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

REPLY BRIEF FOR THE PETITIONERS

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

I. The court of appeals erred in holding that Section 1225 compels the Executive Branch to reinstate MPP 2
  A. Congress did not compel the Executive Branch to send noncitizens into a foreign territory whenever immigration detention capacity is insufficient 3
  B. DHS's longstanding immigration detention and release practices are consistent with statutory requirements 8
    1. Respondents' reading of the detention authority in Section 1225(b)(2)(A) contradicts *Castle Rock* 9
    2. Respondents misdescribe the INA's bond and parole authorities 12
II. The court of appeals erred in holding that the Secretary's October 29 termination decision has no legal effect 17

TABLE OF AUTHORITIES

Cases:

Arizona v. *Biden*, No. 22-3272, 2022 WL 1090176 (6th Cir. Apr. 12, 2022) 9, 10, 11
Arizona v. *United States*, 567 U.S. 387 (2012) 11
Azar v. *Allina Health Services*, 139 S. Ct. 1804 (2019) 16
Conceiro, *In re*, 14 I. & N. Dec. 278 (B.I.A. 1973) 11
Cruz-Miguel v. *Holder*, 650 F.3d 189 (2d Cir. 2011) 17
DHS v. *Regents of the Univ. of California*, 140 S. Ct. 1891 (2020) 17, 18
Dames & Moore v. *Regan*, 453 U.S. 654 (1981) 7
Delgado-Sobalvarro v. *Attorney General*, 625 F.3d 782 (3d Cir. 2010) 13

Cases—Continued: Page

Department of Commerce v. *New York*, 139 S. Ct. 2551 (2019) 18, 19, 20, 21
E-R-M- & L-R-M-, *In re*, 25 I. & N. Dec. 520 (B.I.A. 2011) 10
FCC v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009) 18
FCC v. *Prometheus Radio Project*, 141 S. Ct. 1150 (2021) 23
Herb v. *Pitcairn*, 324 U.S. 117 (1945) 21, 22
Innovation Law Lab v. *McAleenan*, 924 F.3d 503 (9th Cir. 2019) 10
Jennings v. *Rodriguez*, 138 S. Ct. 830 (2018) 12, 13
Leng May Ma v. *Barber*, 357 U.S. 185 (1958) 11
Little Sisters of the Poor Saints Peter & Paul Home v. *Pennsylvania*, 140 S. Ct. 2367 (2020) 18
M-D-C-V-, *In re*, 28 I. & N. Dec. 18 (B.I.A. 2020) 13
Mission Product Holdings, Inc. v. *Tempnology, LLC*, 139 S. Ct. 1652 (2019) 4, 5
Nielsen v. *Preap*, 139 S. Ct. 954 (2019) 10
R-, *In re*, 3 I. & N. Dec. 45 (B.I.A. 1947) 12
Sanchez-Avila, *In re*, 21 I. & N. Dec. 444 (B.I.A. 1996) 5
Schaffer ex rel. Schaffer v. *Weast*, 546 U.S. 49 (2005) 14
Town of Castle Rock v. *Gonzales*, 545 U.S. 748 (2005) 9, 11
United States v. *Armstrong*, 517 U.S. 456 (1996) 19
Zadvydas v. *Davis*, 533 U.S. 678 (2001) 12
Zivotofsky ex rel. Zivotofsky v. *Kerry*, 576 U.S. 1 (2015) 6, 7

Statutes, regulations, and rule: Page

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 302(a), 110 Stat. 3009-579 3

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq*. 2

8 U.S.C. 1182(d)(5)(A) 4, 14, 15, 16, 17

8 U.S.C. 1225 .... *passim*

8 U.S.C. 1225(a)(1) 13

8 U.S.C. 1225(b)(1)(A)(i) 10

8 U.S.C. 1225(b)(2)(A) 3, 4, 9, 10, 12, 13

8 U.S.C. 1225(b)(2)(C) .... *passim*

8 U.S.C. 1226(a) 13

8 U.S.C. 1226(a)(2) 13

8 U.S.C. 1231(a)(2) 16

8 U.S.C. 1231(a)(6) 12

6 U.S.C. 202(5) 10

8 C.F.R.:

Section 212.5(a) 16

Section 212.5(b)-(c) 15

Fed. R. Crim. P. 60(b) 22

Miscellaneous:

H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1 (1996) 16

H.R. Rep. No. 828, 104th Cong., 2d Sess. (1996) 17

Memorandum from Secretary Kirstjen Nielsen, *Policy Guidance for Implementation of the Migrant Protection Protocols* (Jan. 25, 2019), https://go.usa.gov/xug5r 7

In the Supreme Court of the United States

No. 21-954

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

REPLY BRIEF FOR THE PETITIONERS

The court of appeals affirmed an unprecedented injunction compelling the Executive Branch to negotiate with Mexico to reinstate—and continue indefinitely—a controversial policy that the Secretary of Homeland Security found burdened U.S. foreign relations, detracted from other policy initiatives, and imposed unjustifiable human costs on migrants facing extreme violence in Mexico. In upholding the injunction, the court cast aside black-letter law and upended decades of settled practice.

