain nearly all the inadmissible noncitizens it encounters, who the court concluded must be detained under that provision, and (2) that the Secretary had not adequately explained his decision. The court also entered a nationwide permanent injunction requiring DHS to reinstate and maintain MPP until Congress funds sufficient detention capacity for DHS to detain all noncitizens subject to detention under Section 1225(b) *and* until the agency adequately explained a future termination.

On October 29, 2021, after thoroughly reconsidering the matter on remand, the Secretary issued a new decision terminating MPP and providing a comprehensive explanation for that decision. The court of appeals nevertheless affirmed the injunction, endorsing the district court's reading of Section 1225 and holding that the Secretary's new decision has no legal effect.

The questions presented are:

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

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

PARTIES TO THE PROCEEDING

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

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

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* Under Secretary Silvers, Commissioner Magnus, and Director Jaddou were automatically substituted for their predecessors at earlier stages of the litigation. See Sup. Ct. R. 35.3.

TABLE OF CONTENTS

Page

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes, regulations, and rule:

Statutes, regulations, and rule—Continued: Page

Miscellaneous: Page

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OPINIONS BELOW

The revised opinion of the court of appeals (Pet. App. 1a-136a) is reported at 20 F.4th 928. The memorandum opinion and order of the district court (Pet. App. 149a-213a) is not yet reported but is available at 2021 WL 3603341. This Court's order denying a stay (Pet. App. 214a) is reported at 142 S. Ct. 926. The court of appeals' order denying a stay (Pet. App. 215a-255a) is reported at 10 F.4th 538. The district court's order denying a stay (Pet. App. 256a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 2021. The petition for a writ of certiorari was filed on December 29, 2021, and granted on Febru-

ary 18, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

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

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

Other pertinent statutory and regulatory provisions are set forth in the appendix to this brief. App., *infra*, 1a-21a.

STATEMENT

This case concerns the Secretary of Homeland Security's decision to stop using a discretionary border-management policy known as the Migrant Protection

Protocols (MPP). MPP, which was first implemented in 2019, applied to certain foreign nationals arriving at the United States land border from Mexico. In adopting MPP, the Department of Homeland Security (DHS) had invoked 8 U.S.C. 1225(b)(2)(C), which provides that the Secretary "may return" certain noncitizens to Mexico during the pendency of their immigration proceedings.[1] Even at its peak in 2019, MPP was applied to only a small fraction of the inadmissible noncitizens encountered at the southwest border. In June 2021, the Secretary exercised his discretion under Section 1225(b)(2)(C) by issuing a memorandum terminating MPP.

The district court vacated the Secretary's memorandum, remanded it to the agency, and issued a nationwide permanent injunction, concluding that (1) Section 1225 effectively requires DHS to implement MPP, and (2) the Secretary's decision had been insufficiently explained. While that decision was on appeal, the Secretary accepted the district court's remand; thoroughly reconsidered his prior decision; and then issued a new decision that again terminated MPP based on new reasoning that, among other things, addressed each of the concerns the district court had raised. But the court of appeals affirmed the permanent injunction, holding that (1) Section 1225 compels DHS to retain MPP unless and until Congress appropriates funds for DHS to detain nearly every noncitizen who arrives at the border without clear entitlement to admission, and (2) the Secretary's new termination decision has no legal effect.

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

Under the court of appeals' unprecedented interpretation, every presidential administration—including the one that adopted MPP—has been in continuous and systemic violation of Section 1225 since the relevant provisions were enacted in 1996. And DHS has been forced to reinstate and indefinitely continue a controversial policy that the Secretary has twice determined is not in the interests of the United States.

A. Legal Background

The Executive Branch has broad constitutional and statutory power over the administration and enforcement of the Nation's immigration laws. See, *e.g.*, *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2418-2419 (2018); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950); see also 6 U.S.C. 202(5); 8 U.S.C. 1103(a). "A principal feature of" the statutory framework governing the removal of noncitizens from the United States "is the broad discretion exercised by immigration officials." *Arizona* v. *United States*, 567 U.S. 387, 396 (2012). In particular, the Executive has long exercised discretion to choose how best to allocate limited resources by prioritizing which noncitizens to take into custody and remove, what procedures to use to pursue removal, and whom to detain during the removal process. See, *e.g.*, *ibid.* (describing federal officials' responsibility to "decide whether it makes sense to pursue removal"); *Leng May Ma* v. *Barber*, 357 U.S. 185, 188-190 (1958) (describing the historical practice of paroling noncitizens pending immigration proceedings); *In re E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 521-523 (B.I.A. 2011) (describing the government's authority to select among removal procedures).

1. The INA refers to a noncitizen who arrives in the United States at a port of entry or between ports as an

"applicant for admission." 8 U.S.C. 1225(a)(1). A noncitizen who is "present in the United States [but] has not been admitted" is also deemed "an applicant for admission." *Ibid.*

The INA affords DHS multiple options for processing applicants for admission. Section 1225(b)(2)(A) provides that, if an "immigration officer determines" upon inspecting "an applicant for admission" that he "is not clearly and beyond a doubt entitled to be admitted," then the person "shall be detained for a proceeding under [8 U.S.C.] 1229a" to determine whether he will be removed from the United States or is eligible for some form of relief or protection from removal, such as asylum. 8 U.S.C. 1225(b)(2)(A). In the alternative, certain applicants for admission may be placed in an expedited removal process described in Section 1225(b)(1). See *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1964-1966 (2020).

Congress has not provided DHS with sufficient appropriations to detain all the noncitizens the agency encounters who are subject to detention under Section 1225(b). Pet. App. 323a; see *id.* at 169a (district court finding that DHS "simply do[es] not have the resources" for universal detention). In 2021, for example, U.S. Immigration and Customs Enforcement (ICE) had a nationwide immigration-detention capacity of "approximately 34,000." *Id.* at 323a. Yet that year DHS processed more than 671,000 inadmissible noncitizens under the INA at the southwest border alone, an average of more than 55,000 every month. See U.S. Customs & Border Protection, *Southwest Land Border Encounters* (Feb. 18, 2022), https://go.usa.gov/xtqmr. In fiscal year 2019 (before the COVID-19 pandemic), DHS processed more than 977,000 inadmissible noncitizens at the southwest border. See *ibid.* DHS's lack of appro-

priations for universal detention is not a recent development: The agency has explained that, since Section 1225 was revised as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 302(a), 110 Stat. 3009-579, the Executive Branch "has never had" "sufficient detention capacity to maintain in custody every single person described in" Section 1225. Pet. App. 323a.

As an alternative to detention pending removal proceedings, the INA authorizes the Secretary, "in his discretion," to release applicants for admission on "parole" "under such conditions as [the Secretary] may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A). That statutory authority accords with the Executive Branch's historical discretion to determine that certain noncitizens need not be detained pending their removal. See, *e.g.*, *Kaplan* v. *Tod*, 267 U.S. 228, 229 (1925) (describing noncitizen's parole pending deportation); *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 661 (1892) (describing noncitizen's shore release pending decision on right to land). In 1952, Congress generally "codif[ied]" the Executive's longstanding "administrative [parole] practice" in the INA's original version of Section 1182(d)(5). *Barber*, 357 U.S. at 188-190 (referencing ch. 477, § 212(d)(5), 66 Stat. 188). DHS's regulations implement its parole authority by providing that designated officials may exercise discretion, "only on a case-by-case basis for 'urgent humanitarian reasons or [ ]significant public benefit,'" to parole certain noncitizens who "present neither a security risk nor a risk of absconding," subject to potential conditions

providing "reasonable assurances" that they "will appear at all hearings." 8 C.F.R. 212.5(a)-(d).

In addition to DHS's authority under Section 1225, Section 1226 provides that the Secretary may arrest noncitizens who are removable from the United States and either detain them "pending a decision on whether" they will be removed or "release" them on "bond" or "conditional parole." 8 U.S.C. 1226(a); see *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 837-838 (2018) (describing Section 1226). Under that authority, some applicants for admission apprehended in the United States shortly after unlawfully crossing the border between ports of entry are released pending their removal proceedings, "provided that" they can "demonstrate to the satisfaction of [an] officer that such release would not pose a danger to property or persons, and that [they are] likely to appear for any future proceeding." 8 C.F.R. 236.1(c)(8).

2. Another provision of Section 1225—the one directly at issue here—gives DHS an additional border-enforcement tool in certain instances: "In the case of an alien described in [Section 1225(b)(2)(A)] who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the [Secretary] may return the alien to that territory pending a proceeding under section 1229a." 8 U.S.C. 1225(b)(2)(C). Congress enacted the contiguous-territory-return authority as part of IIRIRA to provide a statutory basis for the government's prior practice of requiring some noncitizens arriving by land from Mexico or Canada to await immigration proceedings within those countries. See *In re M-D-C-V-*, 28 I. & N. Dec. 18, 25-26 (B.I.A. 2020).

Before the 2019 initiation of MPP, "DHS and the former" Immigration and Naturalization Service (INS) "primarily used Section 1225(b)(2)(C) on an ad hoc basis to return certain Mexican and Canadian nationals" arriving at ports of entry. Pet. App. 273a & n.12; see 8 C.F.R. 235.3(d).

B. The Present Controversy

1. In December 2018, then-Secretary Kirstjen Nielsen announced MPP, under which DHS would "begin implementation of" the contiguous-territory-return authority in Section 1225(b)(2)(C) "on a wide-scale basis" along the southwest border. 84 Fed. Reg. 6811, 6811 (Feb. 28, 2019); see Pet. App. 157a-158a. "That same day, [the Government of] Mexico announced its independent decision to accept those returned to Mexico through the program—a key precondition to implementation." Pet. App. 274a. Under MPP, certain non-Mexican nationals arriving by land from Mexico could be "placed in removal proceedings and returned to Mexico to await their immigration court proceedings." *Id.* at 275a; see *id.* at 158a-159a. MPP was a controversial program that sparked extensive litigation, some of which is still pending. See *id.* at 281a-283a.

DHS began implementing MPP in January 2019. In April 2020, DHS dramatically reduced the program's use after it began expelling many noncitizens pursuant to an order of the Centers for Disease Control and Prevention, in connection with the COVID-19 pandemic. Pet. App. 162a n.8, 277a n.24. Between the start of MPP and January 21, 2021, DHS enrolled roughly 68,000 noncitizens in the program—a small fraction of the inadmissible noncitizens encountered at the southwest border during that period. *Id.* at 277a; see p. 5, *supra*.

