

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH R. BIDEN, JR., )  
PRESIDENT OF THE UNITED STATES, )  
ET AL., )  
                                Petitioners, )  
                                v. ) No. 21-954  
TEXAS, ET AL., )  
                                Respondents. )  
- - - - -

Pages: 1 through 122  
Place: Washington, D.C.  
Date: April 26, 2022

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4       PRESIDENT OF THE UNITED STATES,       )  
5       ET AL.,                                       )  
6    Petitioners,       )  
7    v.                                       ) No. 21-954  
8       TEXAS, ET AL.,                            )  
9    Respondents.       )  
10      - - - - -

11  
12   Washington, D.C.  
13   Tuesday, April 26, 2022

14  
15                   The above-entitled matter came on for  
16       oral argument before the Supreme Court of the  
17       United States at 10:00 a.m.

18  
19       APPEARANCES:  
20       GEN. ELIZABETH B. PRELOGAR, Solicitor General,  
21           Department of Justice, Washington, D.C.; on behalf  
22           of the Petitioners.  
23       JUDD E. STONE, II, Solicitor General, Austin, Texas;  
24           on behalf of the Respondents.

25

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 21-954, Biden against Texas.

General Prelogar.

ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

ON BEHALF OF THE PETITIONERS

GENERAL PRELOGAR: Mr. Chief Justice, and may it please the Court:

The Secretary of Homeland Security exercised his statutory discretion to make a policy judgment. He found that the benefits of MPP were outweighed by its domestic, humanitarian, and foreign policy costs. Yet, the lower courts ordered DHS to reinstate MPP in perpetuity, requiring ongoing negotiations with Mexico to send thousands of non-citizens into its territory. That was error.

On the first question, Section 1225 confers a discretionary return authority that the Secretary may use, not a mandate. Nothing in the statutory text or history compels DHS to use MPP whenever Congress fails to provide sufficient funds for universal detention.

1                    Respondents identify no one who  
2                    interpreted Section 1225 this way before this  
3                    lawsuit, no member of Congress or executive  
4                    branch official or anyone else. And on this  
5                    reading, every presidential administration, in  
6                    an unbroken line for the past quarter century,  
7                    has been in open violation of the INA.

8                    The courts' interpretation compels  
9                    sensitive foreign policy negotiations and would  
10                    require transformative changes to the  
11                    government's border operations. If Congress had  
12                    wanted to mandate those results, it would have  
13                    spoken clearly.

14                    On the second question, Respondents  
15                    have abandoned virtually all of the district  
16                    court's reasons for -- and the Fifth Circuit's  
17                    reasons for finding that the October 29  
18                    termination decision has no legal effect. Texas  
19                    now concedes that DHS was permitted to respond  
20                    to the district court's remand by issuing a new  
21                    decision. That's just what the Secretary did  
22                    following a multi-week reconsideration process.

23                    Respondents claim that the Secretary  
24                    didn't really have an open mind in that process.  
25                    But the APA doesn't impose an amorphous

1 open-mindedness requirement, and Respondents  
2 have not carried their heavy burden to show that  
3 the October 29 decision was pretextual.

4 This Court should reverse the judgment  
5 below, and the Secretary should be allowed to  
6 finally put his policy decision into effect.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: General, the --  
9 below, you argued 1252(f)(1) and its limitation  
10 on who could impose injunctions here. And it  
11 seems as though you've abandoned that, but what  
12 should we do with that provision in this case?

13 GENERAL PRELOGAR: Well, Justice  
14 Thomas, we included a footnote in our opening  
15 brief in this case to make clear that we were  
16 continuing to press our Section 1252(f)(1)  
17 argument. Of course, we recognize the Court is  
18 considering that issue in the Aleman Gonzalez  
19 case, but we continue to adhere to the position  
20 that the district court in this case had no  
21 authority to enter the injunction that it did  
22 because that would enjoin or restrain the  
23 operation of the INA, and only this Court has  
24 jurisdiction to enter an injunction like that.

25 JUSTICE THOMAS: On -- you emphasized

1 the foreign relations concerns that arise in  
2 this case, but we've said in previous cases that  
3 Congress has plenary authority in this area.

4 Beyond that, what -- if -- if Congress  
5 has already legislated in this area and  
6 expressed those concerns, then what additional  
7 concerns should we take into account?

8 GENERAL PRELOGAR: Well, Justice  
9 Thomas, I think that the particular  
10 interpretation of the statute that the district  
11 court adopted here implicates grave and serious  
12 foreign policy implications. Of course, the  
13 executive branch has primary responsibility for  
14 managing foreign relations and conducting those  
15 kinds of negotiations.

16 And I think that if Congress had  
17 intended to override the executive's ordinary  
18 discretion that it enjoys with respect to that  
19 kind of foreign policy relationship, then, at  
20 the very least, it should have made that intent  
21 express in the statute.

22 But, instead, if you look at the text  
23 of Section 1225(b) (2) (C), this is the contiguous  
24 territory return provision, what Congress said  
25 is that the Secretary may return. Congress in

1 no sense indicated that it was actually imposing  
2 on the executive a mandate to engage in those  
3 kinds of ongoing negotiations with Mexico, not  
4 just to obtain its consent at the outset, but  
5 the enormous investment of diplomatic resources  
6 that it takes to engage with Mexico on a  
7 day-to-day basis to implement this policy, then  
8 Congress should at least have said that clearly  
9 in the statute and put it into 12 --

10 JUSTICE THOMAS: But I think their  
11 argument is that it was -- I apologize for  
12 interrupting you, but I think they suggest that  
13 there's the underlying rule that Congress --  
14 that you shall detain, and the "shall," I think,  
15 they see as a baseline. And then the others are  
16 there's limited discretion to parole or to send  
17 -- to do other things. But the -- the -- it  
18 seems as though they think that discretion is  
19 consumed by the "shall."

20 GENERAL PRELOGAR: Well, Justice  
21 Thomas, let me respond to that in a few  
22 different ways. I want to emphasize at the  
23 outset that we think that DHS is relying  
24 permissibly on its express statutory release  
25 authorities here. So it's the parole authority



1 you mentioned in 1182(d)(5). It's also the  
2 authority to grant bond or conditional parole  
3 under Section 1226(a), which is a provision that  
4 Respondents largely ignore.

5           So we think that the releases are  
6 consistent with those express authorities, and  
7 we think that the language in 1225(b)(2)(A), the  
8 "shall be detained" language that you  
9 referenced, should be interpreted against the  
10 backdrop of long-standing principles of  
11 enforcement discretion, in recognition that this  
12 is essentially a limited law enforcement  
13 resource. No one disputes that DHS does not  
14 have sufficient capacity to detain everyone who  
15 could be subject to detention under that  
16 provision.

17           But I should say also that if you  
18 disagree with everything that I just said or  
19 think that there is more room for doubt about  
20 how DHS implements those detention and release  
21 authorities, still I don't think that provides  
22 any license to rewrite Section 1225(b)(2)(C) in  
23 contravention of its plain language. Congress  
24 said there "may return." It didn't create the  
25 kind of mandate that Respondents are now reading

1 into the statute.

2 CHIEF JUSTICE ROBERTS: Well, I mean,  
3 you say, if we disagree with you on the other  
4 grounds, that's not a basis for adopting an  
5 erroneous interpretation of the third provision.

6 But where does that leave us? I mean,  
7 I -- I am sympathetic with your position, which  
8 is that you can't detain enough people. You  
9 don't think you have to send people back through  
10 the return mechanism. And that's fine, I would  
11 say. You're -- one way to look at it is you're  
12 sort of taking away from yourself an option to  
13 comply with the statute.

14 And then it gets to a question of the  
15 parole -- interpretation of the parole provision  
16 and whether or not, I think, significant public  
17 benefit can accommodate as -- as far as you want  
18 to stretch it.

19 So, if I get to the point of looking  
20 at this and agreeing -- basically saying there's  
21 nothing you can do, given the statutory  
22 requirements, it's not -- you're in a position  
23 where the facts have sort of overtaken the law.  
24 But, in that situation, what are we supposed to  
25 do? It's still our job to say what the law is.

1 And if we say what the law is and you tell us we  
2 can't do anything about it, where do you think  
3 that leaves us?

4 GENERAL PRELOGAR: Well, I would say  
5 at the outset that to the extent that the Court  
6 is inclined to say what the law is with respect  
7 to the detention and release authorities that  
8 you mentioned, 1225(b)(2)(A), parole, I think  
9 that those should be challenged on their own  
10 terms if Respondents disagree with how DHS is  
11 implementing those provisions.

12 Instead, Respondents said in the  
13 district court that they weren't even  
14 challenging our parole policies. Any judicial  
15 relief that could be necessary in that context  
16 should focus on those provisions, but, instead,  
17 it collaterally --

18 CHIEF JUSTICE ROBERTS: Well, but, I  
19 mean, let's go through them. You don't --  
20 detention is not -- it is, what, a -- a  
21 2 percent answer to the problem? So we can put  
22 that to one side. I don't think they have to  
23 challenge detention for the reality to be there,  
24 that that's not going to help you get to where  
25 you need to get.

1           And with respect to the others, again,  
2           assuming that I find significant public benefit  
3           to be a more substantive restriction than --  
4           than perhaps -- perhaps you do, I guess, again,  
5           where does that leave us?

6           GENERAL PRELOGAR: Well, I think it  
7           would leave the Court --

8           CHIEF JUSTICE ROBERTS: If you have a  
9           situation where you're stuck because there's no  
10          way you can comply with the law and deal with  
11          the problem there, I guess I'm just wondering  
12          why that's our problem?

13          Our problem is to say what the law is.  
14          And if you're in a position where you say, well,  
15          we can't do anything about it, what do we do?

16          GENERAL PRELOGAR: Well, I agree that  
17          it's not your problem in this case. I think  
18          that to the extent the Court interpreted the  
19          provisions along the lines you're suggesting,  
20          that that could, at most, support a judicial  
21          order that we need to detain more people or we  
22          need to change how we're releasing people.

23          But, again, I would go back to the  
24          central issue in this case, that the Court's  
25          responsibility here is to look at how the

1 district court interpreted the contiguous  
2 territory return provision. And none of those  
3 concerns about detention and release could in  
4 any sense justify transforming that position,  
5 contrary to Congress's plain language, the "may  
6 return" language, with all of the consequences  
7 that would have for our foreign relations.

8           So I think the simplest route to  
9 resolving this case is to say that. I don't  
10 think the Court actually needs to say anything  
11 more. It's not necessary to resolve any of  
12 those questions about the meaning of  
13 1225(b) (2) (A) or 1182(d) (5) or 1226(a).

14           All the Court needs to say in this  
15 case is that the contiguous territory return  
16 provision does not carry the meaning that  
17 justify the district court's injunction in this  
18 case.

19           JUSTICE SOTOMAYOR: General --

20           JUSTICE ALITO: May I -- may I ask you  
21 about the jurisdictional question that Justice  
22 Thomas raised? You argue that we lack  
23 jurisdiction because the district court lacked  
24 jurisdiction, and you devoted -- you devote two  
25 sentences in a footnote to the question.

1                   I want to see how far your  
2 jurisdictional argument goes. So do you think  
3 that 1252(f)(1) barred the district court from  
4 vacating the Secretary's decision to stop using  
5 8 U.S.C. 1225(b)(2)(C) authority to return  
6 aliens to Mexico?

7                   GENERAL PRELOGAR: Well, I think, you  
8 know, we focused on the injunctive relief in  
9 this case, and I think that there's an  
10 additional question about vacatur. I -- I do  
11 believe that our arguments would extend to that  
12 as well. To the extent that -- that you're  
13 worried about the extent of the briefing in this  
14 case, I would, of course, refer back to our  
15 briefing in Aleman Gonzalez. We also briefed  
16 this issue at the --

17                   JUSTICE ALITO: Oh, I'm very well  
18 aware of the briefing in -- in that case. It  
19 doesn't say anything about the APA, and that's  
20 my principal concern right here.

21                   So your answer is that it would  
22 prevent a district court from reviewing  
23 immigration rules dealing with the relevant  
24 provisions of the INA under the APA? A district  
25 court could not do that?

1           GENERAL PRELOGAR: Well, to the extent  
2 that that would entail the district court in --  
3 in setting aside the agency's action, I do think  
4 that that would fall within the bounds of our  
5 interpretation of (f)(1).

6           JUSTICE ALITO: Well, let me ask you  
7 this -- to address this hypothetical. Suppose  
8 DHS invoked that authority, the return  
9 authority, to promulgate a policy where every  
10 alien who arrives on land from a foreign country  
11 contiguous to the United States was required to  
12 return to Mexico or Canada pending the  
13 initiation of a removal proceeding under 1220 --  
14 1229(a).

15           And then suppose DHS also promulgated  
16 a policy where neither 1229(a) removal  
17 proceedings nor asylum proceedings could be  
18 initiated for any of those aliens until 10 years  
19 after their removal. Okay? You get the -- you  
20 get the hypothetical?

21           Would any court besides this Court  
22 have jurisdiction to hear a challenge seeking to  
23 vacate that policy?

24           GENERAL PRELOGAR: Well, I think that,  
25 of course, there would be jurisdiction in the

1 lower courts with respect to individual  
2 non-citizens who are raising that challenge,  
3 and that's, I think, the premise of  
4 Section (f)(1), that Congress was trying to  
5 channel those types of claims into individual  
6 proceedings with respect to individual  
7 non-citizens. So there would be jurisdiction in  
8 that circumstance.

9 JUSTICE ALITO: But it would have to  
10 be done on an individual basis? There could be  
11 no -- no request under the APA to vacate that  
12 order, that -- that policy saying everybody  
13 covered has to stay in Mexico for 10 years?

14 GENERAL PRELOGAR: Well, obviously,  
15 that policy could be challenged in the  
16 individual case, and so I think it could be  
17 taken on on its own terms there.

18 JUSTICE SOTOMAYOR: Then --

19 JUSTICE ALITO: I mean, don't you  
20 think that that's a -- I mean, you might be  
21 right, but don't you think that's a far-reaching  
22 argument? Don't you think that goes well beyond  
23 anything that would come to -- that we would  
24 have thought about in -- in Garland versus  
25 Gonzalez? Don't you think that deserved



1 briefing?

2           GENERAL PRELOGAR: Well, certainly,  
3 Justice Alito, I defer to this Court and how  
4 it's choosing to resolve those issues in Aleman  
5 Gonzalez. With respect to additional briefing,  
6 we did include briefing on this issue at the  
7 stay stage in this case as well, so I would  
8 refer to our -- our briefing.