Respondents' defense of that judgment is most notable for what it does *not* say. On the first question—whether 8 U.S.C. 1225 compels the Migrant Protection Protocols (MPP)—respondents concede that the court of appeals' holding would mean that every presidential administration has openly and systemically violated the

Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, since Congress added the contiguous-territory-return provision 25 years ago. Indeed, respondents identify no one—not a single Member of Congress, Executive Branch official, academic, or advocate—who advanced their revolutionary interpretation of Section 1225(b)(2)(C) before this lawsuit. Nor do respondents attempt to explain why Congress used the discretionary phrase "may return" (*ibid.*) if it wanted to fundamentally reorganize border operations and compel sensitive and ongoing foreign-policy negotiations about returning third-country nationals to Mexico's or Canada's sovereign territory.

On the second question—whether the Secretary's October 29 decision has legal effect—respondents abandon virtually all of the court of appeals' reasoning. They do not defend the court's conclusion that the Secretary's October 29 decision sought merely to justify some abstract, antecedent "Termination Decision." They do not even mention the D.C. Circuit's reopening doctrine. And they do not argue that the Department of Homeland Security (DHS) was prohibited from reconsidering whether to terminate MPP while it appealed the injunction's erroneous conclusion that Section 1225 compels MPP in perpetuity. Respondents instead stake their case on the assertion that the Secretary's October 29 decision was pretextual. But they offer no evidence to meet the extraordinarily high bar that this Court has imposed for that grave accusation.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT SECTION 1225 COMPELS THE EXECUTIVE BRANCH TO REINSTATE MPP

The Secretary lawfully exercised his statutory discretion to terminate MPP. Respondents fail to rehabil-

itate any of the multiple independent flaws in the court of appeals' statutory analysis. Section 1225(b)(2)(C) creates a discretionary return authority that the Secretary "may" use, not a mandate. The detention language in Section 1225(b)(2)(A) must be read consistent with fundamental principles of enforcement discretion. And the INA expressly authorizes DHS to release certain inadmissible noncitizens on bond or parole.

A. Congress Did Not Compel The Executive Branch To Send Noncitizens Into A Foreign Territory Whenever Immigration Detention Capacity Is Insufficient

Respondents acknowledge (Br. 14, 21) what the statutory text makes obvious: Section 1225(b)(2)(C) establishes a "discretionary authority." Contrary to respondents' suggestion (Br. 20-21), Congress did not impliedly withdraw that express grant of discretion whenever it has failed to fund "detention capacity" for every noncitizen "described in section 1225"—as Congress has consistently failed to do since the contiguous-territory-return authority was added in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 302(a), 110 Stat. 3009-579. Pet. App. 323a. Congress instead committed to the Secretary the complex policy determination about when to return noncitizens to another country during their removal proceedings, including an assessment of foreign-policy consequences.

1. Respondents ground their argument (Br. 1-2, 19-20) on the overall statutory structure, attempting to portray contiguous-territory return as Congress's mandatory solution to the problem of insufficient detention capacity. But the structure itself refutes that suggestion, as respondents do not contest that the return authority is available for only a limited subset of the

noncitizens detainable under the INA: applicants for admission who are arriving on land, whom Mexico and Canada are willing to accept, and whose return would not constitute refoulement. Gov't Br. 19, 26, 28. Those limitations are part of why MPP was used for only a small percentage of the noncitizens not clearly entitled to admission, *id.* at 8—another fact that respondents do not dispute and that gives the lie to their suggestion that contiguous-territory return was intended to or could be a simple fix for insufficient detention space.

Respondents' account also "treats as a neat, reticulated scheme of 'narrowly tailored'" options "what history reveals to be anything but." *Mission Product Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1664 (2019) (citation omitted). "Each of the provisions" that respondents "highlight[] emerged at a different time, over a span of" nearly a century, "[a]nd each responded to a discrete problem." *Ibid.* The "shall be detained" language in 8 U.S.C. 1225(b)(2)(A) emerged in 1903. Gov't Br. 32. The parole authority in 8 U.S.C. 1182(d)(5)(A) was added in 1952. Gov't Br. 32. And the contiguous-territory-return authority in Section 1225(b)(2)(C) was created in IIRIRA in 1996—with almost no discussion—to abrogate a decision of the Board of Immigration Appeals by authorizing a pre-IIRIRA return practice. *Id.* at 22-23.