2. On January 20, 2021, after President Biden took office, the Acting Secretary of Homeland Security "suspend[ed] new enrollments in [MPP], pending further review of the program." Pet. App. 361a. On February 2, 2021, the President issued Executive Order No. 14,010, directing the Secretary to "promptly review and determine whether to terminate or modify" MPP. § 4(a)(ii)(B), 86 Fed. Reg. 8267, 8269 (Feb. 5, 2021). The President also instructed the Secretary to consider a "phased strategy" for completing proceedings for MPP enrollees with pending asylum claims. *Ibid.*

In response to the President's order, DHS developed a strategy to permit re-entry of MPP enrollees with still-pending removal proceedings (many of which had been paused for several months due to COVID-19). See Pet. App. 271a & n.7, 353a. The agency also conducted a thorough review of the significant policy questions implicated by the program, including its rationales and practical efficacy. See *id.* at 350a-351a.

After that review, on June 1, 2021, Secretary Mayorkas terminated MPP. Pet. App. 346a-360a. The Secretary explained that his decision was based on several considerations, including the extent of agency personnel and resources required to implement the program, the availability of alternative approaches for managing irregular migration that he viewed as both more effective and more humane, and MPP's impact on the United States' relationship with Mexico. *Id.* at 351a-359a.[2]

3. Respondents, the States of Texas and Missouri, brought this suit in the Northern District of Texas chal-

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

lenging the Acting Secretary's January 20 suspension of new enrollments in MPP. Pet. App. 150a. They later amended their complaint to claim that the Secretary's June 1 decision terminating MPP violated the INA and the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Pet. App. 151a.

Following a one-day bench trial—at which respondents called no witnesses—the district court entered judgment for respondents. Pet. App. 149a-213a. The court concluded that the Secretary's June 1 decision violated the INA, reasoning that Section 1225 *mandates* that DHS return noncitizens to Mexico whenever it lacks sufficient appropriations to detain all noncitizens described in Section 1225(b). *Id.* at 200a-202a. The court also concluded that the Secretary's June 1 decision had been inadequately explained in violation of the APA. *Id.* at 190a-200a.

The district court "vacated" the Secretary's "June 1 Memorandum" and "remanded" it to DHS "for further consideration." Pet. App. 212a (capitalization and emphasis omitted). The court also entered a nationwide permanent injunction ordering DHS to reinstate and "implement MPP *in good faith* until such a time as" two conditions are satisfied: (1) "the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section [1225] without releasing any aliens *because of* a lack of detention resources," and (2) MPP "has been lawfully rescinded in compliance with the APA." *Ibid.*

4. The government promptly appealed and sought a stay of the injunction, which the district court and the court of appeals denied. Pet. App. 215a-255a, 256a. The government then applied to this Court for a stay. The Court denied the application, finding that the govern-

ment was unlikely to succeed in showing that the Secretary's June 1 memorandum terminating MPP "was not arbitrary and capricious" in violation of the APA. *Id.* at 214a. The Court's order did not address respondents' claim that terminating MPP violated the INA.

5. The government thereafter complied with the injunction by undertaking significant operational and diplomatic efforts—including negotiation with the Government of Mexico—to reimplement MPP in good faith. Pet. App. 286a; see D. Ct. Doc. 117 (Dec. 2, 2021). As required by the injunction, DHS is continuing the resource-intensive process of maintaining the program.

On appeal, the government vigorously contested the district court's conclusion that Section 1225 compels DHS to maintain MPP subject to Congress's appropriations decisions. At the same time, consistent with the court's remand to the agency for "further consideration," Pet. App. 212a, the Secretary conducted a fresh evaluation process to consider "whether to maintain, terminate, or modify MPP," *id.* at 286a. The Secretary's re-evaluation considered, among other things, the court decisions and briefs in cases involving MPP; prior assessments of the program, both favorable and unfavorable; records and testimony from congressional hearings on MPP; reports by nongovernmental entities; data on MPP enrollments, encounters at the border, and outcomes; and the effects of other policies on irregular migration and its impact at the southwest border. *Id.* at 259a-260a, 287a-288a. The Secretary also met with "a broad array" of people "with divergent views about MPP," including DHS personnel "engaged in border management"; elected officials from border States; border sheriffs and other law enforcement officials; and non-profit organizations. *Id.* at 287a. The Secretary ex-

amined each of the considerations that the district court had found were, for APA purposes, "insufficiently addressed in the June 1 Memorandum." *Id.* at 259a.

To avoid disrupting the appellate process, DHS kept the court of appeals informed of the Secretary's reconsideration process on remand. On September 20, 2021, the government's brief advised the court that the Secretary had been "reviewing the June 1 Memorandum and evaluating policy options regarding MPP," and that the "result of that review could have an impact on this appeal." Gov't C.A. Br. 9 n.2. On September 29, 2021, the Secretary announced his "inten[tion] to issue in the coming weeks a new memorandum terminating [MPP]." Pet. App. 28a. The government then moved to hold the appeal briefly in abeyance pending the Secretary's decision. Gov't C.A. Motion 3 (Sept. 29, 2021). The court of appeals denied that motion. C.A. Order (Oct. 4, 2021).

On October 29, 2021, the Secretary issued a new decision, again terminating MPP. Pet. App. 257a-264a. He incorporated a 38-page memorandum exhaustively describing his reconsideration process and the reasons for his decision. *Id.* at 265a-345a. The Secretary explained that he had "carefully considered" the arguments for retaining MPP, including what he considered "the strongest argument," namely a "significant decrease in [southwest] border encounters" following MPP's implementation. *Id.* at 261a. But the Secretary found that MPP's "benefits do not justify the costs" given "endemic" flaws in the program, including extreme violence perpetrated by criminal organizations against some migrants enrolled in MPP, migrants' difficulties in accessing counsel across the border, and MPP's detraction from "foreign-policy objectives[ ] and domestic policy initiatives." *Id.* at 260a-261a; see *id.* at

267a-270a. The Secretary also found that "[e]fforts to implement MPP have played a particularly outsized role in diplomatic engagements with Mexico," and that Mexico "w[ould] not agree to accept" returned migrants without "substantial improvements" to MPP, which would require devoting even more resources to the program. *Id.* at 262a. In the Secretary's judgment, those resources would be better directed to other policies designed to "disincentivize irregular migration while incentivizing safe, orderly, and humane pathways," *id.* at 267a-268a, which the Secretary determined would "address migratory flows as effectively, in fact more effectively, while holding true to our nation's values," *id.* at 260a.

The Secretary therefore again "terminat[ed] MPP." Pet. App. 263a. "Effective immediately," he "supersede[d] and rescind[ed] the June 1 memorandum" and all prior DHS memoranda implementing MPP. *Id.* at 263a-264a. But the Secretary also made clear that his decision "w[ould] be implemented" only upon the lifting of the district court's injunction, *id.* at 264a, which precludes terminating MPP so long as DHS has inadequate "detention resources," *id.* at 212a.

That same day, the government moved in the court of appeals to vacate the injunction on the ground that respondents' challenge to the Secretary's June 1 decision had been superseded by the October 29 decision—the operative agency action. Gov't C.A. Motion (Oct. 29, 2021). In the alternative, the government asked the court to hold the INA question in abeyance and remand the other part of the case to the district court to permit respondents to challenge the October 29 decision if they wished. *Id.* at 4.

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

The court concluded that respondents' claims were reviewable and not moot. Pet. App. 15a-102a. The court held that whereas "DHS's June 1 decision to terminate MPP had legal effect," "the October 29 Memoranda and any other subsequent memos" did not; they "simply *explained* DHS's decision." *Id.* at 22a. Relying on D.C. Circuit case law governing the statute of limitations for challenging agency action, the court concluded that "[t]he October 29 [decision] did not constitute a new and separately reviewable 'final agency action.'" *Id.* at 23a (citing *National Ass'n of Reversionary Prop. Owners* v. *Surface Transp. Bd.*, 158 F.3d 135 (1998)); see *id.* at 23a-30a. The court stated that the only way for DHS to issue a new decision would have been to "dismiss its appeal"—thereby abandoning its challenge to the district court's Section 1225 holding and the accompanying condition of the injunction requiring the indefinite continuation of MPP—and then "restart its rulemaking process." *Id.* at 126a n.19. The court went on to affirm the district court's conclusion that the Secretary's now-superseded explanation for terminating MPP on June 1 had been inadequate. *Id.* at 102a-113a.

The court of appeals also affirmed the district court's conclusion that the Secretary "violated the INA" by terminating MPP. Pet. App. 113a; see *id.* at 113a-123a. In the court of appeals' view, Section 1225(b)(2)(A)'s "mandatory language" imposes a "plainly obligatory rule" requiring "detention for aliens seeking admission." *Id.* at 115a, 118a. The court reasoned that DHS "is violating [that] mandate" by releasing too many noncitizens

due to inadequate detention capacity, *id.* at 120a n.18, thereby "ignor[ing] Congress's limits on immigration parole," *id.* at 121a. See *id.* at 119a-122a. The court concluded that DHS must "avail itself" of the contiguous-territory-return authority in Section 1225(b)(2)(C) to avoid violating Section 1225(b)(2)(A)'s purported detention mandate. *Id.* at 120a n.18.

SUMMARY OF ARGUMENT

I. The court of appeals erred in holding that 8 U.S.C. 1225 requires the Secretary to use contiguous-territory return whenever DHS lacks adequate capacity to detain nearly all noncitizens described in Section 1225(b).

A. Section 1225(b)(2)(C) provides that the Secretary "may" return land-arriving noncitizens to Mexico or Canada pending their removal proceedings. 8 U.S.C. 1225(b)(2)(C). The plain meaning of that language vests the Secretary with *discretion* to exercise the return authority, as decades of this Court's precedents confirm. The court of appeals' interpretation is also inconsistent with the history of Section 1225(b)(2)(C), which Congress enacted to authorize a preexisting, discretionary INS return practice. The statutory history decisively refutes the suggestion that Congress intended that provision to revolutionize the Executive Branch's border-management policy.