9           JUSTICE ALITO: Well, did you say  
10 anything about the APA in -- in the Gonzalez  
11 case?

12           GENERAL PRELOGAR: I'm sorry that I  
13 can't recall right now whether we -- we briefed  
14 that issue there. If you're telling me we  
15 didn't, I assume we did not.

16           JUSTICE ALITO: On the jurisdictional  
17 question, you think that we should go back and  
18 read what you submitted below? It wasn't  
19 important enough for you to submit it to us  
20 directly?

21           GENERAL PRELOGAR: We did brief this  
22 issue at the stay stage in this case, and this  
23 Court, we understand, issued -- denied the stay  
24 nevertheless and found a likelihood of success  
25 on the merits with respect to the procedural APA

1 claim on the June 1 memorandum. So that's why  
2 we didn't renew our briefing on this issue at  
3 the merits stage.

4 JUSTICE SOTOMAYOR: Counsel --

5 JUSTICE KAGAN: General --

6 JUSTICE SOTOMAYOR: -- are you taking  
7 the position that 1252(f)(1) also eliminates  
8 declaratory judgment rulings?

9 GENERAL PRELOGAR: We --

10 JUSTICE SOTOMAYOR: There is a  
11 difference between issuing an injunction  
12 vacating an agency action and issuing a  
13 declaratory judgment that agency action is  
14 unauthorized and letting that come to this Court  
15 to decide what remedy is appropriate, whether an  
16 injunction is appropriate or not if you decide  
17 not to follow the statement, correct? There's  
18 nothing in a declaratory judgment rule that  
19 forces you to.

20 You might be subjecting yourself to  
21 contempt, but you can stay that pending review  
22 by this Court, couldn't you?

23 GENERAL PRELOGAR: That's right,  
24 Justice Sotomayor. So I think that it would be  
25 possible for the Court to draw that distinction

1 and distinguish between declaratory relief and  
2 injunctive relief.

3 Of course, if there were other --

4 JUSTICE SOTOMAYOR: You don't see  
5 anything in 12 -- in the language of 1252(f)(1)  
6 that stops declaratory relief. It says --

7 GENERAL PRELOGAR: I believe, when  
8 Aleman Gonzalez was argued, we -- we suggested  
9 that that was an open question, and I recognize  
10 that it's a more difficult question. Here, I  
11 think that it's clear that our (f)(1) argument  
12 applies because we're facing a nationwide  
13 permanent injunction in this case.

14 JUSTICE GORSUCH: I -- I --

15 JUSTICE SOTOMAYOR: Now what do we --

16 JUSTICE GORSUCH: Hold on. Hold on.

17 I'm sorry.

18 JUSTICE SOTOMAYOR: I'm sorry. Go  
19 ahead.

20 JUSTICE GORSUCH: I wanted to follow  
21 up on that.

22 JUSTICE SOTOMAYOR: Go ahead.

23 JUSTICE GORSUCH: Okay. I -- I --

24 I -- I would just appreciate an answer to  
25 Justice Sotomayor's question about declaratory

1 relief and the government's position with  
2 respect to 1252(f).

3 GENERAL PRELOGAR: I'm sorry, a  
4 clarification?

5 JUSTICE GORSUCH: Yeah. Just --

6 GENERAL PRELOGAR: So I'll do my best  
7 --

8 JUSTICE GORSUCH: -- does -- does --  
9 does --

10 GENERAL PRELOGAR: -- and I should  
11 confess that I didn't go back to review the oral  
12 argument transcript in Aleman Gonzalez.

13 JUSTICE GORSUCH: No, no, no.

14 GENERAL PRELOGAR: But I think we took  
15 the position there that it's an unsettled  
16 question, how this would apply in the context of  
17 declaratory relief.

18 And so, you know, I -- I want to be  
19 consistent with that position, but I recognize  
20 it's a harder issue for us, and I think that  
21 there would be a path for the Court to determine  
22 that there's a distinction between declaratory  
23 relief and injunctive relief, which is, of  
24 course, the primary focus of that provision.

25 JUSTICE GORSUCH: No, I understand

1 it's an open question and a difficult one. I  
2 just wonder whether the government has a view on  
3 it one way or the other.

4 GENERAL PRELOGAR: Our view is that  
5 it -- that it also could foreclose review of  
6 declaratory relief, but I recognize the Court  
7 could conclude otherwise.

8 JUSTICE GORSUCH: Why would it  
9 foreclose declaratory relief?

10 GENERAL PRELOGAR: I'm sorry, Justice  
11 Gorsuch, I'm -- I don't have further information  
12 at this time. If you'd like us to submit  
13 supplemental briefing on this issue, we would be  
14 happy to do so to try to clarify that position.

15 JUSTICE GORSUCH: But it is the  
16 government's position that it -- it does  
17 foreclose declaratory relief too?

18 GENERAL PRELOGAR: I believe that's  
19 the position we took at oral argument in Aleman  
20 Gonzalez, recognizing it was a tougher issue.

21 JUSTICE GORSUCH: Thank you.

22 GENERAL PRELOGAR: If I could turn to  
23 the -- the various textual clues and textual  
24 clues that we think fortify our interpretation  
25 of the contiguous territory return provision in

1 this case, there are really four key things that  
2 I want to focus on that I think demonstrate that  
3 the district court's interpretation here went  
4 seriously awry.

5 And the first thing, of course, is the  
6 text which was emphasized, that Congress used  
7 the "may return" language, which is clearly  
8 discretionary. On Respondents' interpretation,  
9 what Congress really meant is the Secretary may  
10 return, unless detention capacity is lacking, in  
11 which case he must return.

12 But Congress nowhere put that  
13 condition precedent into the statute, and I  
14 think it's really significant that Congress  
15 failed to do so because, on Respondents'  
16 reading, this would have been mandatory from the  
17 outset and at all times thereafter.

18 In 1996, when Congress enacted this  
19 provision, there was not sufficient detention  
20 capacity at that time, and Respondents don't  
21 dispute that that has remained continuously the  
22 case. So I think it's particularly notable that  
23 their interpretation of the statute would have  
24 run counter to the text all along.

25 I would point as well --

1 JUSTICE KAVANAUGH: Is there any  
2 indication in connection with the '96 Act that  
3 anyone in Congress expected that if there  
4 were -- was not sufficient detention capacity,  
5 that hundreds of thousands of people would be  
6 just paroled into the United States without  
7 being lawfully admitted?

8 Did anyone say that in Congress?

9 GENERAL PRELOGAR: I don't think that  
10 there was express history on that point, but  
11 Congress was focused on the detention issue, and  
12 it thought that the new expedited removal  
13 provisions that it had added to the statute at  
14 the same time would function to alleviate part  
15 of the strain on detention of resources.

16 So I think that history actually shows  
17 that Congress here wasn't thinking that  
18 contiguous territory return would -- would be  
19 the solution to this issue. Instead, they were  
20 focused on expedited removal to do so.

21 And it's no mystery about where this  
22 provision came from, contiguous territory  
23 return. It was a much narrower and more  
24 discrete problem, which was that the Board of  
25 Immigration Appeals in the Sanchez-Avila case

1 had just concluded in 1996 that the executive's  
2 prior discretionary practice of sometimes  
3 returning some non-citizens to contiguous  
4 territory required express statutory  
5 authorization if it was going to continue. And  
6 Congress provided that express statutory  
7 authorization in 1225(b)(2)(C).

8 But there is no indication that it  
9 meant to go further and actually transform that  
10 -- that prior practice and turn it into an  
11 ongoing mandate that DHS must implement this on  
12 a border-wide basis consistently based on a lack  
13 of detention appropriations.

14 JUSTICE KAVANAUGH: I think --

15 JUSTICE ALITO: Well, the Fifth --

16 JUSTICE KAVANAUGH: Go ahead.

17 JUSTICE ALITO: The -- the Fifth  
18 Circuit reasoned that -- it didn't -- it didn't  
19 deny that the -- that the provision you're  
20 talking about uses the term "may," but it said  
21 that if you read the relevant statutory  
22 provisions, they give DHS three options.

23 One is to return these individuals to  
24 Mexico or Canada. The second is to detain them.  
25 Third is to have case-by-case determinations



1 regarding humanitarian issues and -- and public  
2 benefit. And 1220 -- a cornerstone of that is  
3 that 1220 -- 1225(b) (2) (A) says "the alien shall  
4 be detained." Right?

5 GENERAL PRELOGAR: That's correct.

6 JUSTICE ALITO: And you now read that  
7 to be discretionary in light of Castle Rock, is  
8 that correct?

9 GENERAL PRELOGAR: No. To be clear,  
10 Justice Alito -- and I appreciate the  
11 opportunity to offer clarification on this  
12 point -- we are not suggesting that that  
13 language in (b) (2) (A) is -- essentially  
14 functions as a "may," that Congress didn't  
15 express a preference on this issue.

16 What we think, though, is that against  
17 the background of Castle Rock, it's appropriate  
18 for DHS to take account of its limited detention  
19 capacity for purposes of exercising its various  
20 authorities, and that includes the express  
21 release authorities.

22 So there's parole you mentioned. You  
23 left off the list Section 1226(a). We think  
24 that's another important source of authority for  
25 DHS here.

1                   JUSTICE ALITO: Well, that -- that  
2                   sound -- what you just said sounded to me like a  
3                   lot of words that means that we have discretion,  
4                   we have prosecutorial discretion, to decide  
5                   whether to detain. "Shall be detained" doesn't  
6                   literally mean shall be detained.

7                   GENERAL PRELOGAR: I think what it  
8                   means --

9                   JUSTICE ALITO: Is that correct?

10                  GENERAL PRELOGAR: Well, I think, in  
11                  this context, what "shall be detained" means is  
12                  that Congress expected us to use the detention  
13                  capacity that we have. And that's what we're  
14                  doing. DHS detains tens of thousands of  
15                  individuals on any given day. Respondents'  
16                  interpretation that would remove any discretion  
17                  would mean that DHS can't take account of that  
18                  limited capacity in making prioritization  
19                  decisions.

20                  So, if they're really right and if DHS  
21                  has to fill up those beds on a first come basis,  
22                  then the upshot is that it's going to run out of  
23                  space and not have capacity to detain those with  
24                  criminal histories or who represent a national  
25                  security threat or have final orders of removal

1 and might be particularly likely to abscond.

2 And I don't think that's a reasonable

3 interpretation of --

4 JUSTICE SOTOMAYOR: Is there --

5 JUSTICE ALITO: Well, I'll tell you,

6 when -- when -- excuse me, if I just ask one

7 more follow-up. I'll tell you, when I read your

8 brief on this point, I said: Wow, this is exact

9 -- I remember the Jennings case, where I had the

10 pleasure of writing the opinion for the Court,

11 and I said: Boy, my recollection is that the

12 government's brief in that case took exactly the

13 opposite position from what the -- the

14 government is taking here.

15 And I went back and looked at it, and

16 that is exactly the case. You stressed that

17 "shall be detained" means shall be detained. I

18 have it right before me. You emphasized the --

19 the language, "shall be detained."

20 And you went on. This is a brief

21 filed by your predecessor, Mr. Gershengorn.

22 "Unlike the word 'may,' which implies

23 discretion, the word 'shall' usually connotes a

24 requirement. And, here, the repeated 'shall be

25 detained' clearly means what it says, because

1 Congress said 'may' when it meant 'may.'  
2 Congress crafted only one exception to that  
3 rule. Congress provided that the Secretary  
4 'may' parole into the United States any alien  
5 applying for admission on a case-by-case basis  
6 for urgent humanitarian reasons or significant  
7 public benefit."

8           GENERAL PRELOGAR: Let me respond to  
9 that in two ways if I could, Justice Alito. And  
10 the first is to make clear that, of course,  
11 there we were addressing a very different type  
12 of argument, which is whether Section 1225  
13 contains effectively an implicit statutory  
14 entitlement to release on bond, which is what  
15 the non-citizens in that case were claiming.  
16 And -- and we said then and remain of the view  
17 and this Court said in Jennings that that's not  
18 a proper interpretation of that "shall be  
19 detained" language.

20           But we had no occasion in that case  
21 and this Court had no occasion in that case to  
22 consider how to interpret these provisions of  
23 the INA against the backdrop of traditional  
24 enforcement discretion principles. And I would  
25 point in particular now to the -- the opinion of

1 Chief Judge Sutton in the Sixth Circuit, a  
2 recent opinion we cite in our reply brief in the  
3 Arizona case, that I think has a really useful  
4 distillation of the relevant principles in this  
5 context when you're looking at those types of  
6 provisions in the INA in light of limited law  
7 enforcement resources.

8 But the -- the second point I'll make  
9 is that to the extent you are focused on this  
10 differential use of "shall" and "may," I think  
11 that only fortifies our principal contention in  
12 this case, which is that the contiguous  
13 territory return provision uses that  
14 discretionary "may return," and it's  
15 Respondents' position that would actually fail  
16 to give effect to Congress's drafting choices by  
17 turning that into a mandate.

18 JUSTICE SOTOMAYOR: Counsel --

19 JUSTICE KAGAN: Do you think that as  
20 to each non-citizen, that you have to comply  
21 with one of the four, let's call them now,  
22 because you added bond, that you have to comply  
23 with one of the four options that the statute  
24 gives you? Or do you think that there is a kind  
25 of residual discretion so that even if an

1 immigrant could not be paroled under 1182, you  
2 could release that immigrant -- you could still  
3 release that immigrant rather than detain him?

4 GENERAL PRELOGAR: So I think the  
5 question of residual discretion is a difficult  
6 one. And we haven't had to process that here  
7 because we think that DHS is complying with  
8 those four statutory options. Our position is  
9 that DHS is faithfully implementing both the  
10 parole provision in 1182(d)(5) and the bond and  
11 conditional parole provision in Section 1226(a).

12 And I think that its implementation of  
13 those provisions suffices in itself to resolve  
14 this case because Respondents as the plaintiffs  
15 alleged and said that DHS was violating those  
16 obligations but came forward with no evidence to  
17 substantiate that claim.

18 JUSTICE KAGAN: I mean, I think  
19 General Stone's position is sort of we don't  
20 need evidence because it's kind of laughable on  
21 its face to think that you're paroling this many  
22 people by using case-by-case determinations  
23 rather than, I think, his word is "en masse."