2. Respondents' short discussion of the principal statutory text (Br. 21-23) fails to show that the concededly "discretionary tool" in Section 1225(b)(2)(C) "becomes mandatory" whenever detention appropriations fall short. Respondents observe (Br. 22) that subsections 1225(b)(2)(A) and (C) "cross-reference each other." But a mere cross-reference describing the class of noncitizens eligible for contiguous-territory return "of-

fers no account of how to read" the operative clause of Section 1225(b)(2)(C) (providing discretion to the Secretary, who "may return" land-arriving noncitizens in that class) "to say essentially its opposite" (mandating that the Secretary must return them whenever detention capacity is lacking). *Mission Product Holdings*, 139 S. Ct. at 1664. Respondents still make no attempt to explain why, if Congress had wanted to impose a springing obligation in Section 1225(b)(2)(C), it used the unadorned term "may"—especially considering that, on respondents' view, contiguous-territory return was mandatory at IIRIRA's enactment due to insufficient detention capacity. See Gov't Br. 21-22. It is far more natural, and more consistent with Section 1225's structure and history, to read Section 1225(b)(2)(C) as a *permitted*, not mandatory, alternative to detention.

3. As to historical context, respondents proffer no evidence that Congress enacted Section 1225(b)(2)(C) to constrain the Executive Branch rather than empower it. Respondents say (Br. 24) that *In re Sanchez-Avila*, 21 I. & N. Dec. 444 (B.I.A. 1996) (en banc), "confirms the Executive has long known that the contiguous-territory authority may be required." That is not accurate. Before IIRIRA, the Immigration and Naturalization Service argued to the Board that it *could* return some noncitizens to Mexico or Canada to advance the INA's objectives, not that it was *required* to do so regardless of practical experience or foreign-policy ramifications. See *id.* at 450-451; compare Pet. App. 260a-263a. Respondents still have not identified any administration before or since IIRIRA (including the administration that created MPP) that treated contiguous-territory return as compulsory, even when detention capacity was insufficient. See Gov't Br. 22-25.

Respondents simply disregard (Br. 23) the only reasonable inference from Congress's enactments. Congress has known, both in developing IIRIRA and since, that universal detention would require enormous resources, which it has not provided. Gov't Br. 5-6, 20-22. The court of appeals' holding thus depends on believing that Congress has consistently mandated maximum contiguous-territory return since 1996—which would have required fundamental changes to the government's border operations. But respondents cannot explain why, over a quarter of a century, no one in Congress, the Executive Branch, or anywhere else ever recognized any such obligation in Section 1225(b)(2)(C).

Respondents instead observe (Br. 25-26) that Congress's failure to appropriate sufficient funds to fulfill a contractual or statutory obligation to make specified payments does not necessarily eliminate the obligation. But this case involves sovereign law-enforcement activities and foreign policy, not payments for the government's debts. In this context, Congress's repeated appropriations decisions before and after the enactment of Section 1225(b)(2)(C) further confirm that Congress did not impose an obligation in the first place.

4. Respondents cannot contest the dramatic foreign-policy and constitutional implications of the court of appeals' conclusion that Section 1225 requires the Executive to negotiate with foreign sovereigns to accept returned noncitizens so long as DHS lacks appropriations for universal detention. See Gov't Br. 25-28. Respondents invoke (Br. 26) *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 576 U.S. 1 (2015), to assert Congress's role in foreign policy. But this case is not about whether the Constitution permits a statute reflecting Congress's "express will" to constrain the President's foreign-

relations authority. *Id.* at 61 (Roberts, C.J., dissenting); see *id.* at 7, 31-32 (majority opinion). The point, rather, is that to the extent there is any ambiguity about whether Section 1225(b)(2)(C) is discretionary, the court of appeals failed to heed this Court's admonitions against construing the statue to inhibit the President's conduct of foreign policy, especially amid a "history of acquiescence" to the Executive's contrary reading. *Dames & Moore* v. *Regan*, 453 U.S. 654, 685-686 (1981).

Respondents argue (Br. 27) that the government failed to demonstrate MPP's foreign-policy effects, but those were described in the Secretary's June 1 memorandum, Pet. App. 357a-358a; in the government's pretrial submissions, *id.* at 429a-431a, 434a-443a; and in policy documents from both the U.S. and Mexican governments dating to MPP's inception, J.A. 180-182; Memorandum from Secretary Kirstjen Nielsen, *Policy Guidance for Implementation of the Migrant Protection Protocols* 2-3 (Jan. 25, 2019), https://go.usa.gov/xug5r. Respondents offer no rebuttal to any of those points demonstrating MPP's substantial and ongoing foreign-relations effects. They do not deny that sending third-country nationals to Mexico pending their U.S. immigration proceedings requires Mexico's consent, as well as regular and ongoing engagement with the Government of Mexico. See Pet. App. 393a-395a; 419a-420a.

Last, respondents dismiss the "foreign-relations problems associated with" reinstating MPP as "'self-inflicted,'" because the Executive "'could have simply informed Mexico throughout the negotiating process that its ability to terminate MPP was contingent on'" respondents' lawsuit. Br. 27 (quoting Pet. App. 133a). But the problem with the court of appeals' holding is not merely that it compelled an abrupt about-face in the

Executive Branch's dealings with Mexico. The deeper problem is that the court has injected itself into the countries' bilateral relationship by requiring ongoing negotiations and coordination over the scope and day-to-day logistics of contiguous-territory return. If the court's decision stands, MPP will be a permanent part of the Executive's foreign-policy agenda, with the district court supervising the Executive's "good faith" in those discussions. Pet. App. 212a. If Congress had compelled that startling result, it would have spoken clearly.