The radical implications of the court of appeals' decision confirm its error. Since IIRIRA was enacted in 1996, *no* presidential administration—including the administration that adopted MPP—has understood Section 1225 to mandate the sweeping use of contiguous-territory return that was ordered by the court. The court's interpretation also carries dramatic foreign-relations implications because it compels the Executive to send third-country nationals into the territory of a

foreign sovereign. In the highly unlikely event that Congress intended to impose those startling consequences, it would not have done so in a little-noticed provision giving the Secretary an additional, discretionary return authority.

B. Even apart from the discretionary character of Section 1225(b)(2)(C), the court of appeals' decision rests on two additional independent errors.

First, the court held that the word "shall" in 8 U.S.C. 1225(b)(2)(A) compels DHS to detain nearly all applicants for admission who arrive at the border without a clear entitlement to admission. But that language does not displace background principles of law-enforcement discretion. See *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748 (2005). Especially given perennial constraints on detention capacity, the Executive retains authority to allocate its limited resources to those noncitizens who are higher priorities for detention.

The court of appeals further erred by holding that DHS's policies for immigration parole and bond violate statutory requirements. Respondents did not challenge DHS's parole or bond practices in the district court. Regardless, release on bond is permitted for certain applicants for admission in the United States. And there is no inconsistency between making parole decisions case-by-case (as the INA and DHS's regulations require) and considering detention capacity (as the Executive has done since IIRIRA's enactment).

II. The court of appeals also erred in holding that the Secretary's October 29 decision terminating MPP lacks legal effect and therefore cannot satisfy the injunction's condition that DHS rescind MPP "in compliance with the APA." Pet. App. 212a.

A. The court of appeals characterized the October 29 decision as a *post hoc* rationalization for the June 1 decision, rather than a new decision. That conclusion conflicts with *DHS* v. *Regents of the University of California*, 140 S. Ct. 1891 (2020), which reaffirmed that, when a court finds an agency's explanation for an action inadequate, the agency may either elaborate on its prior reasons *or* issue a new decision. Here, the Secretary considered the matter afresh and expressly issued a new decision terminating MPP, offering extensive reasoning apart from that of the June 1 memorandum.

B. The court of appeals suggested that DHS had not *really* reconsidered the matter, and that the October 29 memorandum was simply pretextual cover for a decision made months before. But a finding of pretext requires a showing that the agency decision-maker acted in "bad faith," *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2574 (2019) (citation omitted)—a standard that the court failed to acknowledge and that plainly is not satisfied. The court instead invoked the D.C. Circuit's reopening doctrine for resolving statute-of-limitations questions, which has no application here.

C. The court of appeals accused the government of acting improperly by issuing a new decision while pursuing an appeal. But the court cited no authority supporting that critique, and agencies routinely revise regulations and policies while litigation is ongoing. The court also criticized the government's litigation conduct as inequitable, but that criticism distorts the history of this case and, in any event, would not justify treating the October 29 decision as a legal nullity.

ARGUMENT

The court of appeals relied on novel and erroneous interpretations of the INA and the APA to compel DHS to maintain *in perpetuity* a discretionary border-management program that the politically accountable Executive Branch has twice determined to be contrary to the interests of the United States. The court's interpretation of the INA disregarded both the statutory text and a quarter century of unbroken executive practice since the contiguous-territory-return provision's enactment. And the court's APA analysis summarily dismissed the Secretary's operative decision explaining his findings that the short-lived MPP policy is not the best tool for deterring unlawful migration, exposes migrants to unacceptable risks, and detracts from diplomatic efforts to manage regional migration. As a result, the court affirmed a nationwide permanent injunction that dramatically intrudes on the Executive's constitutional and statutory authority to manage the border and conduct the Nation's foreign policy. This Court should reverse that flawed judgment.[3]

I. THE COURT OF APPEALS ERRED IN ORDERING THE SECRETARY TO IMPLEMENT THE DISCRETIONARY CONTIGUOUS-TERRITORY-RETURN AUTHORITY

The court of appeals interpreted Section 1225 to require that, unless and until DHS has appropriations to detain all noncitizens subject to detention under Section 1225(b)—with only very limited parole releases—the agency *must* implement the contiguous-territory-

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

return authority in Section 1225(b)(2)(C) to avoid violating a detention mandate in Section 1225(b)(2)(A). That analysis cannot be reconciled with the statutory text or context. Section 1225(b)(2)(C) unambiguously establishes a discretionary authority, not a mandatory duty; the detention provision in Section 1225(b)(2)(A) must be read in light of foundational principles of enforcement discretion; and the INA permits the Secretary to account for detention capacity when making parole and bond determinations. Under the court of appeals' unprecedented interpretation of Section 1225, *every* presidential administration—including the one that adopted MPP—has been in open and systemic violation of the INA since the relevant provisions were enacted in 1996. And the far-reaching consequences of that interpretation for the Executive's constitutional authority to manage the border and conduct foreign policy confirm that the court erred.

A. Section 1225(b)(2)(C) Establishes A Discretionary Border-Management Tool, Not An Obligatory Duty

The court of appeals' most fundamental error was its construction of Section 1225(b)(2)(C). Correcting that mistake would by itself suffice to resolve the first question presented.

1. Section 1225(b)(2)(C) is not a mandatory safety valve for a lack of detention capacity

a. The statutory text is plain: The Secretary "may return" land-arriving noncitizens to Mexico or Canada pending removal proceedings. 8 U.S.C. 1225(b)(2)(C). Congress's use of the word "may" unmistakably indicates that contiguous-territory return is a discretionary tool that the Secretary has "the authority, but not the duty," to use. *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001).

This Court has "repeatedly observed" that "the word 'may' *clearly* connotes discretion." *Opati* v. *Republic of Sudan*, 140 S. Ct. 1601, 1609 (2020) (citation and internal quotation marks omitted); see, *e.g.*, *Weyerhaeuser Co.* v. *United States Fish & Wildlife Serv.*, 139 S. Ct. 361, 371 (2018); *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005); *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533 (1994).

The court of appeals' construction of Section 1225(b)(2)(C) as a springing mandate that the Secretary must implement whenever detention capacity is lacking is at war with the ordinary meaning of the term "may." The court effectively rewrote the provision to say that the Secretary "may return" land-arriving noncitizens "unless DHS lacks adequate detention capacity, in which case the Secretary must return" them. But the court had no license to "blue-pencil" the statute in that manner. *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010).

b. The court of appeals acknowledged that Section 1225(b)(2)(C) "obviously" is "discretionary." Pet. App. 120a n.18. But the court nevertheless believed that Congress created the contiguous-territory-return authority as a mandatory "safety valve to address th[e] problem" of insufficient detention capacity. *Id.* at 4a. That is incorrect.

In the first place, even if the court of appeals were right about the scope of DHS's detention obligations and release authorities, but see pp. 29-36, *infra*, that would not affect the legality of the Secretary's separate decision to terminate programmatic use of the discretionary contiguous-territory-return authority. The court's conclusion (Pet. App. 120a n.18) that DHS is "violating" a detention mandate in Section 1225(b)(2)(A)

could conceivably support, at most, an order limiting DHS's parole or bond releases—not an order compelling the Secretary to employ a separate enforcement tool that Congress said he "may" use.

Even setting aside that problem, the court of appeals' interpretation of Section 1225(b)(2)(C) as a compulsory "safety valve" is impossible to reconcile with the statutory text for the reasons explained above. See pp. 19-20, *supra*. If, as the court supposed, Congress had wanted to order the Executive Branch to implement contiguous-territory return whenever detention capacity is lacking, there would be no plausible justification for Congress's unelaborated use of the discretionary term "may."

c. The court of appeals' interpretation is also refuted by historical context. When developing IIRIRA, Congress was well aware that INS lacked the capacity to detain all removable noncitizens. The House Judiciary Committee's report for IIRIRA observed that, "[d]ue to lack of detention space and overcrowded immigration court dockets, many" of the "[t]housands of smuggled aliens [who] arrive in the United States each year with no valid entry documents and declare asylum immediately" "have been released into the general population." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 117 (1996); see *id.* at 123-124. And the General Accounting Office had informed Congress of the "astronomical[]" cost that would be required to detain "all detainable aliens." *Alien Smuggling*: *Hearing Before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 48 (1993); see *id.* at 33, 47 (projecting cost of "$200 million" per year to detain just the "70,000 smuggled aliens for 1992," a fraction of the 1.2 million noncitizens apprehended between ports of entry that year).

Congress chose not to provide the hundreds of millions of dollars that would have been needed for expansive detention. Compare IIRIRA § 386(a), 110 Stat. 3009-653 (directing an increase to "at least 9,000 beds" in immigration-detention facilities during fiscal year 1997), with U.S. Border Patrol, *Southwest Border Sectors: Total Encounters By Fiscal Year*, https://go.usa.gov/xeJCM (showing over 1.3 million noncitizens apprehended that year just between ports of entry on the southwest border). Instead, Congress sought to address the flow of inadmissible noncitizens in large part through IIRIRA's new expedited-removal procedure, see 8 U.S.C. 1225(b)(1), which Congress crafted with the goal of "weeding out patently meritless claims [for admission] and expeditiously removing the aliens making such claims from the country." *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1963 (2020). But nothing in IIRIRA's text, context, or history suggests that Congress intended to obligate the Executive to return hundreds of thousands of land-arriving noncitizens to Mexico or Canada due to a lack of detention space.

Indeed, contiguous-territory return received no significant attention as Congress considered IIRIRA. The Senate Judiciary Committee's report stated in one sentence that the authority "[p]ermits aliens who enter from Canada or Mexico to be returned to those countries pending their" removal proceedings. S. Rep. No. 249, 104th Cong., 2d Sess. 14 (1996). The reports of the House Judiciary Committee and the Conference Committee did not meaningfully discuss that authority at all.

That silence is not surprising. As the Board of Immigration Appeals has explained, the contiguous-territory-return authority was added to Section 1225 principally to provide a statutory basis for INS's prior

discretionary return practice, shortly after the Board had found that it required express authorization in *In re Sanchez-Avila*, 21 I. & N. Dec. 444 (1996) (en banc). See *In re M-D-C-V-*, 28 I. & N. Dec. 18, 25-26 (B.I.A. 2020) (describing the history). When the statute was enacted, INS likewise explained that Section 1225(b)(2)(C) and its implementing regulation "simply add[] to statute and regulation a long-standing practice of the Service." 62 Fed. Reg. 444, 445 (Jan. 3, 1997).