24 GENERAL PRELOGAR: Well, those kinds  
25 of arguments just don't engage with the

1 statutory text here. 1182(d)(5) has a  
2 procedural requirement, case-by-case  
3 adjudication. DHS does that. It does not grant  
4 parole to any individual non-citizen without  
5 reviewing the individual case and making an  
6 assessment of individualized factors like flight  
7 risk, likelihood of absconding, and whether the  
8 release of that individual would advance an  
9 urgent humanitarian reason or a substantial  
10 public -- a significant public benefit. And  
11 that's, of course, the substantive criteria.

12 Our position is that DHS can  
13 permissibly take account of its detention  
14 capacity in determining that there is a  
15 significant public benefit from releasing a  
16 low-priority individual who's not a flight risk,  
17 who doesn't have a criminal history, if that  
18 would preserve a bed space for someone who's a  
19 higher priority under our detention policies.

20 JUSTICE KAGAN: But you're saying we  
21 don't need -- or you don't need to argue for  
22 residual discretion because you're not using any  
23 residual discretion? You're saying that --

24 GENERAL PRELOGAR: That's right.

25 JUSTICE KAGAN: -- that everything

1 fits --

2 GENERAL PRELOGAR: We are not using  
3 residual discretion here.

4 JUSTICE KAGAN: -- within these four  
5 categories?

6 GENERAL PRELOGAR: That's correct. We  
7 think that we do not need residual discretion  
8 here, and I think that it's an interesting  
9 question, but it's largely an academic one  
10 because, here, DHS's release authorities amply  
11 justify what it's doing on the ground.

12 JUSTICE SOTOMAYOR: Counsel, can you  
13 tell me what "case-by-case review" means? You  
14 -- you -- part of your answer addressed it, but  
15 each alien is interviewed?

16 GENERAL PRELOGAR: That's right. So  
17 what DHS does --

18 JUSTICE SOTOMAYOR: Is a background  
19 check done on them?

20 GENERAL PRELOGAR: There is usually a  
21 criminal background check done. There's a  
22 biometric records check that's completed. And  
23 DHS reviews that information and makes judgments  
24 about things like flight risk and security  
25 concerns for purposes of administering these



1 provisions.

2 JUSTICE SOTOMAYOR: I'm assuming  
3 there's a terrorist list of some sort or a  
4 database that you look at as well?

5 GENERAL PRELOGAR: I assume so as  
6 well, although I haven't checked with DHS on  
7 that.

8 JUSTICE SOTOMAYOR: All right. So --  
9 and you -- presumably, you find out what ties or  
10 not the person has to the United States and  
11 whether they've absconded before, et cetera?

12 GENERAL PRELOGAR: That's right. So,  
13 by regulation, DHS is required to take into  
14 account those kinds of considerations insofar as  
15 they bear on flight risk, and the parole  
16 determination will only be made after making a  
17 judgment that the person does not likely present  
18 a flight risk.

19 JUSTICE SOTOMAYOR: Now your  
20 adversary, General Stone, points to a lot of  
21 legislative history that Congress intended  
22 1182(d)(5)(A) to be narrow. Virtually all of  
23 the history that he points to is a House  
24 committee report, correct?

25 GENERAL PRELOGAR: That's right. And

1 it was a committee report that addressed a  
2 different version of the statute, not the one  
3 that was enacted.

4 JUSTICE SOTOMAYOR: So, with respect  
5 to this version of the statute, was there  
6 anywhere a directive by Congress to limit the  
7 number of people?

8 GENERAL PRELOGAR: No, there's  
9 certainly nothing in the text of the statute  
10 that Congress enacted that places that kind of  
11 cap. Instead, Congress directed how parole  
12 determinations need to be made case by case, and  
13 it set forth that substantive criteria of the  
14 bases for parole, but it nowhere suggested that  
15 there is a numerical cap on the number of people  
16 who can receive parole.

17 JUSTICE SOTOMAYOR: Now please tell me  
18 how you satisfy the urgent humanitarian reasons  
19 or significant public benefit requirements of  
20 the statute.

21 GENERAL PRELOGAR: We satisfy that  
22 because there is a significant public benefit in  
23 ensuring that DHS doesn't run out of detention  
24 space to house individuals who are higher  
25 priorities for detention because of their

1 criminal records or because they might be  
2 particularly likely to abscond or because  
3 Congress itself has directed that they should be  
4 detained without release under provisions like  
5 1231(a)(2), 1226(c).

6 And DHS's judgment in implementing the  
7 statute has been, I think, properly interpreted  
8 against the background of enforcement discretion  
9 here, that that serves a significant public  
10 benefit in ensuring that it doesn't run out of  
11 capacity when someone is a low-priority  
12 individual because they're -- they don't have a  
13 criminal history, they're not a danger to  
14 society, they aren't likely to abscond.

15 JUSTICE SOTOMAYOR: How about the  
16 issue of whether you have enough resources to  
17 detain all these people, feed them, clothe them?  
18 If you don't, you're going to let them starve  
19 and you're going to have the horrific conditions  
20 that have gotten so much public attention,  
21 correct?

22 GENERAL PRELOGAR: Well, certainly,  
23 DHS is committed to providing humanitarian  
24 conditions for detention. But I do think that  
25 the report --

1 JUSTICE SOTOMAYOR: If you had to  
2 detain everybody, could you?

3 GENERAL PRELOGAR: No. And no one  
4 disputes that. DHS does not have sufficient  
5 detention capacity. Congress knows that.

6 Congress was aware of that in 1996  
7 when it enacted this -- this provision, and  
8 there is no indication that Congress intended  
9 the safety valve here to be contiguous territory  
10 return.

11 JUSTICE KAGAN: Well, what are the  
12 numbers with respect to that, both now and in  
13 the past, in terms of the percentage of people  
14 who are stopped or encountered or, you know,  
15 arrested at the border -- think of those as  
16 synonyms, I didn't mean to -- versus the number  
17 that you can detain?

18 GENERAL PRELOGAR: So let me give you  
19 a -- a sense of the current numbers. I'll point  
20 to the recent monthly reports that we've been  
21 filing in accordance with the district court's  
22 reporting requirement of the injunction.

23 The most recent numbers are from March  
24 2022. At -- at that juncture, DHS apprehended  
25 about 220,000 people at the border. There were

1 -- that was the number of border encounters. At  
2 that point in time, DHS was appropriated for a  
3 little under 32,000 detention beds, counting  
4 some COVID restrictions, some court restrictions  
5 in place.

6 And the average daily amount of  
7 detention over that same month was also at about  
8 32,000 individuals. That's ICE being a little  
9 under its capacity and CBP being over capacity.

10 So I think that it's -- it's kind of  
11 self-evident and no one disputes here that there  
12 is a tremendous shortfall and that DHS could not  
13 detain everyone who it's encountering at the  
14 border.

15 JUSTICE BREYER: Is 320 -- you say  
16 220,000 come in?

17 GENERAL PRELOGAR: Yes, about 220,000  
18 encounters.

19 JUSTICE BREYER: How -- per what? Per  
20 what? Per month, per day, per week, per what?

21 GENERAL PRELOGAR: This was in March  
22 2021 --

23 JUSTICE BREYER: For a month?

24 GENERAL PRELOGAR: -- is the most  
25 recent --

1 JUSTICE BREYER: In a month? You're  
2 saying 220,000 in a month or 220,000 in a week  
3 or what?

4 GENERAL PRELOGAR: No, in one month.  
5 Those were the numbers.

6 JUSTICE BREYER: In one month?

7 GENERAL PRELOGAR: Now, of course, it  
8 fluctuates.

9 JUSTICE BREYER: So 220,000 come to  
10 the border and about 30,000 or so, 38,000 are  
11 detained, and the rest are paroled?

12 GENERAL PRELOGAR: Well, there are a  
13 variety of tools that DHS uses. They're not all  
14 paroled. Some are expelled under Title 42.

15 JUSTICE BREYER: These are the ones  
16 who are --

17 GENERAL PRELOGAR: Some have been  
18 expedited removal.

19 JUSTICE BREYER: So how many are  
20 paroled about?

21 GENERAL PRELOGAR: In March 2021, I  
22 believe the parole figure was about 37,000, and  
23 then there were another 43,000 that received  
24 bond or conditional parole under Section  
25 1226(a).

1 JUSTICE BREYER: So that's what  
2 happened. So there were 110,000 or 120,000, and  
3 we don't know what happened to them? Where did  
4 they go?

5 GENERAL PRELOGAR: Many of them were  
6 expelled pursuant to Title 42.

7 JUSTICE BREYER: I see.

8 GENERAL PRELOGAR: Others were --

9 JUSTICE BREYER: Okay. So half of  
10 them --

11 GENERAL PRELOGAR: -- processed under  
12 other provisions of the Act.

13 JUSTICE BREYER: -- they say you have  
14 no business here and it comes right under here  
15 that they're not -- oh, under 42, in other  
16 words, under the --

17 GENERAL PRELOGAR: The public health  
18 order --

19 JUSTICE BREYER: Under public health.

20 GENERAL PRELOGAR: -- that CDC had  
21 issued. That -- that number, though, also  
22 includes other processing under Title 8  
23 authority, so it includes things like expedited  
24 removal.

25 JUSTICE BREYER: Now -- now suppose --

1 I mean, here, I'm worried about -- suppose I  
2 accept your argument for -- hypothetically,  
3 let's assume that. And then I say I see (b) has  
4 to do with people whom the immigration person at  
5 the border says you're inadmissible or you want  
6 asylum and it tells you what to do.

7 But now we go to our part, which is  
8 other people who come in. So I don't know if  
9 they're inadmissible or not. Maybe, maybe not.  
10 That's -- that's -- that's what we're -- this is  
11 number 2, is that right?

12 GENERAL PRELOGAR: I'm sorry, you're  
13 looking at 1225(b) (2) --

14 JUSTICE BREYER: Yeah. Yeah.

15 GENERAL PRELOGAR: -- (B)?

16 JUSTICE BREYER: It says inspection of  
17 other aliens. Those are the aliens who were not  
18 in the first part, which is the first part --

19 GENERAL PRELOGAR: Oh, I'm sorry,  
20 you're looking at, right, (b) (1). So you're  
21 looking at the -- the provisions about --

22 JUSTICE BREYER: (b) (1) are certain  
23 people where they say you're inadmissible,  
24 good-bye, or they say you want asylum and here's  
25 the procedure.



1                   GENERAL PRELOGAR: That's right.

2                   JUSTICE BREYER: Then it says  
3 inspection of other aliens. That's what we're  
4 talking about.

5                   GENERAL PRELOGAR: That's correct,  
6 yes.

7                   JUSTICE BREYER: Okay. Who are the  
8 others? The others are the ones you don't know  
9 if they're inadmissible or not?

10                  GENERAL PRELOGAR: So these are the  
11 ones who wouldn't be inadmissible under the  
12 grounds that are specified in (b)(1).

13                  JUSTICE BREYER: Okay. Okay. We got  
14 that.

15                  GENERAL PRELOGAR: It also can be  
16 applied --

17                  JUSTICE BREYER: Now it says there are  
18 three things you can do. One is, as you say,  
19 confine them, you know, detain. And then number  
20 B is an exception, and number C is send them  
21 back to Mexico with the word "may," okay? So  
22 we've got those three things right equally under  
23 the statute.

24                  And you say it says "may." So what  
25 happens if you say no? And it seems to say

1 "shall be detained." And that's what we're  
2 talking about. Suppose you just don't detain  
3 them, vast numbers. You parole them. You say,  
4 I can do that because of 1182. So I got the  
5 structure in my mind.

6 But you are not doing what they said,  
7 which shall be detained. Well, we can parole  
8 them case by case. Okay. Suppose you lose on  
9 that. At that point, you have Congress telling  
10 you "shall be detained" and you're not doing it.

11 What happens? I'm asking you that  
12 because the words are important. And the reason  
13 I ask you that is this is not the first time  
14 Congress has said to an agency, do it. Do it by  
15 May 15. May 15 comes. They haven't done it.  
16 That happens more than you might think.

17 Okay. So there's a case law history  
18 there of what judges did when the government  
19 just didn't do what Congress told them within  
20 the time frame they were supposed to do it.

21 Have you looked at that? Do you know  
22 what that was? My impression, very vaguely, at  
23 a distance, was the judge sort of tried to work  
24 things out. They sort of tried to negotiate  
25 with the agency. They sort of -- they -- they

1 didn't just order them detained or order the  
2 SALT regulation issued because they couldn't.

3           What happened? And does that have any  
4 instruction for us?

5           GENERAL PRELOGAR: Well, I think,  
6 here, I -- I have a couple of reactions to that,  
7 Justice Breyer, and I hope I can work through  
8 them. I -- I first want to push back on the  
9 idea of how you describe the -- the statutory  
10 structure only insofar as I think that it's  
11 wrong to treat this as a self-contained unit.

12           It's not as though Congress sat down  
13 at one point in time and thought this is going  
14 to be our universal solution for how to deal  
15 with these encounters at the border with this  
16 class of non-citizen.

17           Instead, all of these provisions were  
18 added to the statute at different times and for  
19 different reasons. The "shall be detained"  
20 language came in 1903. That was first. Then  
21 Congress added the parole authority in 1952 in  
22 the INA, and that was actually a -- a  
23 codification of the executive's prior practice  
24 of granting parole even when it didn't have  
25 express statutory authority to do so.

1           It was only in 1996 that Congress  
2           added the (c) that you referred to, contiguous  
3           territory return. And so I just want to push  
4           back on the suggestion that this was all at one  
5           point in time with Congress kind of thinking  
6           about these --

7           JUSTICE BREYER: So that -- that --  
8           that suggests the argument that you gave up on,  
9           and that was the argument that "shall" doesn't  
10          literally mean shall this instant. It means  
11          shall as best you can.

12          Now you've given -- you've given up on  
13          that argument, I think, or have you?

14          GENERAL PRELOGAR: Well, no. I think  
15          "shall" properly interpreted means that we  
16          should use the detention capacity that we've  
17          been afforded here. I think the -- the argument  
18          --

19          JUSTICE BREYER: Did you ask for more?

20          GENERAL PRELOGAR: -- in my response  
21          to Justice Kagan --

22          JUSTICE BREYER: Did you ask Congress  
23          for more?

24          GENERAL PRELOGAR: -- was that we have  
25          express statutory release authorities here, and

1 we think that all of these releases are  
2 happening in conformance with the INA.