B. DHS's Longstanding Immigration Detention And Release Practices Are Consistent With Statutory Requirements

In addition to misinterpreting Section 1225(b)(2)(C), the court of appeals erroneously concluded that DHS is releasing noncitizens in removal proceedings in violation of the INA's requirements. Even if that were correct, it could not justify an injunction mandating the use of contiguous-territory return in contravention of Section 1225(b)(2)(C)'s discretionary language. But in any event, there is no merit to respondents' attacks on DHS's implementation of the INA's express release authorities. Respondents do not dispute that every presidential administration for the last 25 years has interpreted the INA to permit consideration of capacity when making detention decisions. Gov't Br. 36. And respondents have not shown that the government's processes for determining which noncitizens are priorities for use of the limited space that Congress has funded—an issue not governed by the memoranda challenged in this case—contradict the statute.

1. Respondents' reading of the detention authority in Section 1225(b)(2)(A) contradicts **Castle Rock**

The court of appeals held that 8 U.S.C. 1225(b)(2)(A) requires detention of inadmissible noncitizens because it uses the "mandatory" phrase "'shall be detained.'" Pet. App. 115a. That disregards this Court's teaching in *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748 (2005), that "seemingly mandatory" language like "'shall'" does not erase "deep-rooted" principles of "law-enforcement discretion." *Id.* at 761 (citation omitted).

a. Respondents cite various cases for the proposition that "the term 'shall' 'usually connotes a requirement.'" Br. 15-16 (citation omitted). But none of those cases involved law enforcement, and the entire point of *Castle Rock* is that the "usual" meaning of "shall" is *not* sufficient to overcome background principles of discretion in the law-enforcement context. Gov't Br. 30-31. That principle applies with particular force here, where Congress has expressly charged the Secretary with the "responsib[ility]" to "establish[] national immigration enforcement policies and priorities." 6 U.S.C. 202(5). Thus, as the Sixth Circuit recently explained: "The question is not whether [INA provisions like Section 1225] have mandatory language. It is whether this mandatory language displaces [DHS's] longstanding discretion in enforcing the many moving parts of the nation's immigration laws." *Arizona* v. *Biden*, No. 22-3272, 2022 WL 1090176, at *7 (Apr. 12, 2022) (Sutton, C.J.).

Respondents emphasize (Br. 15) that Section 1225 "uses the discretionary 'may' 15 times, and the mandatory 'shall' 34 times." That observation *undermines* their argument, because they cannot maintain that every use of "shall" in Section 1225 is mandatory. Most obviously, Congress provided that many inadmissible

noncitizens "shall" be placed in expedited-removal proceedings, 8 U.S.C. 1225(b)(1)(A)(i), but MPP was predicated on DHS's discretion to instead place those noncitizens directly in regular removal proceedings. See *Innovation Law Lab* v. *McAleenan*, 924 F.3d 503, 508-509 (9th Cir. 2019) (per curiam); see also *In re E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 521-523 (B.I.A. 2011) (interpreting Section 1225(b)(1)(A)(i) to preserve DHS's discretion). On respondents' simplistic reading of "shall," MPP itself violated Section 1225 because DHS would have instead been required to use expedited removal for all eligible noncitizens.

Contrary to respondents' suggestion, interpreting Section 1225 to preserve discretion does not require treating its uses of "may" and "shall" as interchangeable. While *Castle Rock* demonstrates why the "shall" in Section 1225(b)(2)(A) should not be read as an inflexible and "obligatory rule," Pet. App. 118a, or a "judicially enforceable mandate," *Arizona*, 2022 WL 1090176, at *8, the language still indicates that the Executive Branch generally should use the detention capacity that Congress has provided. Cf. *Nielsen* v. *Preap*, 139 S. Ct. 954, 969 & n.6 (2019). That interpretation harmonizes the text with foundational principles of enforcement discretion and the Secretary's statutory responsibility to set enforcement priorities.

b. Respondents argue (Br. 17-18) that *Castle Rock* is inapposite because contiguous-territory return concerns how removal proceedings are conducted rather than whether they occur at all. The same could be said of the choice between expedited and ordinary removal proceedings, which is discretionary notwithstanding Congress's use of "shall." As this Court has recognized, executive discretion extends not just to whether but

also *how* to enforce the law. Gov't Br. 31-32; see *Arizona* v. *United States*, 567 U.S. 387, 409 (2012) (describing "whether an alien should be detained" as part of "the removal process [that] is entrusted to the discretion of the Federal Government"). Allocating limited detention capacity based on factors such as security and flight risk is a quintessential—and commonsense—exercise of enforcement discretion. See *Castle Rock*, 545 U.S. at 760-761 (observing that discretion must account for "insufficient resources" and "sheer physical impossibility") (citation omitted). "[B]edrock separation of powers" thus teaches that "[n]ot every 'shall' directive in a federal immigration statute * * * creates a judicially enforceable mandate," "because the Executive Branch has considerable enforcement discretion in deploying limited resources," including creating priorities for using its "not-unlimited detention" facilities. *Arizona*, 2022 WL 1090176, at *7-8.