That Section 1225(b)(2)(C) was a response to the Board's decision in *Sanchez-Avila* further confirms that Congress created a *discretionary* return authority, not a mandatory solution to the problem of insufficient detention space. See 21 I. & N. Dec. at 462, 465 (describing INS's lack of written guidance for, or evidence of widespread use of, the pre-IIRIRA return practice). While Section 1225(b)(2)(C) somewhat broadened the Secretary's return authority beyond the pre-IIRIRA practice, see *M-D-C-V-*, 28 I. & N. Dec. at 26, Congress conspicuously declined to require contiguous-territory return in any circumstance.

2. The radical implications of the court of appeals' interpretation confirm that the court erred

If Section 1225(b)(2)(C) actually functioned as the court of appeals believed, it would have required transformative changes to the Executive Branch's management of the border. But it is implausible that a one-sentence codification of a little-noted prior practice carried such far-reaching consequences. "Congress does not," after all, "'hide elephants in mouseholes.'" *Cyan, Inc.* v. *Beaver County Emps. Ret. Fund*, 138 S. Ct. 1061, 1071 (2018) (citation omitted). And the "staggering results," *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 840 (2018)

(plurality opinion), of the court of appeals' interpretation provide further reason to reject it.

a. Tellingly, the purported mandate that the court of appeals perceived in Section 1225(b)(2)(C) not only went unremarked at the time, but also went unnoticed for the next quarter century. Every presidential administration since IIRIRA has interpreted Section 1225(b)(2)(C) as a discretionary authority—using it selectively despite the perennial lack of sufficient detention capacity. See Pet. App. 273a n.12, 323a; see also, *e.g.*, J.A. 155 (June 2005 DHS memorandum authorizing return for certain Cuban nationals "only if" they "can not demonstrate eligibility for the exercise of parole discretion").

The court of appeals simply brushed aside that consistent interpretation spanning the presidential administrations of Bill Clinton, George W. Bush, Barack Obama, Donald Trump, and Joe Biden. The court did not deny that, since IIRIRA was enacted in 1996, no administration has ever attempted to use Section 1225(b)(2)(C) to return all land-arriving inadmissible noncitizens whenever detention capacity was lacking. Respondents have not contested that point either. See Br. in Opp. 32-33.

On the court of appeals' interpretation, even the administration that initiated MPP was violating Section 1225 while the program was in effect, because MPP expressly declined to make maximum use of the contiguous-territory-return authority. Instead, MPP started gradually and always categorically exempted several classes of noncitizens, including all Mexican nationals and most persons from non-Spanish-speaking countries. Pet. App. 158a-159a, 275a & n.17. DHS enrolled only 68,000 noncitizens in MPP while it was

operational—just 6.5% of the more than 1 million inadmissible noncitizens that DHS processed at the southwest border under the INA during that period. See *id.* at 277a, 319a; see also *id.* at 323a-324a (while MPP was in effect, "more than two-thirds of single adults and individuals in family units encountered along the [southwest border]" and processed under the INA "were never detained or [were] released from ICE custody"). "[E]ven at the height of MPP's implementation in August 2019, it was not [DHS's] primary enforcement tool; approximately 12,000 migrants were enrolled in MPP but more than 50,000 were processed under other Title 8 authorities." *Id.* at 312a-313a.

The court of appeals erred in declaring unlawful 25 years of unbroken Executive Branch practice. Cf. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (noting that "judicial deference to the Executive Branch is especially appropriate in the immigration context"). And that is especially true because Congress has never changed Section 1225(b)(2)(C) over all the years since IIRIRA, despite making various other amendments to the INA, and despite not funding "sufficient detention capacity to maintain in custody every single person described in" Section 1225. Pet. App. 323a; see p. 36, *infra* (describing post-IIRIRA parole policies to address lack of detention capacity); see also *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974) (observing that longstanding Executive Branch practice under the INA was "entitled to great weight, particularly when, as here, Congress has revisited the Act and left the practice untouched").

b. The court of appeals' interpretation is especially implausible because of the depth of the intrusion that it would work into the Executive Branch's constitutional authorities to manage the border and foreign relations,

without any evidence that Congress intended those extreme results.

i. This Court has observed that "[t]he dynamic nature of relations with other countries requires the Executive Branch to ensure that [immigration] enforcement policies are consistent with this Nation's foreign policy." *Arizona* v. *United States*, 567 U.S. 387, 397 (2012). The Court has also cautioned against "the danger of unwarranted judicial interference in the conduct of foreign policy," and held that the Judiciary will not "'run interference in . . . [the] delicate field of international relations'" without "'the affirmative intention of the Congress clearly expressed.'" *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 115-116 (2013) (citation omitted).

The court of appeals failed to heed those instructions. Every instance of contiguous-territory return carries meaningful foreign-policy consequences, as both the current and prior administration have explained with respect to MPP. See Pet. App. 325a-327a (finding that MPP had an "outsized" impact on the United States' relationship with the Government of Mexico); J.A. 188 (2019 DHS report describing MPP as "a core component of U.S. foreign relations and bilateral cooperation"). The policy necessarily entails sending people into the territory of another "sovereign nation," and that sovereignty "means that the U.S. Government cannot return individuals to Mexico without an independent decision by the [Government of Mexico] to accept their entry." Pet. App. 325a; see, *e.g.*, *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power * * * to forbid the entrance of foreigners."). MPP accordingly was first "put into ef-

fect only *after* the U.S. government had conducted diplomatic engagement with [Mexico] and *after*" Mexico had "announced its independent decision to accept returnees." Pet. App. 325a; see *id.* at 158a; J.A. 180 (Government of Mexico "reaffirm[ing] its sovereign right to admit or reject the entry of foreigners into its territory" upon the announcement of MPP).

The court of appeals did not explain how to reconcile its view of Section 1225(b)(2)(C) with the sovereign authority of Mexico and Canada to refuse to accept persons sent back from the United States. While the court appeared to acknowledge that MPP would require Mexico's consent in some instances, the court believed that, for noncitizens arriving at ports of entry, DHS could use MPP "unilaterally" and simply "refuse admission at ports of entry in the first place." Pet. App. 71a. That is incorrect. Ports of entry are on United States soil, and MPP is available only for "applicant[s] for admission," 8 U.S.C. 1225(b)(2)(A), who by definition must be "in the United States," 8 U.S.C. 1225(a)(1). The court did not cite any legal principle authorizing the United States to send non-Mexican nationals back across the border into Mexico without Mexico's consent.

Moreover, MPP has always depended on Mexico's ongoing cooperation and willingness to allow returned noncitizens to remain in its territory, with temporary residency and work authorization, for the time required to complete their removal proceedings in the United States—a process that often requires repeated border-crossings as noncitizens are brought into the United States for hearings, then returned to Mexico pending further proceedings. See Pet. App. 275a; J.A. 180-182 (Government of Mexico describing its commitments to MPP returnees). The court of appeals erred in reading

Section 1225(b)(2)(C)—without any clear indication from Congress—to *compel* the Executive to negotiate with Mexico for its cooperation, and to require the Executive to reinstate MPP with whatever resource-intensive modifications proved necessary to secure Mexico's cooperation, see Pet. App. 262a.

ii. The court of appeals also disregarded multiple other features that demonstrate the implausibility of treating contiguous-territory return as a mandatory and universal safety valve. The United States' international commitments constrain its ability to return to Mexico persons at risk of torture or persecution on account of a protected ground in Mexico, which would necessitate a non-refoulement process and exemptions for noncitizens who satisfy that process. See Pet. App. 293a-297a (identifying substantial concerns about MPP's non-refoulement process). In addition, the court of appeals offered no solutions to the "significant" problems that the Secretary identified with MPP, *id.* at 261a, including the predatory violence that many returnees faced in Mexico, *id.* at 288a-293a, and the challenges for the immigration courts processing MPP enrollees' removal proceedings, *id.* at 275a-276a, 298a-308a. Returning the hundreds of thousands of migrants that would be required under the court of appeals' interpretation would seriously magnify those problems and likely create new ones.

The complexity of the decisions needed to manage immigration at the border belies the court of appeals' characterization of contiguous-territory return as a quick-fix safety valve capable of solving a severe lack of detention capacity.

B. The Court Of Appeals Erred In Concluding That DHS Is Violating Section 1225's Purported Detention Mandate By Releasing Noncitizens On Bond Or Parole

This Court can resolve this case simply by confirming Section 1225(b)(2)(C)'s discretionary character. But the court of appeals' holding also depends on two additional faulty premises: (1) that Section 1225(b)(2)(A) imposes an inflexible detention "mandate" that overrides ordinary principles of enforcement discretion, and (2) that DHS is "violating" that mandate by releasing noncitizens due to a lack of detention capacity. Pet. App. 120a n.18; see *id.* at 119a-122a. Each of those errors independently warrants reversal.

1. Section 1225(b)(2)(A) is not an inflexible detention mandate

a. The court of appeals reasoned that Section 1225(b)(2)(A) "uses mandatory language ('the alien shall be detained') to require DHS to detain aliens pending removal proceedings." Pet. App. 115a. But this Court held in *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748 (2005), that such "seemingly mandatory legislative commands" do not displace "the deep-rooted nature of law enforcement discretion." *Id.* at 761. Thus, the Court will not construe a provision stating that law enforcement "shall" take some action as a "true mandate," absent "some stronger indication from the * * * Legislature." *Ibid.* (citation omitted). The Court's cases have recognized that principle for more than a century. See, *e.g.*, *Richbourg Motor Co.* v. *United States*, 281 U.S. 528, 534 (1930) ("Undoubtedly, 'shall' is sometimes the equivalent of 'may' when used in a statute prospectively affecting government action."); *Railroad Co.* v. *Hecht*, 95 U.S. 168, 170 (1877) ("As against the government, the word 'shall,' when used in statutes, is to be construed as

'may,' unless a contrary intention is manifest."); see also *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 432 n.9 (1995) (observing that, "[t]hough 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may'").