3 Left off your list as well was  
4 1226(a). This is an important source of  
5 authority for DHS. This is a provision that  
6 applies as all agree to anyone who is in the  
7 United States, and so that means --

8 JUSTICE BREYER: Yeah, but these are  
9 people coming to the border. I thought 1226(a)  
10 does just what you say, it applies to people who  
11 are already here. And I didn't think --

12 GENERAL PRELOGAR: Yeah. But that  
13 applies --

14 JUSTICE BREYER: -- therefore, it  
15 applied to this case particularly because I  
16 think, here, we're dealing with people who come  
17 up to the border. Am I -- tell me why I'm wrong  
18 on that.

19 GENERAL PRELOGAR: You're wrong on  
20 that because DHS's long-standing interpretation  
21 has been that 1226(a) applies to those who have  
22 crossed the border between ports of entry and  
23 are shortly thereafter apprehended. So that's  
24 an important category of the group of  
25 non-citizens that we're talking about here.

1           And it memorialized that understanding  
2           in regulations shortly after IIRIRA was enacted,  
3           and as well that has been the agency's  
4           consistent interpretation across the -- the  
5           subsequent 25 years.

6           JUSTICE KAVANAUGH: The October memo  
7           does not rely on 1226.

8           GENERAL PRELOGAR: Justice Kavanaugh,  
9           I -- I -- I think that the October memo, of  
10          course, wasn't focused on any of these issues  
11          about detention or release because the Secretary  
12          was making a judgment about whether to continue  
13          with MPP, and that was his policy judgment  
14          weighing all of the costs and benefits of the  
15          program.

16          JUSTICE KAVANAUGH: Now, in the  
17          section about the relationship between MPP and  
18          statutory mandates, it was all about significant  
19          public benefit under the parole authority.

20          GENERAL PRELOGAR: That's right, that  
21          he discussed that at length because that is an  
22          important source of DHS's authority here. I  
23          believe he also referred to the authority that's  
24          conferred by Section 1226(a).

25          JUSTICE BREYER: I need to know this

1 for this reason, that I -- I think -- suppose we  
2 do exactly what you suggested we might do, "may"  
3 means may. Okay? End of the matter.

4 Then the thing goes back. At that  
5 point, I'm guessing, but somebody might say,  
6 okay, "may" means may. You don't have to send  
7 them back to Mexico, but you do have to detain  
8 them. No, we don't, because of the two statutes  
9 you mentioned. Yes, you do, because they don't  
10 apply. There will be an argument.

11 I don't know if, one, we should  
12 foresee that argument and take a view or, two,  
13 we should foresee that argument and not take a  
14 view or, three, we should just forget about that  
15 and just say whether "may" means may.

16 GENERAL PRELOGAR: I think that is the  
17 simplest --

18 JUSTICE BREYER: What's your view?

19 GENERAL PRELOGAR: That is the  
20 simplest way to resolve this case. We certainly  
21 agree that "may" means "may." And that's really  
22 the only issue that's directly teed up for this  
23 Court's review in light of the injunction.

24 We are actively litigating those other  
25 issues in other cases brought by states with

1 respect to our interpretation of 1225(b)(2)(A),  
2 with respect to our application of the release  
3 authorities, and I think that that is a better  
4 context where it's not essentially relying on  
5 those release and detention authorities as a  
6 collateral way to force the reimposition of MPP.

7 JUSTICE KAGAN: But --

8 CHIEF JUSTICE ROBERTS: Your --

9 JUSTICE KAGAN: -- General, I could --

10 CHIEF JUSTICE ROBERTS: Go ahead.

11 JUSTICE KAGAN: I could understand  
12 General Stone saying back to you, well, you  
13 know, "may" means "may," but you have to read  
14 that "may" within the entire statutory structure  
15 and within the set of authorizations that you  
16 have.

17 And, essentially, the "may" would  
18 become a "shall" if you couldn't meet the  
19 obligations -- if you -- if -- if you were using  
20 completely residual discretionary authority,  
21 right, so that if you couldn't parole people  
22 under 1182, give them bond under whatever that  
23 provision is, et cetera, et cetera, and you were  
24 just throwing up your hands in the air and  
25 saying, well, we have to do something, so now



1 we're operating outside the statute entirely, I  
2 could see him saying, well, in that case, the  
3 "may" becomes a "shall." It's kind of a  
4 springing mandate if you can't satisfy your  
5 obligations in another way.

6           So I have to think -- am I wrong about  
7 this -- that your argument depends on the fact  
8 that you say you are satisfying your obligations  
9 in other ways. If you weren't, wouldn't you  
10 have a harder argument?

11           GENERAL PRELOGAR: No, I don't think  
12 so. I think that's actually an easy argument in  
13 this case. We certainly do think that we're  
14 satisfying those other provisions, so the  
15 predicate of Texas's suit fails here.

16           But even if this Court disagreed or  
17 thought there was room for doubt, there is no  
18 way to interpret Section 1225(b)(2)(C) to be  
19 that kind of springing mandate.

20           First, there's a textual problem.  
21 Congress said "may return." On their view, it's  
22 been mandatory from the get-go and at all times  
23 thereafter, and it would be inexplicable for  
24 Congress to use that discretionary language if  
25 it wanted to have detention capacity be the

1 trigger.

2           Second, I would point to the  
3 significant foreign policy consequences that are  
4 implicated by that interpretation. We cannot  
5 unilaterally implement foreign -- contiguous  
6 territory return. Instead, each exercise of  
7 this authority requires ongoing negotiation and  
8 cooperation and coordination with Mexico. And  
9 there again, it's implausible that Congress  
10 would have demanded that we do that, that the  
11 executive branch engage in those negotiations,  
12 without saying so expressly and just using "may  
13 return."

14           Third, I'd point to the history. No  
15 one at any point in time during the legislative  
16 drafting acknowledged that the -- the provision  
17 would have this kind of effect that they're  
18 attributing to it. Instead, the history is  
19 clear that this was just responding to that BIA  
20 decision and overturning the conclusion that the  
21 executive's prior discretionary use of the  
22 authority required authorization with no  
23 indication that Congress was changing it into a  
24 mandate.

25           And then, fourth and finally, I would

1 point to the consistent executive interpretation  
2 of this provision. No one's interpreted the INA  
3 this way before. Every presidential  
4 administration has understood this to just be a  
5 purely discretionary authority. That goes for  
6 the prior administration. On their view, MPP  
7 itself would be unlawful because it doesn't  
8 maximize the use of contiguous territory return.

9 JUSTICE ALITO: Part of --

10 CHIEF JUSTICE ROBERTS: General, your  
11 interpretation of the statute, I think, is  
12 entirely manipulable. You use -- the -- the  
13 statute has what seems to be a serious  
14 limitation on parole, significant public  
15 benefit.

16 And yet you say that goes down due to  
17 the fact that you have limited detention. So --  
18 and you have limited detention. It's not like  
19 you're going to hit a number there which is  
20 going to take care of everything. More than  
21 30,000 are going to come in at a time, and you  
22 say, well, it's not -- it's actually less than  
23 that because we have to save a number of beds --  
24 beds for this.

25 So you can have a phrase in the

1 statute mean what you want it to mean to  
2 accommodate as many people at the border by  
3 releasing them as -- as you want, right? There  
4 is no limit, as you read the statute, to the  
5 number of people that you can release into the  
6 United States, right?

7           GENERAL PRELOGAR: Congress did not  
8 create a limit in that statute, but, of course,  
9 it's Congress itself that's making these  
10 appropriations decisions about how much bed  
11 space to give us.

12           CHIEF JUSTICE ROBERTS: Well, right.  
13 But -- but -- but, if Congress wants there to be  
14 the release of a significant or whatever number,  
15 all they have to do is not fund the detention  
16 facilities to keep the number low, and then you  
17 would have whatever authority you want to -- to  
18 extend the number of people released into the  
19 United States to as great an extent as you want.

20           And you say, well, we're not going to  
21 -- don't worry about MPP. And, you know, maybe  
22 that's your decision, but you're sort of making  
23 it even harder for you to do anything other than  
24 release the people encountered at the border  
25 into the United States --

1                   GENERAL PRELOGAR: Well, this is a  
2     statutory --

3                   CHIEF JUSTICE ROBERTS: -- even  
4     though -- I don't mean to repeat myself, but  
5     it's a significant question -- even though the  
6     statute that allows you to release people into  
7     the United States says there has to be a  
8     significant public benefit.

9                   And you say there's a significant  
10    public benefit when there aren't enough  
11    people -- there aren't enough beds in detention.  
12    So there's no limit at all on how many you can  
13    release into the United States.

14                  GENERAL PRELOGAR: Well, I think the  
15    inherent limit, of course, is the detention  
16    capacity. Congress didn't define that as a  
17    significant public interest.

18                  CHIEF JUSTICE ROBERTS: Well, yeah.  
19    No, I'm putting that to one side because  
20    everybody knows that's not nearly enough beds to  
21    take care of the problem.

22                  GENERAL PRELOGAR: That's right. And  
23    -- and this has been the agency's --

24                  CHIEF JUSTICE ROBERTS: If you don't  
25    think it's a problem, you don't want to have --

1 you should add more beds anyway.

2 GENERAL PRELOGAR: Well, this is the  
3 agency's consistent interpretation of the parole  
4 provision. Congress has never disapproved it.  
5 It has known that DHS is exercising its parole  
6 authority that way.

7 But, Mr. Chief Justice, to the extent  
8 that the impetus for this question is the sense  
9 that contiguous territory return could take care  
10 of that issue, I want to forcefully push back on  
11 that idea because contiguous territory return  
12 cannot be the solution here. Over the life of  
13 the program in the prior administration, only  
14 6.5 percent of individuals we encountered at the  
15 border were enrolled in MPP.

16 It has inherent constraints. The  
17 statute limits who can be enrolled in MPP. You  
18 have to be arriving by land from contiguous  
19 territory. We're constrained by what Mexico is  
20 willing to consent to with respect to who it  
21 will allow to be enrolled into the program, and  
22 it's placed important limitations on our  
23 exercise of that.

24 There were entire categories of people  
25 who were excluded from MPP, like all Mexican

1 nationals. Our international commitments, our  
2 non-refoulement obligations, likewise provide a  
3 constraint here.

4 So, to the extent that you are  
5 concerned about how parole operates, that  
6 concern doesn't go away based on implementing  
7 MPP. And, in fact, in the prior administration,  
8 when MPP was in full force, still DHS was  
9 implementing its parole decisions this way, as  
10 it's always done consistently for the past 25  
11 years.

12 JUSTICE SOTOMAYOR: Counsel --

13 JUSTICE BARRETT: Do you --

14 JUSTICE SOTOMAYOR: I'm sorry,  
15 General.

16 JUSTICE BARRETT: Well, I don't want  
17 to -- I know we were into seriatim time, so I  
18 don't want to --

19 CHIEF JUSTICE ROBERTS: No, not just  
20 yet. Justice Sotomayor?

21 JUSTICE SOTOMAYOR: General, going  
22 back to Justice Breyer's question, assuming just  
23 for the sake of argument that there's no  
24 injunctive power in the court below the way  
25 you're arguing, how would we ever reach the

1 question that Justice Breyer raised, which is  
2 the district court being wrong on its assumption  
3 that this "may" is a "shall"? How do we reach  
4 that question if the injunction was erroneously  
5 issued?

6 GENERAL PRELOGAR: We think that  
7 question would be appropriately reached in the  
8 case of an individual non-citizen. And there  
9 is, of course, jurisdiction preserved to reserve  
10 those kinds of claims in those types of cases.  
11 This was Congress channeling the review to those  
12 cases in order to --

13 JUSTICE SOTOMAYOR: So you would say  
14 under an -- we should just say an injunction of  
15 any kind is improper?

16 GENERAL PRELOGAR: Yes. We think that  
17 that is the correct interpretation of  
18 1252(f)(1).

19 JUSTICE SOTOMAYOR: Would we need to  
20 reach the declaratory judgment issue in your  
21 mind, or should we just simply address whether  
22 what's before us, which is the injunction, that  
23 it's improper?

24 GENERAL PRELOGAR: I think, here, the  
25 Court could just reach the injunction and



1 declare that that's improper.

2 JUSTICE BARRETT: General Prelogar,  
3 can I ask you a question about significant  
4 public benefit? You've identified the number of  
5 beds and the need to prioritize as the public  
6 benefit that DHS is taking into account and --  
7 when deciding whether to parole.

8 Can you -- is it your position that  
9 you cannot consider the significant public  
10 benefit in not releasing into Mexico? In other  
11 words, that you're only looking at the  
12 significant public benefit of releasing into the  
13 United States but not in choosing that option  
14 versus the other?

15 GENERAL PRELOGAR: So I think, with  
16 respect to kind of how this is working on the  
17 ground, the -- the individual immigration  
18 officers -- and there are thousands of them who  
19 would be responsible for making these decisions  
20 -- are -- are focused on the actual detention  
21 capacity at that moment.

22 With respect to the broader question,  
23 though, about using contiguous territory return  
24 versus releasing into the interior, I think  
25 that's ultimately a policy judgment for the

1 Secretary. It's not as though return to Mexico  
2 is costless. It involves an enormous investment  
3 of our diplomatic resources and our engagement  
4 with that bilateral negotiation.

5 And so I think that the Secretary is  
6 well justified in thinking that in light of the  
7 tremendous costs that he identified with the  
8 program and in light of his determination that  
9 it actually detracted from other strategies and  
10 programs he thought would be more effective in  
11 stemming the tide of irregular migration, that  
12 he was well justified in making that policy  
13 determination.

14 JUSTICE BARRETT: Let me go back --

15 CHIEF JUSTICE ROBERTS: Thank you --

16 JUSTICE BARRETT: -- to the individual  
17 -- oh, sorry.

18 CHIEF JUSTICE ROBERTS: Go ahead,  
19 finish up.

20 JUSTICE BARRETT: For the individual  
21 determinations. So you would say that it is not  
22 DHS's practice or responsibility with respect to  
23 any individual non-citizen to decide the  
24 significant public benefit of paroling into the  
25 United States versus sending that particular

1 non-citizen back to Mexico?

2 GENERAL PRELOGAR: Well, while MPP was  
3 operational -- I should -- I should take the  
4 opportunity to clarify -- my understanding is  
5 that the officers were making those kinds of  
6 discretionary decisions, and, in fact, the vast  
7 majority of -- of -- of non-citizens who were  
8 eligible for MPP, or at least a substantial  
9 number, were actually diverted out of the  
10 program.