Respondents assert (Br. 18) that, unlike in *Castle Rock*, there is no "tradition" of discretion "in the immigration context," but they ignore this Court's opinions holding exactly the opposite. See *Arizona*, 567 U.S. at 396 ("A principal feature of the removal system is the broad discretion exercised by immigration officials."); Gov't Br. 32. Respondents say that "detention in exclusion proceedings had a long history before 1952." Br. 18 (citation omitted). That misses the point: After enactment of the "shall be detained" language in 1903, the Executive Branch administratively released some arriving noncitizens from detention for decades before the parole provision was added in 1952. See *Leng May Ma* v. *Barber*, 357 U.S. 185, 188 & n.4 (1958); *In re Conceiro*, 14 I. & N. Dec. 278, 279 (B.I.A. 1973) ("Parole was then an administrative expedient, fashioned out of necessity

and without statutory sanction."); *In re R-*, 3 I. & N. Dec. 45, 46 (B.I.A. 1947). That history confirms that the "shall be detained" directive has always been understood against a backdrop of enforcement discretion.

c. Respondents err in asserting (Br. 15-17) that *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), resolved the question presented here by observing that, "[r]ead most naturally," Section 1225(b)(2)(A) "mandate[s] detention." *Id.* at 842; see also Resp. Br. 17 (invoking the government's brief in *Jennings*). In rejecting the *Jennings* plaintiffs' claimed statutory entitlement to bond hearings, neither this Court nor the government had occasion to address the extent of the enforcement discretion that Section 1225 preserves.

Respondents point (Br. 16-17) to the *Jennings* Court's discussion of *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), which had found an implicit limit on detention under 8 U.S.C. 1231(a)(6). In distinguishing *Zadvydas*, *Jennings* observed that Section 1231(a)(6) provides that the government "may" detain certain noncitizens, whereas Section 1225(b)(2)(A) states that it "shall" detain others. 138 S. Ct. at 844. But our position here does not require making those two terms interchangeable. See p. 10, *supra*. And *Jennings* expressly recognized the availability of parole, 138 S. Ct. at 844, which authorizes DHS to prioritize noncitizens for detention, as *Castle Rock* contemplates.

2. Respondents misdescribe the INA's bond and parole authorities

Even if respondents' reading of Section 1225(b)(2)(A) were correct, they still could not establish that MPP is mandatory. Respondents concede (Br. 19-20 & n.2) that DHS is not compelled to "exercise" its contiguous-territory-return authority over noncitizens who are

lawfully released on bond or parole. And respondents identify no way that DHS violates the statutory release requirements.

a. First, as the government has explained (Br. 7, 35), DHS lawfully exercises its authority to "release" certain noncitizens found in the United States shortly after crossing the border between ports of entry on "bond" or "conditional parole" under 8 U.S.C. 1226(a)(2). Respondents nevertheless contend that Section 1226 "cannot be used" at all for "MPP-eligible" noncitizens, observing that "only [non-citizens] apprehended at the border are eligible for MPP" and arguing that Section 1226(a) "does not apply to [noncitizens] newly arriving to the United States." Br. 34; see Br. 20 n.2. That is incorrect: Section 1226(a) *is* available to process newly arriving noncitizens who cross the border between ports of entry. All agree that the key precondition for Section 1226(a) is whether a noncitizen is "already 'inside the United States'"—which is true of one who has recently crossed the border. Resp. Br. 34 (quoting *Jennings*, 138 S. Ct. at 838); accord Gov't Br. 7. Such a person is *also* an "applicant for admission" as defined in 8 U.S.C. 1225(a)(1), and thus potentially eligible for contiguous-territory return under 8 U.S.C. 1225(b)(2)(A) and (C). See *In re M-D-C-V-*, 28 I. & N. Dec. 18, 27 (B.I.A. 2020) (holding that noncitizens apprehended between ports of entry are "arriving" and eligible for MPP).