The Court in *Castle Rock* accordingly declined to read a state law instructing that officers "'shall arrest'" a person who violates a restraining order to "truly ma[k]e enforcement of [such] orders *mandatory*," because "'insufficient resources'" and "'sheer physical impossibility,'" among other factors, required enforcement discretion. 545 U.S. at 760-761 (citations omitted). The Court found it "hard to imagine that a [law enforcement] officer would not have some discretion to determine that * * * the circumstances of [a] violation or the competing duties of that officer or his agency counsel decisively against enforcement in a particular instance." *Id.* at 761. In *City of Chicago* v. *Morales*, 527 U.S. 41 (1999), the Court similarly rejected the notion that "mandatory language * * * affords [law enforcement] *no* discretion," observing that such a construction "flies in the face of common sense that all [law enforcement] officers must use some discretion in deciding when and where to enforce" the law. *Id.* at 62 n.32.

The same reasoning applies to Section 1225(b)(2)(A). It is "hard to imagine," *Castle Rock*, 545 U.S. at 761, that Congress deprived DHS officers of discretion to determine that particular circumstances or competing duties—particularly the need to devote limited resources to other noncitizens whose dangerousness or risk of flight make them higher priorities for detention—counsel in favor of declining to detain a particular noncitizen pending removal proceedings. See *Arizona*, 567 U.S. at 396 ("Discretion in the enforcement of im-

migration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime."). And that is particularly so given that DHS has consistently lacked the physical capacity to detain every noncitizen subject to Section 1225 as a result of Congress's appropriations decisions.

b. The court of appeals' reasons for concluding that *Castle Rock* is not "relevant" here, Pet. App. 122a, are unpersuasive.

The court stated that *Castle Rock* does not allow DHS to "ignore Congress's limits on immigration parole." Pet. App. 121a-122a. Properly construed, however, the parole statute allows DHS to take account of competing considerations and prioritize noncitizens for detention, as *Castle Rock* contemplates. See pp. 35-36, *infra*. But even if parole did not afford that degree of flexibility, Section 1225's use of "shall" would not be sufficient in this law-enforcement context to make detention mandatory in situations where practical realities (like detention capacity) require the Executive Branch to exercise discretion in choosing whom to detain. See *Castle Rock*, 545 U.S. at 760-761.

The court of appeals also dismissed *Castle Rock*'s discussion of traditional principles of enforcement discretion on the ground that the Secretary's termination of MPP was not "a nonenforcement decision." Pet. App. 122a. The court reasoned that noncitizens are placed in MPP after removal proceedings have started, and MPP determines only "*where* the [noncitizen] will *be* while the federal government pursues removal." *Id.* at 99a (citation omitted). That reasoning misunderstands the nature of enforcement discretion, which encompasses not

just choices about whether to initiate proceedings at all, but also *how* to enforce the law. See *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483-484 (1999) (describing the "discrete acts of 'commencing proceedings, adjudicating cases, and executing removal orders'" as representing "the initiation or prosecution of various stages in the deportation process") (brackets omitted); see also *Arizona*, 567 U.S. at 396-397 (describing aspects of executive discretion to manage immigration). The Board of Immigration Appeals has similarly explained that, even when the government has chosen to pursue a noncitizen's removal, selecting among the INA's available removal procedures is a matter of executive discretion. See *In re E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 521-523 (2011).

Respondents, for their part, deny any "tradition of discretion regarding *detention* of arriving aliens predating the enactment of § 1225(b)(2)(A) in 1952" in the original INA. Br. in Opp. 26. But *Castle Rock* reflects general principles of enforcement discretion, not a discrete historical tradition. And in any event, respondents are wrong about the history. The "shall be detained" language for arriving noncitizens dates at least as far back as the Immigration Act of 1903, ch. 1012, § 24, 32 Stat. 1220, and this Court has observed that the INA was "generally a codification" of the government's "administrative [parole] practice," *Leng May Ma* v. *Barber*, 357 U.S. 185, 188, 190 (1958). Long before the INA, the Court's cases and immigration treatises discussed the Executive Branch's practice of releasing certain arriving noncitizens pending removal. See, *e.g.*, *Kaplan* v. *Tod*, 267 U.S. 228, 230 (1925); *Nishimura Ekiu*, 142 U.S. at 653, 661; William C. Van Vleck, *The Administrative Control of Aliens* 74-75 (1932) (recog-

nizing no "express[]" authority for release of applicants for admission waiting at "ports of entry," but describing "the power of the Secretary to grant temporary admission under bond" in cases of "great hardship and long delay").

c. The court of appeals also reasoned (Pet. App. 115a-116a) that its reading of Section 1225(b)(2)(A) was supported by *Jennings* v. *Rodriguez*, *supra*, which observed that, "[r]ead most naturally, §§ 1225(b)(1) and (b)(2) * * * mandate detention of applicants for admission until certain proceedings have concluded." 138 S. Ct. at 842. But *Jennings* did not address the extent of the enforcement discretion that Section 1225(b)(2)(A) leaves to DHS; to the contrary, the Court referred to that provision alternately as "mandat[ing] detention," *id.* at 842, 844, 845, and as "authoriz[ing] detention until the end of applicable proceedings," *id.* at 842; see *id.* at 835, 837, 838. Those alternating descriptions are unsurprising in light of the question presented in *Jennings*: The Court was asked whether noncitizens "have a statutory right to periodic bond hearings under" Section 1225, *id.* at 836, and it answered in the negative, see *id.* at 842-846—a result that did not depend on whether Section 1225(b)(2)(A) "authorize[s]" detention or "mandate[s]" it, *id.* at 842. The Court had no occasion to consider how DHS should implement Section 1225(b)(2)(A) when it cannot detain all noncitizens subject to that provision due to a lack of appropriations. *Jennings* therefore did not resolve the statutory premise of respondents' INA claim.

2. The INA permits DHS to consider detention capacity when making parole and bond determinations

The court of appeals compounded its mistaken interpretation of Section 1225 by concluding that, without

MPP, DHS will violate "the limits Congress placed on" the power to release applicants for admission on parole or bond. Pet. App. 122a; see *id.* at 119a-121a.

a. As an initial matter, the court of appeals drew its sweeping conclusions about DHS's practices without a relevant record. Respondents filed this APA suit to challenge the June 1 termination of MPP—a decision that did not involve parole or bond. See J.A. 124-125 (operative complaint). Respondents expressly told the district court that they were "not challenging" DHS's "parole policies." J.A. 212; see J.A. 214 (Respondents' counsel: "We're not talking about even setting aside a practice about parole."). And they did not even mention bond. Moreover, respondents made no serious attempt to show that DHS's practices violate the INA. At trial, they merely pointed to a news article in the administrative record stating that DHS "frequently" granted parole due to insufficient detention space—while MPP was in effect—and quoting one law professor's forecast about parole. J.A. 208 (referring to J.A. 184-185). Respondents did not attempt to show how many noncitizens DHS would release on parole or bond without MPP, much less that the agency's procedures for making those determinations are inconsistent with the INA. Respondents thus provided no basis for the court of appeals' assertion that DHS is "parol[ing] aliens *en masse*" and "ignoring * * * the case-by-case requirement in § 1182." Pet. App. 120a, 122a.[4]

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[4] Perhaps because respondents did not challenge DHS's parole policies, the court of appeals misapprehended which statutes govern the release of applicants for admission. The court invoked (Pet. App. 117a) limitations on the parole of "refugee[s]" in 8 U.S.C. 1182(d)(5)(B). But that provision ordinarily concerns noncitizens *overseas* applying for entry on parole with refugee status under

b. The court of appeals' conclusion that DHS's practices are inconsistent with the INA was incorrect.

The court first misdescribed the bond authority in 8 U.S.C. 1226(a). The court dismissed Section 1226(a) as "[ir]relevant" to "any aliens within MPP's scope," reasoning that it applies only to noncitizens "*already in the United States*," whereas MPP and Section 1225(b)(2) involve noncitizens "*apprehended at the border*." Pet. App. 121a. But the text of Section 1226(a) makes it applicable to applicants for admission who are arrested in the United States shortly after crossing the border between ports of entry, and DHS *does* process some of those persons by using bond and conditional parole—as it has since the relevant provisions were enacted. See 8 C.F.R. 236.1(c)(8); 62 Fed. Reg. 10,312, 10,323 (Mar. 6, 1997).

The court of appeals also erred in describing parole. DHS's regulations authorize parole "only on a case-by-case basis," "for 'urgent humanitarian reasons or [ ]significant public benefit,'" and after determining that the noncitizen "present[s] neither a security risk nor a risk of absconding." 8 C.F.R. 212.5(b). That regulation conforms to the statutory text. See 8 U.S.C. 1182(d)(5)(A).

And the court of appeals offered no basis for finding that DHS has failed to follow its regulations. The court stated (without citation) that DHS "propos[es]" to "exercise the parole power on a class-wide basis." Pet. App. 121a. But DHS never proposed that: The June 1 memorandum challenged by respondents said nothing about parole. And as described above, the relevant reg-

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8 U.S.C. 1101(a)(42). Applicants for admission who have not yet been determined to be refugees are not paroled under Section 1182(d)(5)(B).

ulation expressly requires a case-by-case determination for each potential parolee. In making those determinations, DHS must of course account for its actual detention capacity. But that does not make its decisions any less case-by-case.