11 And that's why the -- the numbers are  
12 only about 6.5 percent of those we encountered  
13 at the border were enrolled in the program. So  
14 there was discretion to not put an individual in  
15 MPP while the program was in effect.

16 JUSTICE SOTOMAYOR: Counsel --

17 CHIEF JUSTICE ROBERTS: Thank you.

18 Thank you, General. We'll get back to you.

19 Justice Thomas, anything further?

20 Justice Breyer?

21 Justice Alito?

22 JUSTICE ALITO: The parole decisions  
23 are supposed to be made on a case-by-case basis,  
24 right?

25 GENERAL PRELOGAR: That's correct.

1 JUSTICE ALITO: And the statistics  
2 that you cite and the statistics that the  
3 Respondents provided in their brief about the  
4 number of individuals who are being paroled  
5 every month are -- are very high.

6 So what does it mean for there to be a  
7 case-by-case determination? Let's think of --  
8 think of the example of people who want to go to  
9 a baseball game at Nationals' Park.

10 So they all line up, they try to get  
11 through the turnstile, and somebody says -- goes  
12 through a little checklist. Do they have a  
13 ticket? Yes. Do they have a gun? No gun. Do  
14 they have alcohol? No alcohol. Something to  
15 throw on the field? Nothing to throw on the  
16 field. Fireworks? Nothing. No fireworks,  
17 fine.

18 Is that a case-by-case determination  
19 in your -- in your view?

20 GENERAL PRELOGAR: I think that that  
21 would satisfy the --

22 JUSTICE ALITO: And that's what you're  
23 doing.

24 GENERAL PRELOGAR: -- legal  
25 requirement.

1 JUSTICE ALITO: That's basically what  
2 you're doing. You've got a little checklist and  
3 you're going -- and, you know, boom, boom, boom,  
4 and that's how you can process. Maybe you're  
5 right, but that's -- that's what you think  
6 Congress meant by a case-by-case determination?

7 GENERAL PRELOGAR: Yes, we think that  
8 Congress required us to give individualized  
9 attention to each non-citizen and make an  
10 assessment about the categories like flight risk  
11 and security concern, and DHS is doing that on  
12 the ground.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Sotomayor?

15 JUSTICE SOTOMAYOR: Counsel, before  
16 the MPP program at issue, I thought that there  
17 were a lot fewer people, but there were people  
18 who were sent back under MPP, correct?

19 GENERAL PRELOGAR: I wouldn't call  
20 that MPP. That's kind of the broad programmatic  
21 use of contiguous territory return. I think  
22 what you're referring to was the executive's  
23 prior practice on an ad hoc basis of sometimes  
24 returning individuals, usually monthly.

25 JUSTICE SOTOMAYOR: Then I understood

1 this wrong? I thought that each asylum officer,  
2 there were two -- I understood from my reading  
3 there were two criterias for MPP. There was a  
4 set of criteria that's different than the parole  
5 criteria and that asylum officers determined  
6 whether to exercise -- if the person fit below  
7 the MPP criteria, they would be sent back.

8 GENERAL PRELOGAR: Yes, I apologize.  
9 I thought you were referring to the prior  
10 executive practice before MPP itself was  
11 implemented. But, yes, under MPP, there was  
12 that discretion to choose whether to enroll  
13 individuals who were eligible in the program.  
14 And, of course, there were entire categories of  
15 individuals who were excluded from eligibility.

16 JUSTICE SOTOMAYOR: Under the prior  
17 administration?

18 GENERAL PRELOGAR: That's correct, and  
19 under this administration as well.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?

21 JUSTICE KAGAN: I have two rather  
22 different questions.

23 First, to go back to Justice Alito's  
24 question when he said aren't you really just  
25 using a checklist. And then, at the end of your

1 answer, you said, well, you know, what we're  
2 doing with respect to each individual is trying  
3 to assess flight risk and danger.

4 So that is not just a, like, are you a  
5 flight risk check, right? That involves  
6 something or other. So what do you do with this  
7 many people? I mean, you have a lot of officers  
8 too, but what do you do to determine flight risk  
9 and danger?

10 GENERAL PRELOGAR: So this relates to  
11 the colloquy I was having with Justice Sotomayor  
12 where we conduct criminal records checks. We  
13 take biometric records checks. We assess ties  
14 to the community and -- and assess other factors  
15 that might bear on the flight risk question.

16 And I do want to push back on the idea  
17 that this is anything like just formality, going  
18 through a checklist. DHS takes seriously its  
19 obligation to responsibly allocate the limited  
20 law enforcement resource here of detention beds.  
21 And it's not as though it's not giving attention  
22 to each individual non-citizen to make these  
23 determinations.

24 JUSTICE KAGAN: Okay. My -- my second  
25 question takes you to someplace that we -- we

1 have not been, which is the second question  
2 presented, and I just wanted to ask, there's --  
3 there's a lot of skepticism on the Fifth  
4 Circuit's part that there was a second  
5 assessment of this question.

6 In other words, the Fifth Circuit  
7 said, oh, you're just sort of adding stuff to  
8 the first one. So -- and you say, no, this was  
9 an independent assessment.

10 I mean, how are we to make that  
11 decision? What is -- what do you look for in  
12 determining whether an assessment is new?

13 I mean, the DACA case basically points  
14 to two paths that the agency can take, and one  
15 is just to kind of use the initial assessment as  
16 a base and -- and -- and -- and add some stuff  
17 maybe, and the other is no, you can start anew,  
18 start afresh.

19 How do we decide whether you've  
20 started afresh?

21 GENERAL PRELOGAR: Well, I think you  
22 look in the first instance to the agency action  
23 itself. And -- and, here, the October 29  
24 termination decision was by its own terms a new  
25 agency action. The Secretary said, I hereby



1 terminate MPP. And I think that that's  
2 fundamentally different than the situation the  
3 Court confronted in the DACA case, where the  
4 agency action by its own terms just supplied  
5 additional reasoning and said this is not a new  
6 decision, this is additional context for a  
7 decision that was made long ago.

8           But, here, Secretary Majorkas did the  
9 opposite. He took Option 2 in Regents. He  
10 accepted the remand. He engaged in a thorough  
11 process of reconsideration. He -- he showed his  
12 work. He described in considerable detail  
13 exactly what he did, the meetings he held with  
14 stakeholders, those in border communities, state  
15 and local law enforcement officials, advocates  
16 and proponents for and against MPP. He  
17 described the material he had consulted, the  
18 congressional records, the litigation records,  
19 all of the agency internal memoranda.

20           And then, over dozens of pages, he  
21 explained the considerations he had taken into  
22 account and the conclusions he reached. And I  
23 think, on that record, this doesn't present a  
24 difficult question because there's no doubt that  
25 that qualifies as a new agency action.

1                   And the Fifth Circuit's contrary  
2 conclusion rested on this inapposite reopening  
3 doctrine from the D.C. Circuit about statute of  
4 limitations issues that Respondents aren't even  
5 seeking to defend or mention in this Court. So  
6 I think whatever hard questions could  
7 theoretically arise, this isn't one of them.

8                   CHIEF JUSTICE ROBERTS: Justice  
9 Gorsuch?

10                   Justice Kavanaugh?

11                   JUSTICE KAVANAUGH: I have several  
12 questions. If you had sufficient detention  
13 capacity, could you still exercise your  
14 discretion to parole people into the United  
15 States?

16                   GENERAL PRELOGAR: I think, at that  
17 point, we couldn't count as a significant public  
18 interest any resource constraints because, under  
19 the hypothetical, there wouldn't be those  
20 resource constraints.

21                   That wouldn't, of course, supplant  
22 the -- the authority that DHS has to take into  
23 account other humanitarian reasons or other  
24 significant public interests, but I -- I  
25 certainly agree that at that juncture, we

1 wouldn't be relying on these allocation of  
2 resource constraints for purposes of -- of  
3 complying with that requirement.

4 JUSTICE KAVANAUGH: And why is that?

5 GENERAL PRELOGAR: Because, at that  
6 point, there wouldn't be a significant public  
7 interest in trying to preserve the limited  
8 resource.

9 JUSTICE KAVANAUGH: Why would you have  
10 to detain them, though?

11 GENERAL PRELOGAR: Well, as I said  
12 before, we understand Section 1225(b) (2) (A) to  
13 set forth Congress's expectation that we should  
14 use the detention capacity that we've been  
15 afforded.

16 So we're not saying that's a "may" or  
17 that Congress was neutral on the issue. We're  
18 simply pointing to the fact that, in this  
19 circumstance, where Congress hasn't given us the  
20 bed space and no one disputes that, it's not  
21 only permissible but responsible for DHS to take  
22 that into account in its detention and release  
23 decisions.

24 JUSTICE KAVANAUGH: Okay. So you  
25 agree that Congress has expressed a preference

1 for detention where -- where that's available?

2 GENERAL PRELOGAR: Yes, we do. We  
3 don't think that that is a -- a "may" or simply  
4 neutrality on the issue.

5 JUSTICE KAVANAUGH: Okay. Switching  
6 gears, I don't know if this is before us, so my  
7 first question is, is the State Farm issue with  
8 respect to the October memo before us or not?  
9 Because, if so, I have a lot of State  
10 Farm-related questions to ask you. I'll  
11 probably ask you them anyway. But is this  
12 before us or not?

13 GENERAL PRELOGAR: So we didn't ask  
14 this Court to review the substance of the  
15 October 29 memorandum, in recognition that the  
16 lower courts haven't considered that issue.  
17 Respondents did brief that issue at the -- the  
18 end of their brief, and we responded to that in  
19 our reply brief.

20 We think, if the Court reaches that  
21 issue, it should clearly reject their arguments,  
22 their exceedingly weak arguments, that this  
23 wasn't reasoned decision-making, but I, of  
24 course, acknowledge that the lower courts  
25 haven't had an opportunity to consider that

1 issue.

2                   And I would say that I think the  
3 problem that we're -- we're trying to address  
4 here and the thing we're asking the Court to do  
5 is reverse the Fifth Circuit's flawed conclusion  
6 that this just isn't an agency action at all.

7                   JUSTICE KAVANAUGH: Okay. On the --  
8 if -- if State Farm is before us -- if it's not  
9 before us here, when will it be before us?

10                  GENERAL PRELOGAR: So we fully expect  
11 that Texas will amend its complaint back in  
12 district court and we'll be litigating that  
13 issue then.

14                  JUSTICE KAVANAUGH: Okay. Well, I'll  
15 ask a couple just in --

16                  GENERAL PRELOGAR: Although, if you  
17 are interested in reaching it, then I'm happy to  
18 defend it.

19                  JUSTICE KAVANAUGH: Well, I'll just  
20 ask a couple questions in case we reach it.  
21 There were two parts of the explanation in the  
22 October memo that jumped out to me as  
23 potentially State Farm-type issues.

24                  One is that you said -- the -- the  
25 memo says that the choice to bring people into

1 the country is because, otherwise, other more  
2 dangerous people would come into the country.  
3 In other words, you have a choice between the  
4 less dangerous or more dangerous coming into the  
5 country. That's on page 28 of the memo.

6 And that strikes me as a false choice  
7 because the other option, of course, is to send  
8 people to Mexico. So that's one issue.

9 The other issue is I don't see -- and  
10 this follows up on Justice Barrett's questions  
11 -- any real explanation in the October memo of  
12 what "public" means and "significant public  
13 benefit." Is that the American public? Is that  
14 the non-citizen public? Who is that?

15 And if it's the American public,  
16 there's no real explanation of how the public is  
17 benefitted by more people coming into the United  
18 States who are not lawfully admitted into the  
19 United States rather than trying, if feasible,  
20 for some of those people to remain in Mexico.

21 I'm not saying what the best exercise  
22 of policy discretion is there. I'm saying I  
23 think the October memo doesn't quite get into  
24 what is public benefit, what does it mean, how  
25 are we supposed to assess that.

1           GENERAL PRELOGAR:  So, if I can, I  
2    think, actually, the October 29 memo largely  
3    addressed both of those issues by reference to  
4    the concerns about detention capacity and their  
5    recognition that DHS has not been appropriated  
6    to detain each and every non-citizen we  
7    encounter by -- by orders of magnitude.

8           And so what Secretary Majorkas was  
9    acknowledging there is that in applying those  
10   release authorities -- and it's not just parole,  
11   of course, but it's also bond under 1226(a) --  
12   it's appropriate to take account of that limited  
13   resource.

14           With respect to how that intersects  
15   with the use of contiguous territory return,  
16   Secretary Majorkas gave that sustained attention  
17   in the memorandum.  He explained that there were  
18   enormous costs associated with maintaining that  
19   program, and with respect to our diplomatic  
20   negotiations with Mexico, that we had to divert  
21   resources away from other types of bilateral  
22   negotiations and cooperation we wished to  
23   pursue, that it also drained resources with  
24   respect to how DHS can pursue some other  
25   policies, and -- and that for all of those

1 reasons, on balance, he found, after giving the  
2 issue sustained attention, that MPP just wasn't  
3 worth the tremendous costs that it imposed.

4           And if I could make one final point to  
5 this line of questioning, I think, again, I want  
6 to make clear that it's not as though, to the  
7 extent you have concerns about significant  
8 public benefit, that MPP cures those concerns.  
9 There are inherent limits on the number of  
10 people we can enroll. Mexico now, under the  
11 court-ordered injunction and reimplementation of  
12 MPP, is requiring that we process those removal  
13 cases within 180 days, and -- and that's a big  
14 change from how MPP operated before because it  
15 didn't function as intended. There were huge  
16 backlogs. People remained in Mexico far longer  
17 than anyone had anticipated. There were  
18 horrible problems of predatory violence. And to  
19 honor that commitment to Mexico, we are very  
20 much constrained in the number of people we can  
21 enroll in the program.

22           JUSTICE KAVANAUGH: And I think this  
23 is Justice Barrett's earlier question. I want  
24 to try to get a precise answer on this. In  
25 considering significant public benefit, is it



1 appropriate for the Secretary to consider the  
2 possibility of some people remaining in Mexico  
3 against the possibility of all the people for  
4 whom there is not detention capacity coming into  
5 the United States?