Respondents fall back to assert (Br. 34-35) that "the record" does not show that DHS processes MPP-eligible recent border-crossers under Section 1226. See Pet. App. 121a. But DHS's bond practice was described in the first regulations implementing IIRIRA, Gov't Br. 35, and in cases, *e.g.*, *Delgado-Sobalvarro* v. *Attorney*

General, 625 F.3d 782, 784 (3d Cir. 2010). Respondents, as plaintiffs, failed even to present any allegations or evidence about DHS's bond practice in their complaint or at trial.

b. Respondents also have not shown that DHS unlawfully releases noncitizens on parole. The parole provision's relevant clauses impose a procedural requirement ("only on a case-by-case basis") and a substantive standard ("for urgent humanitarian reasons or significant public benefit"). 8 U.S.C. 1182(d)(5)(A). Respondents concede (Br. 28) that DHS's parole regulations adhere to that statutory text. See Gov't Br. 35. And they point to nothing in the record that suggests DHS administers parole in contravention of those requirements.

i. Respondents blame (Br. 29, 31) the government for their failure to introduce any evidence of what process DHS uses to make parole determinations. Gov't Br. 34. But as plaintiffs, they "b[ore] the burden of persuasion" to prove—not merely allege—every "essential aspect[ ]" of their claim, *Schaffer ex rel. Schaffer* v. *Weast*, 546 U.S. 49, 57 (2005), including their assertion that, without MPP, DHS would "unlawfully prioritize alternatives to detention," J.A. 123. Instead, respondents told the district court that they were "not challenging" DHS's parole policies. J.A. 212.

Respondents' description (Br. 29-30) of their "evidence" that DHS "illegally releas[es] [noncitizens]" confirms the lower courts' error. Respondents identify only three things in the record. Br. 30 (citing Pet. App. 169a, 201a n.13). The first is DHS's 2019 MPP assessment, which observed that "resource constraints" and "court-ordered limitations" on detention had led to "many releases" before MPP. J.A. 187. But that docu-

ment did not suggest that those paroles were unlawful or not issued case-by-case. Respondents next cite a footnote on a DHS statistical website stating that continued detention of noncitizens who establish a credible fear of persecution is "not in the interest of resource allocation or justice." J.A. 70 n.7. But the government objected to that statement on the ground that it was "inaccurate" and "not part of the record considered by" the Secretary, D. Ct. Doc. 62, at 5-6 (June 25, 2021), and the district court did not explain why the footnote was nevertheless probative. Respondents last cite a 2019 news article quoting a law professor's prediction about how DHS would make releases *while MPP was in place*, but they offer no indication that DHS endorsed the professor's view. J.A. 185.

Respondents attempt (Br. 30-31) to bolster the court of appeals' insinuations about parole *en masse* with reports of parole figures from January and February 2022. Those reports were not before either lower court and so could not support the judgment. Regardless, the figures do not show any paroles in violation of Section 1182(d)(5)(A), which prescribes how to make parole determinations and for what reasons, see p. 14, *supra*, not *how many* may be paroled.

ii. Respondents argue (Br. 31-32)—in conflict with the conclusion of every presidential administration since IIRIRA (Gov't Br. 36)—that Section 1182(d)(5)(A) does not permit the Executive Branch to consider detention capacity when making parole determinations. Respondents are wrong.

Procedurally, the applicable regulations require DHS to consider every parolee to assess whether urgent humanitarian reasons or significant public benefit justify release. 8 C.F.R. 212.5(b)-(c). That case-by-case

requirement is in no way inconsistent with DHS's recognition that certain recurring circumstances may warrant a favorable exercise of parole discretion, such as pregnancy, serious medical conditions, or a lack of detention space. That respondents find it "impossible to believe" (Br. 31) that DHS considers thousands of individuals on a case-by-case basis is no substitute for evidence—especially because the decisions are made by thousands of immigration officers. See 8 C.F.R. 212.5(a).

Substantively, the Executive Branch has long determined that paroling some low-risk noncitizens achieves the significant public benefit of freeing limited detention space for other noncitizens who are higher priorities for detention—because, for example, they might endanger the public or fail to appear for their proceedings, or because they are part of another class that Congress itself has prioritized. See, *e.g.*, 8 U.S.C. 1231(a)(2) (providing that certain criminal noncitizens shall "[u]nder no circumstance" be released). The INA commits parole decisions to the Secretary's "discretion," 8 U.S.C. 1182(d)(5)(A), and respondents do not show how DHS's consistent interpretation across five presidential administrations is unreasonable.

Respondents repeatedly appeal (Br. 2, 19, 32-34) to legislative history. But that history cannot justify imposing limitations on parole beyond those in the statutory text. See *Azar* v. *Allina Health Services*, 139 S. Ct. 1804, 1814 (2019). In any event, respondents' account is misleading. They rely on the IIRIRA House Report, which objected that parole "ha[d] been used increasingly to admit entire categories of [noncitizens]"—for example, "Cuban nationals"—"with the intent that they will remain *permanently* in the United States." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 140 (1996)

(emphasis added) (cited in *Cruz-Miguel* v. *Holder*, 650 F.3d 189, 199 n.15 (2d Cir. 2011)). Parole for that purpose is not at issue here: Inadmissible applicants for admission in removal proceedings are paroled to complete those proceedings. Moreover, the House Report is a dubious guide to interpreting Section 1182(d)(5)(A) because Congress did not enact the House's proposed constraints on parole authority, which would have tightly limited the substantive grounds for release. See *id.* at 77-78. The House largely receded to the Senate's amendment to Section 1182(d)(5)(A), which proposed essentially the current standard more broadly authorizing release to advance a significant public benefit. See H.R. Rep. No. 828, 104th Cong., 2d Sess. 245 (1996) (Conference Report).