Ever since IIRIRA, the Executive Branch has consistently exercised its authority to interpret and implement Section 1182(d)(5)(A) by determining that, if a noncitizen in removal proceedings presents neither a security nor a flight risk, then release pending those proceedings may be warranted for urgent humanitarian reasons or significant public benefit, especially where parole would free up limited detention capacity for other, higher-priority noncitizens such as those with criminal records or who pose a national-security risk. See, *e.g.*, Memorandum from Secretary John Kelly, *Implementing the President's Border Security and Immigration Enforcement Improvements Policies* 3 (Feb. 20, 2017), https://go.usa.gov/xtqtW; J.A. 160-176 (January 2010 ICE parole directive); Memorandum from Marcy M. Forman & Victor X. Cerda, *ICE Transportation, Detention and Processing Requirements* 2 (Jan. 11, 2005), https://go.usa.gov/xtqtK; J.A. 137-151 (1998 INS Memorandum for Regional Directors establishing detention guidelines). Other than simply stating that DHS refuses to make case-by-case parole determinations, the court of appeals did not substantiate its conclusion that DHS's decades-old parole procedures violate the INA. And that flawed reasoning provides yet another basis for rejecting the court's interpretation of the statute.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE SECRETARY'S OCTOBER 29 TERMINATION DECISION HAS NO LEGAL EFFECT

After the district court concluded that the Secretary's June 1 decision violated the APA because the Secretary had not adequately explained his decision, the court "vacated" that decision and "remanded to DHS for further consideration." Pet. App. 212a (capitalization and emphasis omitted). The Secretary then accepted the court's remand and conducted a reconsideration process to determine the future of MPP. See pp. 11-12, *supra*. At the conclusion of a thorough review, the Secretary on October 29 issued a new decision once more terminating MPP and specifically addressing the perceived shortcomings identified by the district court. See pp. 12-13, *supra*. Yet the court of appeals held that the October 29 decision has no legal effect, and thus cannot satisfy the injunction's condition that MPP be "lawfully rescinded in compliance with the APA." Pet. App. 212a. The court suggested variously that the October 29 decision was a mere *post hoc* rationalization for the June 1 decision; that the Secretary's new reasoning was pretextual; and that principles of appellate procedure barred the Secretary from issuing a new decision while the district court's injunction was on appeal. That analysis misapplies this Court's precedents and flouts hornbook principles of administrative law.

A. The October 29 Termination Is A New Agency Decision, Not A *Post Hoc* Rationale

1. It is a "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan* v. *EPA*, 576 U.S. 743, 758 (2015). In light of that rule, when an agency's "grounds" for a chal-

lenged action "are inadequate, a court may remand for the agency to do one of two things." *DHS* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020). "First, the agency can offer 'a fuller explanation of the agency's reasoning *at the time of the agency action*.'" *Ibid.* (citation omitted). When an agency selects that route, it "may elaborate" on its original reasons "but may not provide new ones." *Id.* at 1908. "Alternatively, the agency can 'deal with the problem afresh' by taking *new* agency action." *Ibid.* (quoting *SEC* v. *Chenery Corp.*, 332 U.S. 194, 201 (1947) (*Chenery II*)). "An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action." *Ibid.*

In *Regents*, the agency selected the first path. It expressly "'declined to disturb'" its initial decision "and instead 'provided further explanation' for that action." 140 S. Ct. at 1908 (brackets and citation omitted). The agency's second memorandum "was by its own terms not a new rule implementing a new policy." *Ibid.* Because this Court found, however, that the supplemental memorandum's reasoning bore "little relationship" to that of the original decision, the Court declined to consider the new memorandum in defense of the original decision, explaining that it amounted to "impermissible *post hoc* rationalizations." *Id.* at 1908-1909.

Here, by contrast, DHS followed the teaching of *Regents* and expressly took the second path described there. When the district court vacated the June 1 decision and remanded to DHS, the agency chose to "'deal with the problem afresh' by taking *new* agency action." *Regents*, 140 S. Ct. at 1908 (quoting *Chenery II*, 332 U.S. at 201). The Secretary could not have been clearer in his October 29 decision: "I am hereby terminating

MPP. Effective immediately, I hereby supersede and rescind the June 1 memorandum." Pet. App. 263a-264a. That new decision followed an extensive assessment process over many weeks to reconsider "whether MPP should be maintained, terminated, or modified in a variety of different ways," including a review of relevant materials and consultations with "a broad and diverse array of internal and external stakeholders." *Id.* at 259a. And the October 29 decision described conclusions that the Secretary drew from that reconsideration process, *id.* at 259a-264a, *not* mere "elaborat[ion]" on his "prior reasoning," *Regents*, 140 S. Ct. at 1908.

In particular, the Secretary offered several "new reasons" for terminating MPP that were "absent from" the June 1 decision, *Regents*, 140 S. Ct. at 1908, including a thorough analysis of the "considerations that the District Court [had] determined were insufficiently addressed in the June 1 memo," Pet. App. 259a. For example, the district court faulted the June 1 decision for failing to consider "several of the main benefits of MPP," including its purported deterrence of irregular migration. *Id.* at 192a. The October 29 decision carefully considered those issues, explaining that although it is impossible to draw definitive conclusions, MPP "likely" contributed to "a decrease in migration flows." *Id.* at 312a. But the Secretary concluded that MPP's benefits could not justify its "costs," including its humanitarian impact and its harm to "other regional and domestic goals and policy initiatives" that the Secretary determined would "manage migratory flows" more effectively. *Id.* at 313a; see *id.* at 327a-335a.

"[B]y its own terms," then, the October 29 decision was a "new" decision. *Regents*, 140 S. Ct. at 1908; see *Fisher* v. *Pension Benefit Guar. Corp.*, 994 F.3d 664,

670 (D.C. Cir. 2021) (rejecting argument that agency action was *post hoc* when it "was styled as a 'final agency action' and did not purport to justify a predetermined outcome").

2. In concluding that the October 29 decision lacks legal effect, the court of appeals reasoned that the Secretary had made only a single "*Termination Decision*" on June 1, and that respondents are challenging that decision—"not the June 1 Memorandum, the October 29 Memoranda, or any other memo." Pet. App. 22a. In the court's view, "DHS's Termination Decision is analogous to the judgment of a court, and its memos are analogous to a court's opinion explicating its judgment," *ibid.*, rendering the October 29 decision a mere "*post hoc* rationalization[] of the Termination Decision" made months earlier, *id.* at 45a. That reasoning is incorrect.

The court of appeals relied principally on *Regents*, describing the "multiple-memorandum agency process" in that case as "strikingly similar" to the one here. Pet. App. 44a. But the two situations are fundamentally distinct along the critical dimension: Unlike in *Regents*, the Secretary here expressly chose *not* to "rest on the [June 1 decision] while elaborating on [his] prior reasoning," 140 S. Ct. at 1908; instead, he issued a new decision "terminating MPP" anew based on his reconsideration process, Pet. App. 263a.

The court of appeals cited no precedent for rejecting an agency's description of its own action in these circumstances. The court did not suggest that DHS failed to "comply with the procedural requirements for new agency action." *Regents*, 140 S. Ct. at 1908. And this case bears no resemblance to those in which the Court has previously rejected agency explanations as *post hoc* rationalizations, none of which involved an assertedly

new agency action. See, *e.g.*, *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (arguments of "appellate counsel[]"); *American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 539 (1981) (arguments in "briefs"); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 419 (1971) (*Overton Park*) ("litigation affidavits").

In addition to contravening this Court's precedent, the court of appeals' reasoning places the agency in a Catch-22. The district court invalidated the June 1 decision under the APA based in part on its conclusion that the Secretary had altogether "failed to consider several critical factors." Pet. App. 192a. Such a defect could not have been cured by additional explanation of DHS's reasoning at the time of the June 1 decision; instead, the *only* way for DHS to remedy it was to reconsider the matter and make a new decision. But the court of appeals effectively foreclosed that route by holding that the October 29 decision, "and any other subsequent memos" attempting to terminate MPP, can do no more than "simply *explain*[] DHS's" original "*Termination Decision*." *Id.* at 22a.

Ultimately, the court of appeals appeared to assert that DHS could have issued a "new" decision only if it had reached a different *conclusion* about whether to terminate MPP. See Pet. App. 11a (characterizing the October 29 decision as *post hoc* because it "did not purport to alter the Termination Decision in any way"). But that rule flouts the settled administrative-law principle that, when a court finds an agency's original explanation lacking, the agency on remand may "reexamine[] the problem, recast its rationale, and reach[] *the same result*." *Chenery II*, 332 U.S. at 196 (emphasis added). Courts routinely consider "additional explanations" of-

fered by agencies "on remand from a court, even if the agency's bottom-line decision itself d[id] not change." *Regents*, 140 S. Ct. at 1934 (Kavanaugh, J., concurring in the judgment in part and dissenting in part). This Court in *Regents* expressly preserved that avenue for agencies whose "grounds" for a given action are deemed "inadequate," *id.* at 1907 (majority opinion), and the court of appeals erred in foreclosing it.

B. The Secretary's Explanation For The October 29 Termination Decision Was Not Pretextual

The court of appeals next sought to justify its disregard of the October 29 decision on the ground that the agency had not "*really*" reconsidered whether to terminate MPP. Pet. App. 24a. Although the Secretary expressly represented that he had "once more assessed whether MPP should be maintained, terminated, or modified in a variety of different ways," *id.* at 259a, the court suggested that the October 29 memorandum was simply pretextual cover for a choice to terminate MPP that the agency had made months before. See *id.* at 30a (stating that the October 29 decision "just further defended what [the agency] had previously decided"). That was error. Respondents have not come close to satisfying the demanding standard for discounting an agency's stated explanation for its action—a standard that the court did not apply or even acknowledge.

1. "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943). And the grounds that an agency provides for its action are entitled to a "presumption of regularity." *Overton Park*, 401 U.S. at 415. "Th[ose] principle[s] reflect[] the recognition that further judicial inquiry into 'executive motivation' represents 'a

substantial intrusion' into the workings of another branch of Government and should normally be avoided." *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2573 (2019) (citation omitted).

Accordingly, any judicial inquiry beyond the administrative record "into the mental processes of administrative decisionmakers" may be justified only by "a strong showing of bad faith or improper behavior." *Overton Park*, 401 U.S. at 420. This Court has remarked on the "narrow[ness]" of that "exception." *Department of Commerce*, 139 S. Ct. at 2573. And the Court has only once invalidated an agency's action on the ground that the given reasons were pretextual, *id.* at 2576 (Thomas, J., concurring in part and dissenting in part), in a case involving "unusual circumstances" that caused the Court to find the agency's reasons "contrived" and "incongruent with what the record reveal[ed] about the agency's priorities and decisionmaking process," *id.* at 2575-2576 (majority opinion).

Respondents recognize (Br. in Opp. 18) that the court of appeals "effectively" found such pretext here, and they attempt to analogize this case to *Department of Commerce*. But like the court of appeals, respondents do not even acknowledge the applicable standard, much less justify the extraordinary conclusion that the entire October 29 decision should be disregarded as pretextual.