6 GENERAL PRELOGAR: Yes, I think that  
7 the Secretary could take that consideration into  
8 account. Here, I think that he analyzed at  
9 length the tremendous cost imposed by MPP and  
10 keeping this program up and running. He  
11 identified other strategies that he wished to  
12 pursue that he thought would be --

13 JUSTICE KAVANAUGH: Do you think --

14 GENERAL PRELOGAR: -- more effective  
15 than MPP.

16 JUSTICE KAVANAUGH: -- do you think  
17 the memo sufficiently grapples with what the 19  
18 states' amicus brief asserts with respect to the  
19 costs to the states and to the people in the  
20 United States in terms of increased  
21 expenditures? Again, not saying which way that  
22 should come out. Do you think that's  
23 sufficiently addressed in the October memo?

24 GENERAL PRELOGAR: I do think it is.  
25 The Secretary took seriously the concern that

1 the district court had raised that in the June 1  
2 termination decision he hadn't appropriately  
3 accounted for the asserted reliance interests of  
4 states.

5 There was an entire section of the  
6 October 29 memorandum where the Secretary worked  
7 through all of the concerns the states had  
8 raised, and I think that that certainly  
9 satisfies the APA's requirement of reasoned  
10 decision-making.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Barrett?

14 JUSTICE BARRETT: Thank you, Justice  
15 Kavanaugh. You did a better job asking my  
16 questions than I did before.

17 General Prelogar, I just want to  
18 follow up one last thing. The -- the question  
19 that I have is one of statutory interpretation  
20 and what "significant public benefit" means.  
21 And as you say, Congress has expressed a  
22 preference for detention, and capacity is -- is  
23 a limit on that and -- and it seems like the  
24 primary driver of your assessment of significant  
25 public benefit.

1           I guess my question is, on the  
2 case-by-case basis, when DHS assesses whether  
3 any individual non-citizen -- whether there  
4 would be a significant public benefit to release  
5 and parole rather than send back to Mexico or  
6 other contiguous territory, what is the benefit?  
7 Is that a limit -- you know, the Chief Justice  
8 said that if you're only considering capacity,  
9 that's a pretty capacious term and there might  
10 not be any limit.

11           So do you have to -- do you have to  
12 take into account as a matter of statutory  
13 interpretation the public benefit, the  
14 significant public benefit of choosing that  
15 option, the parole into the United States  
16 option, rather than sending back to Mexico or  
17 whatever contiguous territory?

18           GENERAL PRELOGAR: Well, I -- I think  
19 that Congress, in enacting these various  
20 provisions, in no way signaled that it was  
21 necessary to think about contiguous territory  
22 return with respect to each of these parole  
23 decisions.

24           Again, I think that Congress would not  
25 have used the unexplained and purely

1 discretionary "may return" language if it meant  
2 to try to transform how the government was  
3 thinking about its parole determinations.

4           And so, you know, here, I think that,  
5 on the ground, DHS immigration officers are  
6 looking at each individual non-citizen to make  
7 those judgments, and in -- in making those  
8 judgments, it's not even clear that there would  
9 be an alternative to return to Mexico for all of  
10 the reasons I listed before, because of the  
11 exclusions under the program, the  
12 non-refoulement obligations, the fact that  
13 Mexico would never agree or consent to accept  
14 everyone that we are currently paroling.

15           So, for all of those reasons, I just  
16 don't think the statutory structure can work  
17 that way.

18           JUSTICE BARRETT: And does that go  
19 back to your point that we shouldn't look at  
20 this when you -- you were responding to Justice  
21 Breyer earlier saying that you would resist the  
22 characterization of this as a unit because each  
23 of these provisions was passed at a different  
24 time. Is that driving part of your answer here,  
25 that significant public benefit shouldn't -- we

1 shouldn't interpret that as any kind of  
2 instruction to the agency to take into account  
3 its various options because each of these  
4 provisions, you're arguing, should be more  
5 stand-alone?

6           GENERAL PRELOGAR: I think that is  
7 absolutely part of it, that it's wrong to think  
8 about 1225 as being that kind of self-contained  
9 unit. And -- and I would point as well to the  
10 fact that we know from the statutory history  
11 exactly what Congress was aiming at with the  
12 contiguous territory return provision. It  
13 wasn't weighing in on how to make those kinds of  
14 judgments about significant public benefit.

15           Instead, it was simply trying to  
16 reverse that BIA decision that had disapproved  
17 the prior kind of ad hoc executive practice of  
18 occasionally returning some non-citizens to  
19 contiguous territory.

20           JUSTICE BARRETT: Thank you.

21           CHIEF JUSTICE ROBERTS: Justice  
22 Breyer?

23           JUSTICE BREYER: Just -- I mean, it  
24 may well be wiser just to focus on "may," okay,  
25 but just -- it might happen that we go beyond

1 that and consider this later memo, the October  
2 memo, et cetera. What's making me worried about  
3 that -- I'm not sure if you want to say -- and  
4 you don't have to -- but what is the  
5 Administration's view of the detention versus  
6 the parole? That is, has the Administration  
7 asked Congress for more money for detention?  
8 What -- and how is that relevant? That's  
9 floating around in my mind. So don't answer if  
10 you don't want to. If you have something you  
11 want to say on it, do.

12 GENERAL PRELOGAR: Well, Congress is,  
13 of course, responsible for making those  
14 appropriations decisions. And the -- the  
15 government has submitted budget requests to  
16 Congress, trying to balance a variety of  
17 different considerations here. Among other  
18 things, we asked for more resources for  
19 immigration judges, who could speed the  
20 processing of cases. That would allow us to  
21 detain more individuals with fewer beds because  
22 we'd be able to remove them more quickly by  
23 resolving their cases more quickly.

24 We've also asked for funding for  
25 alternatives to detention, which would help us

1 supervise a greater number of people and ensure  
2 that they're not absconding, that they appear  
3 for their hearings. We've asked for more  
4 resources for enforcement at the southwest  
5 border, to hire additional officers.

6 And so all of these ways, I think that  
7 we are seriously engaging with whatever  
8 challenges exist at the border.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 General.

11 General Stone.

12 ORAL ARGUMENT OF JUDD E. STONE, II

13 ON BEHALF OF THE RESPONDENTS

14 MR. STONE: Thank you, Mr. Chief  
15 Justice, and may it please the Court:

16 This case presents a procedural  
17 question about the October memoranda's effect on  
18 Petitioners' appeal and a substantive question  
19 about Petitioners' obligations under  
20 Section 1225(b) (2).

21 The answer to the procedural question  
22 is straightforward. The Fifth Circuit announced  
23 only two holdings regarding the October  
24 memoranda's effect on that appeal. The first is  
25 that the termination of MPP via the October

1 memoranda did not deprive the June termination  
2 of its status as final agency action for  
3 purposes of that court's jurisdiction. The  
4 second is that the Fifth Circuit concluded that  
5 those memoranda did not moot this case.

6           Petitioners did not challenge the  
7 first in their opening brief, and thus Texas did  
8 not address the reopening doctrine, and  
9 Petitioners have affirmatively disclaimed any  
10 challenge to the Fifth Circuit's mootness  
11 holding in their reply brief. Because  
12 Petitioners challenged neither holding, neither  
13 -- the October memoranda provide no basis to  
14 disturb the judgment.

15           Petitioners instead asked this Court  
16 to evaluate the merits of potential APA  
17 challenges to the October memos in the first  
18 instance and without an administrative record  
19 and then to decide that those memos satisfy the  
20 district court's injunction. This is not the  
21 proper forum for Petitioners to initially seek  
22 such relief.

23           This Court should also affirm the  
24 Fifth Circuit on the substantive question of  
25 Petitioners' detention obligations under 1225.



1 Jennings held that executive officials must  
2 detain aliens who fall within 1225(b) (2)'s  
3 scope. And that holding all but forecloses the  
4 executive -- Petitioners' arguments under Castle  
5 Rock and past practice that say subsection  
6 (b) (2) (A) is discretionary.

7 There are just two other ways to  
8 satisfy this detention mandate. This Court in  
9 Jennings mentioned one, parole under  
10 Section 1182(d) (5). The other is to return,  
11 rather than to detain, certain aliens under  
12 1182(b) (2) (C).

13 The Fifth Circuit concluded that the  
14 executive was not permitted to rescind MPP and  
15 thus to increase its total number of violations  
16 of Section 1225(b) (2) (A)'s mandate in lieu of  
17 exercising that authority. If this Court  
18 agrees, it need go no further.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: General Stone, the --  
21 I know there's not much briefing, but I would  
22 like your reaction to the 1252(f) (1) problem  
23 that we've discussed.

24 MR. STONE: Certainly, Your Honor. In  
25 candor, I can only give general observations

1 because the United States confined that to a  
2 footnote and we viewed it as certainly  
3 inapplicable.

4 That 1252(f)(1) specifically prohibits  
5 the district court from enjoining the operation  
6 or application of the -- of Title 4 of the  
7 Immigration and Nationality Act, our APA  
8 challenge is against their rescission of a  
9 program that would, in fact, exercise their  
10 powers underneath (b)(2)(C).

11 So we see -- in our view, (f)(1) has  
12 just simply nothing -- no role to play here.

13 JUSTICE THOMAS: Well, I don't know  
14 whether we can dispose of it that easily, but  
15 going to the merits, the -- do you think with  
16 your reading of the -- of 1225, do you think  
17 that the MPP as implemented complied with the --  
18 with 1225?

19 MR. STONE: MPP as implemented reduced  
20 the number of violations. It did not fully  
21 satisfy the executive mandate, but so far as it  
22 went, it complied with the executive's  
23 obligations to return rather than detain the  
24 aliens enrolled in MPP.

25 JUSTICE THOMAS: So you could have

1 brought -- you could have brought the same  
2 lawsuit against the last administration under  
3 your reading of 1225?

4 MR. STONE: We could have brought a  
5 related lawsuit, Your Honor. We would still be  
6 required to hew to the Administrative Procedure  
7 Act's limitations, and, at that point, we would  
8 be saying that the Administration was required  
9 to take a certain specific action, which is to  
10 say craft a policy in which they would have  
11 otherwise some discretion about how to use  
12 (b) (2) (A), (b) (2) (C), and 1182. I think that --

13 JUSTICE THOMAS: So has any  
14 administration ever applied -- complied with  
15 1225 under your reading?

16 MR. STONE: I assume not, Your Honor.  
17 Petitioners suggest that no administration, no  
18 executive has fully complied with their  
19 detention obligations. That certainly doesn't  
20 prove that past administrations assumed that  
21 those obligations could be essentially -- could  
22 be shirked in the event that they preferred not  
23 to use one of Congress's allowed statutory  
24 tools, but I have no reason to think that that's  
25 incorrect.

1 JUSTICE THOMAS: But wouldn't --  
2 assuming you're right, wouldn't it be odd for  
3 Congress to leave in place a statute that would  
4 appear to be impossible to comply with?

5 MR. STONE: No, Your Honor. Congress,  
6 as -- as my friends on the other side mentioned,  
7 had this mandatory detention obligation for over  
8 a century. It has added authorities to enable  
9 the executive to attempt to meet it  
10 additionally.

11 Now, to some extent, I think some of  
12 the problem of the question that you're getting  
13 at is what happens when Congress doesn't provide  
14 enough money to be able to actually require that  
15 to be satisfied.

16 Then the executive has to do the best  
17 it can with the obligated -- with the -- with  
18 the amount of money that's been appropriated to  
19 it and the other lawful -- the other lawful  
20 authorities it's been provided.

21 JUSTICE THOMAS: So you're -- we're  
22 just talking then about how much an -- an  
23 administration would be out of compliance  
24 because they would all be out of compliance  
25 under your --

1           MR. STONE: Yes, Your Honor. Each  
2 individual -- each individual who is subject to  
3 mandatory detention, as this Court described it  
4 in Jennings, under 1225(b)(2)(A), who is not  
5 either detained, returned pursuant to (b)(2)(C),  
6 or otherwise paroled on a case-by-case basis is  
7 a separate divisible violation of the  
8 Immigration and Nationality Act.

9           To what extent, again, that there  
10 might be relief in any of those circumstances,  
11 especially if, you know, we're talking about  
12 them individually, that's a different case.

13           JUSTICE SOTOMAYOR: Counsel, I have a  
14 different view of history, and perhaps you'll  
15 deal with mine, and that is that when Congress  
16 knows that something's happening and it responds  
17 or it fails to respond, that that tells us  
18 something about its intent.

19           And the General said that the "shall"  
20 language has been in existence since the turn of  
21 the century and that in no time in American  
22 history has any administration followed your  
23 interpretation and attempted to detain every  
24 single illegal immigrant.

25           On top of that, that they have been

1 paroling or bailing out people in the face of  
2 that language since the turn of the century and  
3 that the most that Congress has done is passed  
4 1182 and 1226(a), the parole and the bail  
5 provisions.

6           And at least in the bail application,  
7 there's no limit. It just says the attorney  
8 general can do this. In the 1182, it has set  
9 parameters, but it didn't set the parameters of  
10 the extensive legislative history you cited in  
11 your brief that it intended to limit the number  
12 to a narrow few. That was the House bill that  
13 was rejected. And it set no limit in 1182.

14           So what do I do if I'm a person who  
15 views that history and says, whatever Congress  
16 didn't do, which is give enough resources or  
17 pass legislation that said be inhumane and  
18 detain every person without any resources, that  
19 we should accept what the practices have been  
20 through generations of presidents?

21           MR. STONE: I think, Your Honor, if I  
22 understand your question correctly, you should  
23 first start with two things.

24           The first is this Court's unequivocal  
25 detention mandate in Jennings that described

1 Section 1225(b) (2) (A). That was only in 2018.  
2 So, to the extent that past administrations  
3 might have thought that there was some room for  
4 discretion on their part, that -- that was a  
5 mandatory provision as something this Court only  
6 resolved --

7 JUSTICE SOTOMAYOR: Just deal -- just  
8 deal with the history involving 1182 and  
9 1226(a).

10 MR. STONE: Certainly.

11 JUSTICE SOTOMAYOR: That's been used  
12 since both provisions were passed and exactly in  
13 this way essentially.

14 MR. STONE: The history of 1182(d) (5),  
15 the specific amendment that -- that Congress  
16 passed to that, previously the section had said  
17 something to the effect of that parole could be  
18 provided by the attorney general if he  
19 determined that there was -- it was in the  
20 public interest.

21 The 1996 amendment specifically  
22 inserted the case-by-case requirement and made  
23 an obligation that there had to be either a  
24 significant public benefit or urgent  
25 humanitarian reason. And so that undoubtedly

1 narrowed the executive's discretion in at least  
2 those two ways.