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

Respondents fail to defend the court of appeals' holding that the Secretary's October 29 termination decision lacks legal effect. Respondents barely contest that the October 29 decision was a new agency decision under *DHS* v. *Regents of the University of California*, 140 S. Ct. 1891 (2020). Their assertions of pretext are facially implausible. And their arguments about procedure are irrelevant and incorrect.

A. After the district court vacated the June 1 decision and remanded to the agency, the Secretary explicitly "'deal[t] with the problem afresh' by taking *new* agency action." *Regents*, 140 S. Ct. at 1908 (citation omitted). The court of appeals therefore erred in characterizing the October 29 decision as an invalid *post hoc* rationalization.

Respondents' brief is unclear about whether they seek to defend the court of appeals' conclusion. They do not dispute (Br. 41) that the October 29 decision, by its terms, was a new agency decision. Pet. App. 263a. Nor do they dispute that the Secretary "compl[ied] with the procedural requirements for new agency action." *Regents*, 140 S. Ct. at 1908. They mention in passing (Br. 39) the court's conclusion that respondents are challenging some abstract "*Termination Decision*—not the June 1 Memorandum, the October 29 Memoranda, or any other memo," Pet. App. 22a. But they offer no defense of, or authority for, that proposition. And they concede (Br. 43-44) that the agency was free to reach the same policy outcome on remand from the district court.

To the extent respondents defend the court of appeals' conclusion at all, they assert only that the Secretary failed to comply with an atextual open-mindedness requirement. See Br. 44 (arguing that the Secretary must "approach MPP with fresh eyes"). While the APA requires "reasoned decisionmaking," *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 520 (2009), neither it nor *Regents* countenances a vague, ill-defined inquiry into the degree of an agency decisionmaker's open-mindedness. Indeed, this Court has refused to graft an "open-mindedness test" onto the APA's procedural requirements. *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2385 (2020). After all, "[i]t is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy." *Department of Commerce* v. *New York*, 139 S. Ct.

2551, 2574 (2019). The same is true where, as here, an agency head reconsiders a matter on remand from a court.

B. In any event, the Secretary *did* genuinely reconsider whether to terminate MPP: The October 29 memorandum described in detail his multi-week reconsideration process and the conclusions he drew after "once more assess[ing] whether MPP should be maintained, terminated, or modified in a variety of different ways." Pet. App. 259a-260a. The Secretary's account of his own decision-making process is entitled to a "presumption of regularity," *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (citation omitted), that can be rebutted only by showing that his reasons were "pretextual" and offered in "'bad faith,'" *Department of Commerce*, 139 S. Ct. at 2574 (citation omitted).

Respondents accuse (Br. 41) the Secretary of deceit, asserting that this Court should reject his "say-so." But respondents themselves previously acknowledged DHS's reconsideration, opposing a stay of the injunction in this Court based on press reports that DHS had recently "discussed reviving" a contiguous-territory-return program in some form. Opp. to Stay Application 3 (Aug. 24, 2021) (No. 21A21) (citation omitted); see Gov't Stay Reply 3 n.1 (Aug. 25, 2021) (No. 21A21). And respondents tellingly abandon the centerpiece of the court of appeals' pretext reasoning: that the October 29 decision was not a new agency decision under the D.C. Circuit's "reopening" doctrine. Pet. App. 23a; see *id.* at 23a-30a. Respondents do not even mention that part of the court's opinion.

Instead, respondents rely (Br. 42) on DHS's September 29 announcement that it "intend[ed] to issue in the coming weeks a new memorandum terminating" MPP,

Pet. App. 28a, which they assert shows prejudgment. But respondents do not dispute that the Secretary had been reevaluating MPP on remand for weeks *before* that announcement. See Gov't Br. 43-44. And they concede (Br. 44) that "[a]n agency may, consistent with the APA, announce preliminary findings or tentative conclusions"—as made sense here to keep the courts apprised of the Secretary's reconsideration process on remand.

Respondents next assert (Br. 42) that the government "engaged in bad-faith litigation and administrative misconduct." But the government repeatedly sought to avoid disruption of the litigation while the Secretary's remand process was ongoing, and respondents opposed those efforts. See, *e.g.*, Gov't Br. 12; Resp. C.A. Opp. 3 (Oct. 4, 2021). In any event, the government's litigation conduct has no logical connection to the question whether the Secretary genuinely reconsidered whether to terminate MPP on October 29.

Last, respondents assert (Br. 43) that DHS "began dismantling MPP in January 2021," purportedly confirming that the "June Termination" was "a foregone conclusion." That misunderstands DHS's implementation of the President's Executive Order. See Gov't Br. 9. And in any event, the question presented in this Court concerns the legal effect of the October 29 decision. Respondents' accusation that the June 1 decision was pretextual is thus irrelevant as well as mistaken.