In refusing to take the Secretary's new decision at face value, the court of appeals invoked the agency's September 29 announcement that it "intend[ed] to issue in the coming weeks a new memorandum terminating" MPP, which the court interpreted to mean that the Secretary had prejudged the issue. Pet. App. 28a; see *id.* at 28a-29a. But that announcement resulted from weeks

of reconsideration following the district court's August 13 remand. *Id.* at 286a-287a; see Gov't C.A. Br. 9 n.2 (describing the Secretary's "review[]" and "evaluat[ion]" as of September 20). There is no requirement that a decision-maker decline to reach tentative conclusions during an administrative process until the very moment of issuing a final decision. And there is nothing improper about an agency's publicizing its intentions once it reaches a sufficient degree of certainty about the likely outcome of its process. Here, DHS had a particularly good reason for announcing its initial intentions: It sought to avoid undue disruption to the ongoing litigation and therefore provided information at the earliest opportunity during the reconsideration process. See pp. 48-49, *infra*.

Moreover, the September 29 announcement by its terms conveyed only the Secretary's "[i]ntention" to terminate MPP. Pet. App. 28a. That was plainly not a final decision, and it could have been adjusted as the Secretary continued to refine his assessment and draft the memorandum prior to the issuance of the final decision on October 29. The court of appeals analogized (*ibid.*) the September 29 announcement to a notice of proposed rulemaking, but that only undermines the court's conclusion: Many notices of proposed rulemaking reflect the agency's intention to adopt a particular policy, but that plainly does not render the subsequent final rules pretextual. Cf. *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2385 (2020) ("declin[ing] to evaluate * * * final rules" that were substantively identical to interim final rules under an "open-mindedness test" when APA procedural requirements were satisfied).

The October 29 decision, in turn, reflects a thorough evaluation of the relevant factors, and it does not so much as hint at the kind of "significant mismatch between the decision the Secretary made and the rationale he provided" that would be necessary to support a finding of pretext. *Department of Commerce*, 139 S. Ct. at 2575. The Secretary fully considered all pertinent "arguments, evidence, and perspectives presented by those who support re-implementation of MPP, those who support terminating the program, and those who have argued for continuing MPP in a modified form." Pet. App. 259a-260a; see *id.* at 287a-343a. He also carefully "examined considerations that the District Court determined were insufficiently addressed in the June 1 memo." *Id.* at 259a. Nothing about that process or the decision that resulted from it suggests that the Secretary acted in "bad faith." *Overton Park*, 401 U.S. at 420. "It is hardly improper for an agency head to come into office with policy preferences and ideas," *Department of Commerce*, 139 S. Ct. at 2574, and the court of appeals identified no case finding pretext in circumstances remotely akin to those present here.

2. Rather than apply the demanding standard for identifying pretext, the court of appeals instead invoked the "reopening" doctrine, Pet. App. 23a-30a, which has no bearing here. The D.C. Circuit formulated that doctrine to determine the triggering event for the statute of limitations in "situations where an agency conducts a rulemaking or adopts a policy on an issue at one time, and then in a later rulemaking * * * addresses the issue again without altering the original decision." *National Ass'n of Reversionary Prop. Owners* v. *Surface Transp. Bd.*, 158 F.3d 135, 141 (1998) (*NARPO*). Under that doctrine, if "the agency actually reconsidered the rule,

the matter has been reopened" and the limitations period "begins anew." *Ibid.*

Even if this case involved a dispute over the proper limitations period, the reopening doctrine would be inapposite. When (as here) a court vacates and remands an agency action as inadequately explained, the court's decision itself forces the agency to "open[] the issue up anew." Pet. App. 24a (quoting *Natural Res. Def. Council* v. *EPA*, 571 F.3d 1245, 1265 (D.C. Cir. 2009) (per curiam)). In any event, the Secretary's October 29 decision explicitly "reopened," *id.* at 30a, the question "whether MPP should be maintained, terminated, or modified in a variety of different ways," *id.* at 259a. In concluding otherwise, the court of appeals invoked factors such as whether the agency issued an "explicit invitation to comment on a previously settled matter." *Id.* at 26a (quoting *NARPO*, 158 F.3d at 142). Those factors may assist a court in ascertaining whether an agency has implicitly reopened a prior decision during a subsequent notice-and-comment rulemaking. But where an agency "explicitly" reconsiders a particular issue, there is "no need to quibble about the precise quantum of evidence sufficient to show" reopening. *Public Citizen* v. *Nuclear Regulatory Comm'n*, 901 F.2d 147, 151 (D.C. Cir.), cert. denied, 498 U.S. 992 (1990).

C. The October 29 Termination Decision Did Not Violate Principles Of Appellate Procedure

1. The court of appeals also criticized DHS for reconsidering the decision whether to terminate MPP while simultaneously pursuing an appeal of the district court's permanent injunction. See, *e.g.*, Pet. App. 125a-126a & n.19. The court held that DHS had only "two procedural options": re-terminate MPP in a new decision and seek relief from the district court under Fed-

eral Rule of Civil Procedure 60(b) ("Option 1"), or appeal the district court's injunction ("Option 2"). Pet. App. 124a-125a. In the court's view, DHS could not pursue what the court called "Option 1.5" by issuing a new decision while the appeal was ongoing. *Ibid.* That reasoning is unprecedented and incorrect.

The court of appeals cited no case law, statute, or rule directly supporting its two-option framework. The court's only arguable support was an analogy to the rule "that a case can exist only in one court at a time, and a notice of appeal permanently transfers the case to [the court of appeals] until [that court] send[s] it back." Pet. App. 50a (citation omitted). But the "one-court-at-a-time rule," *ibid.*, by its terms, does not apply to action by agencies.

Nor does the rule make sense for agencies. Applying it in this context would mean that the government's appeal deprived DHS of the *authority* to modify MPP. But agencies routinely revise regulations and other agency actions while litigation concerning those actions is ongoing, including with the purpose of remedying the deficiencies alleged in the litigation. See, *e.g.*, *Little Sisters of the Poor*, 140 S. Ct. at 2378; *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 37 (1950); *Southern Utah Wilderness Alliance* v. *Smith*, 110 F.3d 724, 727 (10th Cir. 1997); *Natural Res. Def. Council, Inc.* v. *United States Nuclear Regulatory Comm'n*, 680 F.2d 810, 813 (D.C. Cir. 1982); see also *I.A.* v. *Garland*, No. 20-5271, 2022 WL 696459, at *1 (D.C. Cir. Feb. 24, 2022) (Jackson, J., concurring) (noting that "[w]hen a district court invalidates a rule under the [APA], it is not unusual for the agency to update the faulty rulemaking" while also seeking relief "in the court of appeals"). This Court has never suggested that those

agency actions are *ultra vires* for lack of jurisdiction, and such a rule would have no foundation in the APA.

The court of appeals' newly fashioned rule would work both inefficiency and injustice. An agency that chose to exercise its appeal rights would effectively have its policies frozen in place for years while litigation ran its course. And an agency that declined to appeal would potentially forfeit the right to challenge a legally erroneous injunction.

Here, the district court's unprecedented interpretation of Section 1225 compelled DHS to preserve MPP indefinitely—*regardless* of the agency's justifications for terminating the program, see p. 10, *supra*—and the government had no choice but to appeal the final judgment imposing that obligation. At the same time, after the district court "remanded" the June 1 memorandum to DHS "for further consideration," Pet. App. 212a (capitalization and emphasis omitted), the agency reasonably chose to obviate the need for further litigation about the adequacy of the June 1 explanation by conducting a reconsideration process and issuing a new decision. The court of appeals' approach would have required the government either to forgo an appeal and seek review of the Section 1225 holding through the implausible vehicle of Rule 60(b), or to delay new agency action while burdening the court of appeals with unnecessary litigation over a matter that DHS was prepared to reconsider. Either result would have been senseless.

2. The court of appeals also criticized the government's procedural choices as inequitable. Pet. App. 124a. That critique, even if it had merit, could not justify the court's refusal to accord the October 29 decision any legal effect. But in any event, the critique distorts the history of this litigation. The government repeat-

edly sought to ensure that its reconsideration of the MPP termination would not disrupt appellate proceedings. It notified the court of appeals on September 29—before respondents had filed their brief and well before oral argument—that it anticipated DHS would issue a new decision "in the coming weeks," *id.* at 28a, and asked to stay the proceedings pending that decision, see p. 12, *supra*. The court denied that request without explanation. C.A. Order (Oct. 4, 2021). Then, after the issuance of the October 29 decision, the government asked the court, in the event it declined to find the entire case moot, to hold the Section 1225 claim in abeyance and partially remand the case for the district court to consider the October 29 decision in the first instance. See p. 13, *supra*. Again, the court denied that request. Pet. App. 123a-126a.

3. Finally, the court of appeals concluded that the Secretary's October 29 rescission of the June 1 decision was a "nullity" (because the "district court had *already* vacated the Termination Decision") and that his re-termination of MPP was merely "impending" (because it "will have no effect until after the district court's injunction has been lifted"). Pet. App. 35a-36a. The court of appeals was wrong on both counts.

On the first, although the district court had vacated the June 1 memorandum, the Secretary's rescission prevented any possibility that the memorandum could be restored through the appeal or otherwise. On the second, the Secretary's re-termination of MPP was "[e]ffective immediately," and the fact that he delayed "implement[ation]" of that decision simply reflected his obligation to comply with the district court's unstayed injunction, which included the separate condition that MPP be implemented in perpetuity in response to a lack

of detention capacity based on the court's flawed interpretation of the INA. Pet. App. 263a-264a. Although the court's statutory holding prevents the new termination from being implemented until the injunction is lifted, that does not support the court of appeals' holding that the termination is incapable of satisfying the injunction's separate condition that MPP be terminated in compliance with the APA.

* * * * *

The district court's permanent nationwide injunction requires DHS to maintain MPP until two conditions are satisfied: (1) the agency has adequate appropriations to detain nearly everyone described in Section 1225(b), and (2) DHS has terminated MPP in compliance with the APA. The first condition should be vacated because it has no basis in the INA. And the Secretary's October 29 decision satisfies the injunction's second condition. Respondents and others are, of course, free to attempt to challenge that new decision. But the court of appeals identified no valid basis for preventing the Secretary's October 29 decision terminating MPP from taking effect.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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MARCH 2022

APPENDIX

1. 6 U.S.C. 202 provides in pertinent part:

Border, maritime, and transportation responsibilities

The Secretary shall be responsible for the following:

* * * * *

(5) Establishing national immigration enforcement policies and priorities.