3           It also had a third component, which  
4 required the duration of that parole be only so  
5 long as that reason or that benefit maintains  
6 its -- kept being the case.

7           So, to illustrate what kinds of  
8 benefits those might be, Petitioners actually  
9 have certain regulations. Let me call to your  
10 attention 8 CFR 212.5, which discusses three  
11 kinds of circumstances among others that might  
12 satisfy as one or the other, one being an  
13 individual for whom essentially they've got a  
14 medical condition wherein detention is simply  
15 incompatible or will worsen it significantly,  
16 another being a pregnant woman, and a third  
17 being an individual who is here to provide  
18 testimony to a legislative adjudicatory or  
19 administrative body.

20           So nothing in how this provision has  
21 been interpreted before, at least through those  
22 regulations, suggests that it would be a  
23 significant public benefit simply to not detain  
24 individuals. And that would be a very strange  
25 result to consider given that Congress has made



1 an unequivocal mandate that it wants detention,  
2 doesn't just prefer it the way Petitioners have  
3 suggested, it has unequivocally mandated that  
4 result.

5 CHIEF JUSTICE ROBERTS: Well, Congress  
6 may want detention, but it hasn't come up with  
7 the money to make -- to provide more beds,  
8 right?

9 MR. STONE: Certainly, Your Honor.

10 CHIEF JUSTICE ROBERTS: I mean, it  
11 gets back to General Prelogar's point, which is  
12 it's not going to make a difference. You can  
13 have MPP and send a limited number of people  
14 back to Mexico, although I gather that requires  
15 the consent of the Mexican government, and I  
16 don't know if that's going to be forthcoming or  
17 not.

18 And then there's a limited number of  
19 beds. I mean, it may mean that it's difficult  
20 for them to comply with the law, but what good  
21 do you think will come from a requirement that  
22 the -- the -- the government keep MPP in place?

23 MR. STONE: Put candidly, Your Honor,  
24 fewer statutory violations of (b) (2) (A) is  
25 better than more. The United States is required

1 to attempt to comply, even in the face of  
2 limited resources, as best it can with the  
3 resources it's been appropriated.

4 JUSTICE BREYER: All right. So you're  
5 --

6 MR. STONE: Of course, the harms --

7 CHIEF JUSTICE ROBERTS: But -- but --

8 MR. STONE: I'm sorry to interrupt.

9 CHIEF JUSTICE ROBERTS: -- the only --  
10 the only point I would make is that that remains  
11 true, but given their termination of MPP, the  
12 most that does as I can see it is make it more  
13 difficult for them to comply with the law.

14 I think it's a bit much for Texas to  
15 substitute itself for the Secretary and say that  
16 you may want to terminate this, but you have to  
17 keep it because it will reduce to a slight  
18 extent your violations of the law.

19 MR. STONE: Certainly not, Your Honor.  
20 And Texas isn't seeking injunctive relief to  
21 require the Administration to take any  
22 particular view -- any particular view of the  
23 immigration policy.

24 Texas is bringing a garden variety or  
25 two garden variety APA claims, one of which are

1 sort of the traditional arbitrary and capricious  
2 that I mentioned earlier during my opening. The  
3 other is that, in fact, this is not consistent  
4 with Section 1225 because this will predictably  
5 -- and this is a finding of fact that was made  
6 by the district court after it was hotly  
7 contested on trial on the merits -- that the --  
8 the rescission of MPP will cause the government  
9 to systemically increase its 1225(a)  
10 obligation -- or its violation of its  
11 1225(b) (2) (A) obligations.

12 That's the reason in the APA sense  
13 that rescission doesn't comply with law.  
14 There's -- now, to speak to the --

15 JUSTICE KAGAN: But, General Stone,  
16 it -- it doesn't really seem like a garden  
17 variety APA thing to -- to basically tell the  
18 executive how to implement its foreign and  
19 immigration policy.

20 And that's what this does. It puts  
21 the United States essentially at the mercy of  
22 Mexico. Mexico knows that, you know, if we come  
23 out your way, well, Mexico has all the leverage  
24 in the world to say: Well, you want to do that?  
25 You want to comply with the Court's order? Here

1 are 20 things that you need to do for us. Or  
2 maybe Mexico says: No, we'd like to see you  
3 squirm and not be able to comply with the  
4 Court's order, and so we won't allow you to do  
5 the program regardless.

6 And either way, I mean, it puts Mexico  
7 in a position vis-à-vis the United States which  
8 I don't think it's really Texas's position to  
9 require.

10 MR. STONE: A couple of points, Your  
11 Honor. The first is whether or not this  
12 required in order to be implemented initially  
13 Mexico's consent was a question of fact  
14 litigated on the merits in the district court.

15 The district court made a finding of  
16 fact, which I don't understand Petitioners to be  
17 challenging for clear error, that the United  
18 States was able to initially implement MPP --

19 JUSTICE KAGAN: Mexico can change --

20 MR. STONE: -- without Mexico's  
21 consent.

22 JUSTICE KAGAN: -- its -- its -- its  
23 mind any day.

24 MR. STONE: Well, certainly, Your  
25 Honor, and to the extent that Petitioners were

1 to show, well, Mexico has changed its mind and  
2 thus we no longer --

3 JUSTICE KAGAN: Or Mexico can change  
4 the conditions that it imposes for consenting  
5 any day. And the point is that requiring the  
6 Secretary to do something like this essentially  
7 says to Mexico: It's all yours. You have  
8 control.

9 I mean, they do have control. You're  
10 -- you're putting the Secretary's immigration  
11 decisions in the hands of Mexico.

12 MR. STONE: I disagree, Your Honor.  
13 Three quick points, the first of which being  
14 this Court recognized in Massachusetts versus  
15 EPA that though the President undoubtedly has  
16 broad foreign policy discretion powers in  
17 dealing with foreign governments, that doesn't  
18 give the President a basis for ignoring a  
19 congressional command.

20 The second is that the district  
21 court's injunction here does not, in fact,  
22 require negotiation with Mexico by its own  
23 terms. In fact, had the President or had the --  
24 had the United States gone to the district court  
25 and sought to modify the injunction on the basis

1 that they can no longer implement MPP in good  
2 faith because of Mexican noncompliance, that  
3 strikes me as a very strong reason by which the  
4 district court would be required in the rubric  
5 of a Rule 50 -- 60(b)(5) motion to permit it to  
6 not have to continue MPP or --

7 JUSTICE KAGAN: Yeah, you're putting a  
8 district court in the position of assessing the  
9 Secretary's determinations about what its  
10 negotiations with Mexico have been like, about  
11 whether Mexico is demanding too much, about  
12 which conditions Mexico is -- I mean, how can a  
13 district court do that?

14 MR. STONE: Certainly not, Your Honor.  
15 Certainly not. The district court would not be  
16 able to sort of supermand over the negotiations  
17 with Mexico. It only has to continue  
18 implementing MPP in good faith.

19 And if it turns out in good faith  
20 because of Mexican non-consent or obstruction  
21 the amount is none, then that's all the  
22 injunction requires in the first place.

23 JUSTICE KAGAN: But -- but somehow the  
24 Secretary has to walk in and convince a district  
25 court that Mexico's conditions are too stringent

1 and it can no longer implement MPP or it can  
2 only implement it with -- you know, to a certain  
3 extent or -- and that that's a daily obligation  
4 on the part of the Secretary, to walk into  
5 district court and say, you know, what Mexico is  
6 asking, what the U.S. Government is willing to  
7 give, et cetera, et cetera.

8 MR. STONE: Certainly not a daily  
9 obligation, Your Honor. I can only imagine the  
10 Secretary having to do anything like that if we  
11 sought to enforce the permanent injunction.

12 JUSTICE BREYER: But I think the  
13 question -- the question is the same question  
14 that I -- that I have. Think of this Court.  
15 And this Court is basically being asked, the  
16 only question I saw relevant here, is what about  
17 the Mexico program? And you have a procedural  
18 argument and you have a substantive argument.  
19 Okay? Let's look at the presumptive argument.

20 Remember -- isn't this true? One,  
21 there are cases written by, if not me, at least  
22 by people I knew in this Court which said, where  
23 Congress and the President want something, the  
24 political branches have greater than ordinary  
25 responsibility for determining immigration

1 policy. And, here, Congress has not  
2 appropriated the detention money.

3 Two, opinions written by people I  
4 actually didn't know, like John Marshall, you  
5 know, have said that where --

6 (Laughter.)

7 JUSTICE BREYER: -- where -- where  
8 Congress -- where foreign affairs is involved,  
9 you don't have to be as -- you can be as  
10 specific as Justice Kagan said or not, but  
11 foreign affairs is involved. And, Judges, this  
12 is above your pay grade, okay? Stay out of it  
13 as much as you can.

14 And, three, they used the word "may."

15 And, four, there is no indication --  
16 this has been in existence for years, passed at  
17 different times, and there is no indication that  
18 Congress tied that "may" which is in Section (C)  
19 to the detention which is in detention (A). You  
20 have created a very good argument. But Congress  
21 nowhere can -- has said anything like that. To  
22 the contrary, they didn't pass the money.

23 So, one, Congress. Two, foreign.  
24 Three, "may." Four, at different times with no  
25 connection. And you heard their policy



1 arguments.

2 Now you may disagree with their policy  
3 arguments, but it's pretty hard to say those  
4 policy arguments are beyond the pale created by  
5 one, two, three, and four. Well, what's your  
6 response?

7 MR. STONE: I may --

8 JUSTICE BREYER: I'm making an  
9 argument, but what's your response?

10 MR. STONE: Respectfully, I may need  
11 help keeping all four questions straight in my  
12 head. So --

13 JUSTICE BREYER: Well, one was foreign  
14 affairs. Two is immigration. Three is the fact  
15 they use the word "may." And four is the fact  
16 that, in fact, it passed at different times and  
17 no evidence of any connection in Congress  
18 between (C) and (A).

19 MR. STONE: The Congress and foreign  
20 affairs piece I think I can address  
21 simultaneously.

22 First of all, again, as I just said to  
23 Justice Kagan, nothing about this injunction  
24 actually requires negotiation with a foreign  
25 power, but in the extent -- that to some extent

1 this Court thought that it did, the -- of  
2 course, the foreign affairs power is shared  
3 between Congress and the President.

4 JUSTICE KAGAN: I'm sorry, I have to  
5 stop you there, General. You can get the other  
6 four questions, but what do you mean it doesn't  
7 require negotiation with the foreign power?  
8 What are we supposed to do? Just drive  
9 truckloads of people into Mexico and leave them  
10 without negotiating with Mexico?

11 MR. STONE: First of all, MPP has to  
12 be continued in good faith, and to the extent  
13 that Mexico does not consent or otherwise  
14 obstruct, again, I think that would be an  
15 excellent reason for the government to go back  
16 to the district court and seek relief from the  
17 injunction.

18 Second, the particular authority on  
19 which MPP relies, (b) (2) (C), was passed in 1996  
20 where Congress was very well aware of the  
21 country through which most inadmissible aliens  
22 arriving on land proceed. And Congress did not  
23 see fit to require the consent of a foreign  
24 country before giving this as a supplemental  
25 tool to the United States to discharge its

1 mandatory (b) (2) (A) options.

2           If that has foreign policy  
3 consequences, that's a function of the fact that  
4 Congress has foreign policy decisions it makes  
5 as well. Congress made one of them through  
6 (b) (2) (C). And all we've asked the district  
7 court to do is to prevent the United States from  
8 increasing its number of 1225(b) (2) (A)  
9 violations.

10           So, to the extent that there's a  
11 foreign policy implication, at most, it comes  
12 from the fact that Congress, well aware of the  
13 fact that we'd be dealing essentially with  
14 Mexico here, made a -- made a decision regarding  
15 (b) (2) (C) and then directed the President, you  
16 must do this, except unless you do this.

17           JUSTICE KAGAN: Well, that's a good  
18 segue into Justice Breyer's "may" question,  
19 because, actually, Congress just said "may."  
20 Congress, aware that Mexico is a sovereign  
21 nation, did not think it appropriate to say you  
22 must ship people back to Mexico. It understood  
23 that there was going to have to be discretion  
24 and -- and significant foreign policy  
25 considerations involved in that choice.

1                   MR. STONE: To speak to the "shall"  
2 and "may" components, it's not that (b) (2) (C)  
3 ever stops being a "may"; it's that when the  
4 only choice the United States has is either to  
5 exercise (b) (2) (C), assuming it can do so  
6 lawfully, or to violate the law -- Petitioners  
7 are not free simply to violate the law. That is  
8 a -- that is a bedrock of their take-care  
9 obligations. And if they can lawfully exercise  
10 their authority under (b) (2) (C), they must do so  
11 so as to not violate 1225(b) (2) (A).

12                   Now there might be a limited --

13                   JUSTICE KAVANAUGH: But the premise --

14                   MR. STONE: I'm sorry. Please.

15                   JUSTICE KAVANAUGH: Keep going.

16                   Sorry. Go ahead.

17                   MR. STONE: I -- I was just going to  
18 say there might be a limited circumstance under  
19 a specific case where some other mandatory  
20 federal law prevents the exercise in that  
21 condition, but those are the edge cases.

22                   CHIEF JUSTICE ROBERTS: You -- you  
23 can't avoid Justice Breyer's -- the remainder --  
24 the three-quarters of his question that are  
25 still outstanding.

1 (Laughter.)

2 JUSTICE KAVANAUGH: Immigration,  
3 "may," and Congress.

4 MR. STONE: I -- I hope I've spoken at  
5 least to the foreign -- to the foreign policy  
6 component with Congress, which is to say that  
7 Congress certainly memorialized a preferred  
8 foreign policy through (b) (2) (C).

9 To the extent that Congress has, in  
10 fact, not appropriated a sufficient number -- a  
11 sufficient amount of money in order to detain  
12 everyone simultaneously, it has several  
13 different options it's given, and then, at most  
14 -- at most, what that means is that the  
15 executive has to do the best it can with the  
16 resources it has.