Ultimately, respondents do not come close to satisfying the exceptionally high burden for proving a pretext claim. See *Department of Commerce*, 139 S. Ct. at 2573 (describing the "narrow[ness]" of that "exception"). "Crediting these accusations on evidence as thin as the evidence here could lead judicial review of admin-

istrative proceedings to devolve into an endless morass of discovery and policy disputes not contemplated by the [APA]." *Id.* at 2576 (Thomas, J., concurring in part and dissenting in part).

C. Respondents' scattershot defense of the court of appeals' procedural critique is baseless.

1. The court of appeals' conclusion that the October 29 decision lacks legal effect rested in part on the notion that the government could not simultaneously appeal the injunction and reconsider MPP on remand. See Pet. App. 125a. Respondents conspicuously make no effort to defend that holding, which is illogical and unprecedented. See Gov't Br. 47-48.

Respondents do endorse the court of appeals' conclusion that, "because 'the [October 29] Memoranda do [not] purport to do anything until the injunction ends,' they have no legal effect while the injunction remains in force." Br. 38 (quoting Pet. App. 36a) (brackets in original). But the injunction remains effective only because of its Section 1225 condition. See Gov't Br. 49-50. If this Court abrogates that condition, there will be no further barrier to the Secretary's putting his October 29 decision into effect. Nothing in the injunction required the government to obtain vacatur of the Section 1225 condition *before* it satisfied the APA condition.

2. Respondents next contend (Br. 38-39) that their challenge to the June 1 decision is not moot. But the validity of the June 1 memorandum lacks practical significance given the Secretary's decision to accept the remand and issue a new decision on October 29. In any event, in this Court the government is not challenging the court of appeals' ruling on mootness, but rather its erroneous conclusion that the October 29 termination lacks legal effect. Correcting that error would not

amount to mere "revis[ion]" of the court of appeals' "opinion[]." Contra Resp. Br. 39 (quoting *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945)). The court's judgment affirmed the injunction's APA condition and found that it continues to bind the government only by holding that the October 29 decision is a legal nullity. Far from being an "advisory opinion," *Herb*, 324 U.S. at 126, a ruling for the government on the second question presented would eliminate the only current barrier to satisfying that condition of the injunction. See Cert. Reply 9-11.

3. Respondents dispute that the October 29 decision satisfied the injunction's APA condition. They first claim (Br. 45) that the government "forfeited" that argument, but that is demonstrably false. See Gov't C.A. Motion 3 (Oct. 29, 2021) (arguing that the October 29 decision "satisfies one of the [district] court's conditions precedent to terminating MPP in its injunction").

Respondents further contend (Br. 45) that the government should have brought the October 29 decision to the district court by moving for relief from the APA condition under Federal Rule of Civil Procedure 60(b). That is audacious considering that respondents *opposed* the government's motion in the court of appeals to "remand the case to the district court for consideration of any objections that [respondents] wish to present to the Secretary's new memorandum." Gov't C.A. Motion 4 (Oct. 29, 2021); see Resp. C.A. Opp. 3 (Nov. 1, 2021). In any event, as the government has explained (Cert. Reply 9), it does not need *relief* from the injunction's APA condition, under Rule 60(b) or otherwise, because it has *satisfied* that condition's terms. All of respondents' cited authorities (Br. 45) involve modifying an injunction in light of changed circumstances; none illogically

holds that a party must seek relief under Rule 60(b) after it has fulfilled a condition in a permanent injunction.

The government has acknowledged that respondents may yet seek to challenge the October 29 decision in district court. See Cert. Reply 10. DHS will produce the full administrative record for the October 29 decision if and when a party challenges that decision in district court. Cf. Resp. Br. 41, 47.

4. Finally, respondents are wrong to assert (Br. 46-49) that the October 29 decision is arbitrary and capricious. Respondents contend that the October 29 decision "fail[ed] to consider key benefits of MPP," Br. 47, but the memorandum explicitly recognized that "MPP likely contributed to reduced migratory flows" and extensively discussed other initiatives to "achieve several key goals of MPP," including "reducing the appeal of exploitative smugglers," Pet. App. 260a, 267a, 334a-335a. Respondents allege that the October 29 decision "did not explain the discrepancy" between its figures on "*in absentia* removal orders" and those "in the June Termination's administrative record," Br. 48, but the memorandum specifically explained how and why DHS had "updated its methodology for measuring *in absentia* rates," Pet. App. 302a n.78. And while respondents insist that the October 29 decision failed "to actually consider [their] financial injuries and other reliance interests," Br. 48, the memorandum devoted an entire section to "addressing the concerns of States," Pet. App. 314a (capitalization altered). Respondents' inaccurate flyspecking of the October 29 decision is flatly inconsistent with the APA's "deferential" standard of review. *FCC* v. *Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). And the weakness of their objections to the Secretary's comprehensive analysis and conclu-

sion that maintaining MPP is not in the interests of the United States only underscores the impropriety of the court of appeals' judgment, which has prevented the Secretary's decision from taking effect for nearly six months.

* * * * *

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

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

APRIL 2022