* * * * *

2. 8 U.S.C. 1103(a) provides in pertinent part:

Powers and duties of the Secretary, the Under Secretary, and the Attorney General

(a) Secretary of Homeland Security

(1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided*, *however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

* * * * *

(3) He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as

he deems necessary for carrying out his authority under the provisions of this chapter.

* * * * *

3. 8 U.S.C. 1182(d)(5) provides:

Inadmissible aliens

(d) Temporary admission of nonimmigrants

(5)(A) The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States 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.

4. 8 U.S.C. 1225 provides:

Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing

(a) Inspection

(1) Aliens treated as applicants for admission

An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.

(2) Stowaways

An arriving alien who is a stowaway is not eligible to apply for admission or to be admitted and shall be ordered removed upon inspection by an immigration officer. Upon such inspection if the alien indicates an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview under subsection (b)(1)(B). A stowaway may apply for asylum only if the stowaway is found to have a credible fear of persecution under subsection (b)(1)(B). In no case may a stowaway be considered an applicant for admission or eligible for a hearing under section 1229a of this title.

(3) Inspection

All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.

(4) Withdrawal of application for admission

An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States.

(5) Statements

An applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the United States, including the applicant's intended length of stay and whether the applicant intends to remain permanently or become a United States citizen, and whether the applicant is inadmissible.

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

(iii) Application to certain other aliens

(I) In general

The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.

(II) Aliens described

An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.

(B) Asylum interviews

(i) Conduct by asylum officers

An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

(ii) Referral of certain aliens

If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.

(iii) Removal without further review if no credible fear of persecution

(I) In general

Subject to subclause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.

(II) Record of determination

The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution. A

copy of the officer's interview notes shall be attached to the written summary.

(III) Review of determination

The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

(IV) Mandatory detention

Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.

(iv) Information about interviews

The Attorney General shall provide information concerning the asylum interview described in this subparagraph to aliens who may be eligible. An alien who is eligible for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations

prescribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process.

(v) "Credible fear of persecution" defined

For purposes of this subparagraph, the term "credible fear of persecution" means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.

(C) Limitation on administrative review

Except as provided in subparagraph (B)(iii)(III), a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath, or as permitted under penalty of perjury under section 1746 of title 28, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section 1157 of this title, or to have been granted asylum under section 1158 of this title.

(D) Limit on collateral attacks

In any action brought against an alien under section 1325(a) of this title or section 1326 of this

title, the court shall not have jurisdiction to hear any claim attacking the validity of an order of removal entered under subparagraph (A)(i) or (B)(iii).

(E) "Asylum officer" defined

As used in this paragraph, the term "asylum officer" means an immigration officer who—

(i) has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under section 1158 of this title, and

(ii) is supervised by an officer who meets the condition described in clause (i) and has had substantial experience adjudicating asylum applications.

(F) Exception

Subparagraph (A) shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry.

(G) Commonwealth of the Northern Mariana Islands

Nothing in this subsection shall be construed to authorize or require any person described in section 1158(e) of this title to be permitted to apply for asylum under section 1158 of this title at any time before January 1, 2014.

(2) Inspection of other aliens

(A) In general

Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

(B) Exception

Subparagraph (A) shall not apply to an alien—

(i) who is a crewman,

(ii) to whom paragraph (1) applies, or

(iii) who is a stowaway.

(C) Treatment of aliens arriving from contiguous territory

In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

(3) Challenge of decision

The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien

whose privilege to be admitted is so challenged, before an immigration judge for a proceeding under section 1229a of this title.

(c) Removal of aliens inadmissible on security and related grounds

(1) Removal without further hearing

If an immigration officer or an immigration judge suspects that an arriving alien may be inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 1182(a)(3) of this title, the officer or judge shall—

(A) order the alien removed, subject to review under paragraph (2);

(B) report the order of removal to the Attorney General; and

(C) not conduct any further inquiry or hearing until ordered by the Attorney General.

(2) Review of order

(A) The Attorney General shall review orders issued under paragraph (1).

(B) If the Attorney General—

(i) is satisfied on the basis of confidential information that the alien is inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 1182(a)(3) of this title, and

(ii) after consulting with appropriate security agencies of the United States Government, concludes that disclosure of the information would be

prejudicial to the public interest, safety, or security,

the Attorney General may order the alien removed without further inquiry or hearing by an immigration judge.

(C) If the Attorney General does not order the removal of the alien under subparagraph (B), the Attorney General shall specify the further inquiry or hearing that shall be conducted in the case.

(3) Submission of statement and information

The alien or the alien's representative may submit a written statement and additional information for consideration by the Attorney General.

(d) Authority relating to inspections

(1) Authority to search conveyances

Immigration officers are authorized to board and search any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought into the United States.

(2) Authority to order detention and delivery of arriving aliens

Immigration officers are authorized to order an owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel or aircraft bringing an alien (except an alien crewmember) to the United States—

(A) to detain the alien on the vessel or at the airport of arrival, and

(B) to deliver the alien to an immigration officer for inspection or to a medical officer for examination.

(3) Administration of oath and consideration of evidence

The Attorney General and any immigration officer shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service.

(4) Subpoena authority

(A) The Attorney General and any immigration officer shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and to that end may invoke the aid of any court of the United States.

(B) Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer may, in the event of neglect or refusal to respond to a subpoena issued under this paragraph or refusal to testify before an immigration officer, issue an order requiring such persons to appear before an immigration officer, produce books, papers, and documents if

demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

5. 8 U.S.C. 1226 provides:

Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[1] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person

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[1] So in original. Probably should be "sentenced".

cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system—

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available—

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

6. 8 C.F.R. 212.5(a)-(d) provides:

Parole of aliens into the United States.

(a) The authority of the Secretary to continue an alien in custody or grant parole under section 212(d)(5)(A) of the Act shall be exercised by the Assistant Commissioner, Office of Field Operations; Director, Detention and Removal; directors of field operations; port directors; special agents in charge; deputy special agents in charge; associate special agents in charge; assistant special agents in charge; resident agents in charge; field office directors; deputy field office directors; chief patrol

agents; district directors for services; and those other officials as may be designated in writing, subject to the parole and detention authority of the Secretary or his designees. The Secretary or his designees may invoke, in the exercise of discretion, the authority under section 212(d)(5)(A) of the Act.

(b) The parole of aliens within the following groups who have been or are detained in accordance with § 235.3(c) of this chapter would generally be justified only on a case-by-case basis for "urgent humanitarian reasons or "significant public benefit," provided the aliens present neither a security risk nor a risk of absconding:

(1) Aliens who have serious medical conditions in which continued detention would not be appropriate;

(2) Women who have been medically certified as pregnant;

(3) Aliens who are defined as minors in § 236.3(b) of this chapter and are in DHS custody. The Executive Assistant Director, Enforcement and Removal Operations; directors of field operations; field office directors, deputy field office directors; or chief patrol agents shall follow the guidelines set forth in § 236.3(j) of this chapter and paragraphs (b)(3)(i) through (ii) of this section in determining under what conditions a minor should be paroled from detention:

(i) Minors may be released to a parent, legal guardian, or adult relative (brother, sister, aunt, uncle, or grandparent) not in detention.

(ii) Minors may be released with an accompanying parent or legal guardian who is in detention.

(iii) If the Service cannot locate a relative in or out of detention to sponsor the minor, but the minor has identified a non-relative in detention who accompanied him or her on arrival, the question of releasing the minor and the accompanying non-relative adult shall be addressed on a case-by-case basis;

(4) Aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; or

(5) Aliens whose continued detention is not in the public interest as determined by those officials identified in paragraph (a) of this section.

(c) In the case of all other arriving aliens, except those detained under § 235.3(b) or (c) of this chapter and paragraph (b) of this section, those officials listed in paragraph (a) of this section may, after review of the individual case, parole into the United States temporarily in accordance with section 212(d)(5)(A) of the Act, any alien applicant for admission, under such terms and conditions, including those set forth in paragraph (d) of this section, as he or she may deem appropriate. An alien who arrives at a port-of-entry and applies for parole into the United States for the sole purpose of seeking adjustment of status under section 245A of the Act, without benefit of advance authorization as described in paragraph (f) of this section shall be denied parole and detained for removal in accordance with the provisions of § 235.3(b) or (c) of this chapter. An alien seeking to enter the United States for the sole purpose of applying for adjustment of status under section 210 of the Act shall be denied parole and detained for removal under § 235.3(b) or (c) of this chapter, unless the alien has been

recommended for approval of such application for adjustment by a consular officer at an Overseas Processing Office.

(d) *Conditions.* In any case where an alien is paroled under paragraph (b) or (c) of this section, those officials listed in paragraph (a) of this section may require reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so. Not all factors listed need be present for parole to be exercised. Those officials should apply reasonable discretion. The consideration of all relevant factors includes:

(1) The giving of an undertaking by the applicant, counsel, or a sponsor to ensure appearances or departure, and a bond may be required on Form I-352 in such amount as may be deemed appropriate;

(2) Community ties such as close relatives with known addresses; and

(3) Agreement to reasonable conditions (such as periodic reporting of whereabouts).

7. 8 C.F.R. 235.3(d) provides:

Inadmissible aliens and expedited removal.

(d) *Service custody.* The Service will assume custody of any alien subject to detention under paragraph (b) or (c) of this section. In its discretion, the Service may require any alien who appears inadmissible and who arrives at a land border port-of-entry from Canada or Mexico, to remain in that country while awaiting a removal hearing. Such alien shall be considered detained for a proceeding within the meaning of section 235(b) of

the Act and may be ordered removed in absentia by an immigration judge if the alien fails to appear for the hearing.

8. 8 C.F.R. 236.1(c)(8) provides:

Apprehension, custody, and detention.

(c) *Custody issues and release procedures—*

(8) Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien not described in section 236(c)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding. Such an officer may also, in the exercise of discretion, release an alien in deportation proceedings pursuant to the authority in section 242 of the Act (as designated prior to April 1, 1997), except as otherwise provided by law.