17 It -- it's a bit of a strange argument  
18 here for Petitioners to say they have limited  
19 resources when, again, the district court found  
20 that the use of MPP would cause fewer  
21 individuals to attempt to -- to migrate  
22 illegally or inadmissibly and that those  
23 individuals, of course, would not require  
24 detention capacity. So, as a matter of fact,  
25 again, here, after a full trial on the merits,

1 MPP costs -- reduces detention costs.

2           Again, my friends on the other side  
3 occasionally sort of tussle with these facts as  
4 though that we're in a sort of posture of where  
5 we're asking for a stay as opposed to we're  
6 defending a final judgment to the district court  
7 with extensive factual findings. But, here, we  
8 are. And -- and to one -- I'm sorry, I don't  
9 want to -- I don't want to sort of speak to --

10           JUSTICE KAVANAUGH: Are you done?

11           MR. STONE: -- or forget any of your  
12 other questions.

13           JUSTICE KAVANAUGH: The -- the heart  
14 of this case, I think, is what does "significant  
15 public benefit" mean under 1182, because your  
16 arguments make a lot of sense, but the other  
17 side's -- the government's arguments make a lot  
18 of sense when they articulate the significant  
19 public benefit exception.

20           And the question comes down to, what  
21 does that mean? What does it encompass  
22 reasonably, more a State Farm-type question?  
23 And have they reasonably explained why this  
24 would be a significant public benefit?

25           And that's the heart of the case. I

1 mean, I -- yes, 1225 does have a mandatory  
2 detention. It does have the "may" for return to  
3 Mexico. But 1182 is the key because it has this  
4 phrase "significant public benefit" for paroling  
5 everyone in the United States. And they say,  
6 consistent with past practice, that that  
7 language authorizes in a situation of limited  
8 capacity for parole to be into the United  
9 States.

10 So you need to deal with "significant  
11 public benefit."

12 MR. STONE: Absolutely, Justice  
13 Kavanaugh. So to speak -- there's sort of a  
14 factual question here about what the United  
15 States will do that was found as a matter of  
16 fact by the district court. And then a legal  
17 question is the extent of significant public  
18 benefit. They're sort of interrelated, so let  
19 me try and start with the fact.

20 Through page -- through Findings of  
21 Fact 41, 42, and 44 and on paragraphs 106 and  
22 107, which I believe are around 201(a) and  
23 202(a) of -- of its decision, the district court  
24 determined after this question was litigated  
25 about what the United States would do, in fact,

1 if it had rescinded MPP, the district court  
2 determined that the United States would release  
3 additional individuals illegally into the United  
4 States.

5 It acknowledged in a footnote right  
6 before that conclusion that it knew that 1182  
7 provided an authority for release on a  
8 case-by-case basis, relied on parts of the  
9 administrative record to state that that could  
10 not be used or could not as a matter of fact be  
11 used in order to supplement -- in order to  
12 supplement detention or return, and then said to  
13 the extent that the United States were to  
14 attempt to do so by saying, oh, I didn't really  
15 --

16 JUSTICE KAVANAUGH: That's not really  
17 getting at what "significant public benefit" is,  
18 I don't think. I mean, "significant public  
19 benefit," they say, is when there's limited  
20 detention capacity, past practice and their  
21 current application of this somewhat vague  
22 provision, "significant public benefit,"  
23 authorizes the government to parole people into  
24 the United States on a case-by-case basis if  
25 they're not too dangerous.



1                   Why is that wrong either as a matter  
2 of statutory interpretation, State Farm, or  
3 their explanation?

4                   MR. STONE: It's wrong both as a  
5 matter of fact and as a matter of  
6 interpretation.

7                   As a matter of fact, let me turn you  
8 to ECF 136, the same material that my friends on  
9 the other side cited as their latest report  
10 regarding compliance with the injunction, where  
11 the United States lists the --

12                   JUSTICE KAVANAUGH: Why is it wrong as  
13 a matter of interpretation? Can you flip the  
14 order of your --

15                   MR. STONE: Absolutely. Your Honor,  
16 again, the United States has already interpreted  
17 what it viewed a significant public benefit to  
18 be and what it thinks case-by-case adjudication  
19 is. So regulation 8 CFR 212.5 describes several  
20 of those circumstances.

21                   The notion that sort of public  
22 benefits also can include the United States --

23                   JUSTICE KAVANAUGH: But it has a  
24 catch-all at the end of the regulation about  
25 public interest.

1 MR. STONE: Certainly, Your Honor.

2 That no longer -- that no longer tracks the  
3 statutory language, as is discussed in --

4 JUSTICE KAVANAUGH: Yeah, but if  
5 you're pointing to the regulation, you're  
6 omitting the -- the capacious term at the end of  
7 the regulation if I -- if I'm reading it  
8 correctly. Correct me if I'm wrong.

9 MR. STONE: As I believe we -- we  
10 described in our brief, that's a relic of the  
11 previous version.

12 JUSTICE KAVANAUGH: But it's still in  
13 the reg, correct?

14 MR. STONE: Yes. And to the extent  
15 that they -- they relied on that as a matter of  
16 statutory interpretation, that would be wrong.  
17 "Significant public benefit" --

18 JUSTICE KAVANAUGH: Okay.

19 MR. STONE: -- superimposed itself  
20 upon what originally was "public interest."

21 The kinds of things that are described  
22 as a public benefit here are specific  
23 case-by-case individuals' sort of dire  
24 circumstances, an individual with a serious  
25 health problem or an individual who for public

1 benefit is going to be providing testimony.

2           The notion that Congress created a --  
3 created a scheme where for -- in (b) (2) (A)  
4 expressed an unequivocal detention obligation  
5 but then said, because this isn't simply a  
6 matter of whether or not -- of whether or not  
7 there's going to be the exercise of parole, but  
8 whether or not the United States wishes to use  
9 its (b) (2) (C) authority, that its -- its refusal  
10 to use that authority and refusal to -- to --  
11 and refusal to detain individuals is a  
12 significant public benefit, certainly is a very  
13 strange contradiction in the language of the  
14 statute.

15           JUSTICE KAVANAUGH: So I -- I --  
16 you -- you make a good point. I think the  
17 examples they did cite were witness testimony.  
18 And I agree with that.

19           But the phrase "significant public  
20 benefit," you know, that's a common -- that's  
21 not a common phrase, but "public interest" is a  
22 common phrase in statutes. And D.C. Circuit,  
23 this Court, give a lot of deference to agencies  
24 to figure out how they're going to apply those  
25 terms. And that's -- the language is a bit of

1 an issue for you unless you revert to the  
2 structure of the statute expressed as a  
3 preference for return to Mexico over parole.

4 MR. STONE: Again, not merely a  
5 preference. That is a mandatory detention  
6 obligation in this words -- in this Court's  
7 words in Jennings.

8 JUSTICE KAVANAUGH: Yeah. But the  
9 question -- I'm sorry to keep interrupting, but  
10 the question is you can't meet that, and the  
11 statute gives you -- the overall statutory  
12 structure gives you two options then at least in  
13 the "may," return to Mexico or parole into the  
14 United States if significant public benefit.

15 And the question is, why can't an  
16 administration say "significant public benefit"  
17 is -- is triggered in this situation?

18 MR. STONE: I had two points, Your  
19 Honor. The first were the statutory points and  
20 the relationship between 1182 as a way of  
21 satisfying (b) (2) (A) and (b) (2) (C)'s sort of  
22 dual requirement.

23 The other part is a matter of fact  
24 based on the -- the submission that the  
25 Petitioners offered to the district court.

1           After -- and this is under their  
2 captions, they list about 120,000 individuals  
3 that they categorize as under 1225(b)(2), so  
4 they're certainly 1225 individuals. Out of  
5 those, they announced that they have -- that  
6 they have paroled roughly, and this is rough  
7 numbers, 40,000.

8           Of those, they've said they paroled  
9 under -- on a case-by-case basis or for  
10 significant public benefit about 6,000. And so  
11 the actual practice right now certainly doesn't  
12 map on to what Petitioners are describing.

13           I might also call attention to in that  
14 document the United States flatly admits that it  
15 is releasing on its own -- on their own  
16 recognizance something on the order of 31,000  
17 aliens who would -- who would be subject to  
18 1225(d). That's precisely the kind of systemic  
19 violation of law that, even if MPP would not  
20 altogether alleviate, and it certainly wouldn't,  
21 would at least reduce.

22           So my friend on the other side's  
23 arguments to the effect of our actual practice  
24 or our past practice with 1182(d) makes the  
25 district court's finding that we will increase

1 our violations clearly erroneous or wrong or  
2 just wrong as a matter of law is in the face of  
3 their multiple, multiple reports where they  
4 haven't even, as a matter of their own  
5 assertions, contested that 1182 was being used  
6 even as a matter of all of their paroles.

7 And this puts aside 1226 because these  
8 are clearly 1225 aliens under their own heading.

9 JUSTICE BARRETT: Okay. But, General  
10 Stone, returning you to the question of  
11 interpretation, which you have to surmount, it's  
12 not just a matter of fact. Again, returning to  
13 Justice Kavanaugh's question about significant  
14 public interest, you lose, right, if -- if the  
15 government is right about what "significant  
16 public interest" is and that prioritizing the  
17 beds, you know, based on who would be dangerous,  
18 you know, who would be the worst aliens to  
19 permit into the United States, right, if -- if  
20 -- if they're right about that, if they're right  
21 about "significant public interest," you lose.  
22 Am I right?

23 MR. STONE: No, Your Honor.

24 JUSTICE BARRETT: Putting aside State  
25 Farm and all that. I'm just talking on the --

1 on the statutory interpretation question.

2 MR. STONE: No, Your Honor, in part  
3 because this injunction rests critically on what  
4 the United States would do if it rescinded MPP.

5 As a matter of fact, along with -- and  
6 I'll turn back to the statutory point -- the  
7 United States attempted to prove that it would,  
8 in fact, use 1182(d)(5) to satisfy these  
9 obligations and thus it could not be required to  
10 continue MPP because that was unnecessary. It  
11 wouldn't violate 1225 anyway.

12 That is a matter of fact that was  
13 based on a trial in which this was hotly  
14 disputed. So the United States would have to  
15 prove both, that, in fact, it could use  
16 1182(d)(5) to address the entire swath of  
17 individuals who obviously are coming in under  
18 different circumstances, under different  
19 conditions, to do so and that it would do so in  
20 fact in order to get a modification of the  
21 injunction, which would belong below. So they  
22 -- they must show both.

23 JUSTICE SOTOMAYOR: Counsel, can I get  
24 --

25 JUSTICE ALITO: Does the statute allow

1 DHS to say that there would be a significant  
2 public benefit in paroling an entire category of  
3 aliens, a large class of aliens?

4 MR. STONE: Far from it, Your Honor.  
5 The 1996 amendment to 1182(d)(5) specifically  
6 inserted a case-by-case requirement. And,  
7 again, read together with (b)(2)(A) and  
8 (b)(2)(C), it's very difficult to see how the  
9 significant public benefit, given a mandatory  
10 detention obligation, could simply be the  
11 preference not to detain or to return.

12 JUSTICE SOTOMAYOR: Counsel, I have  
13 never seen Congress use a -- a "may" language in  
14 the way you say. There are other parts of the  
15 INA itself that says you do this or you do that.  
16 If you can't do this, you do this other thing.

17 This is not an either/or. The  
18 statute's not written that way.

19 And you said that it becomes mandatory  
20 because they can't do A, but where does the  
21 discretion fit in? Meaning they're not  
22 challenging that they rescinded this problem --  
23 this policy erroneously in June. They're saying  
24 we did the right thing in October.

25 We looked at it anew. We've given all



1 of these reasons. And we've explained why the  
2 cost of this program and running it is not in  
3 the best interest of the United States because  
4 we can detain more people and act more  
5 expeditiously if we spend that money a different  
6 way.

7           You're now telling us that we as  
8 judges should be in the business of deciding  
9 whether that policy choice is one that we think  
10 who wants? That we as a Court want? Where does  
11 Congress say that it shall need to do this?  
12 Because I don't see it in the language. They  
13 left it discretionary.

14           Having left it discretionary, why  
15 isn't that the answer itself, that the policy  
16 has been terminated or the rescission of the  
17 policy in June, which is what the district court  
18 had before it, was terminated, and the  
19 injunction has to be lifted until you prove that  
20 the rescission was wrong?

21           MR. STONE: Three reasons, Your Honor,  
22 the first of which being where the "may" becomes  
23 mandatory. It's only in the limited  
24 circumstance where the only -- that is the only  
25 way that -- that the executive can --

1 JUSTICE SOTOMAYOR: It's already  
2 happened. They've done it. They did it and  
3 looked at it and said this doesn't make sense.  
4 Our discretion says we shouldn't use this.

5 So it's been considered. It was  
6 considered by the old administration. They  
7 followed it to an extent, not completely,  
8 because they carved out huge numbers of  
9 categories of people they weren't sending back.  
10 And you're telling me they violated it too.  
11 They now had it before them, they've given  
12 thought to it, and they've said, as a matter of  
13 our discretion, continuing this program doesn't  
14 further the "shall" because we can do more with  
15 the money in other ways.

16 MR. STONE: Respectfully, Your Honor,  
17 our arguments don't depend on the policy wisdom  
18 of MPP or any other particular approach to  
19 immigration. They rely in here -- and  
20 specifically on the APA merits of the June  
21 termination. We agree with the United States  
22 that the merits of the October termination under  
23 the APA are not properly before this Court and  
24 they weren't properly before --

25 JUSTICE SOTOMAYOR: So why shouldn't

1 we just lift this to say June is over with, it's  
2 not being challenged, there's a new program, you  
3 don't need the injunction?

4 MR. STONE: In part because, Your  
5 Honor, that would be one of two things as I  
6 understand it, either an appeal to mootness,  
7 which, of course, they've already disclaimed  
8 they are not challenging the Fifth Circuit's  
9 holding on, or otherwise a request under Rule  
10 60(b)(5) to set aside the injunction.

11 We're here after a trial on the merits  
12 and having received a permanent injunction.

13 JUSTICE SOTOMAYOR: Well, the  
14 injunction might be moot, but the lawsuit is not  
15 moot. They're -- they're claiming there are  
16 still issues to be resolved, including the  
17 October issue, but the reasons for the  
18 injunction are over with. So why should we  
19 leave extant an injunction that's not necessary?

20 MR. STONE: Your Honor, to the extent  
21 that -- that they have not affirmatively  
22 disclaimed the position that the injunction is  
23 moot, it would be upon them to show that, in  
24 fact, it had become moot because of their  
25 intervening actions, which they don't attempt.

1           And then, in response, of course, we'd  
2     cite this Court's voluntary cessation doctrine.  
3     In all candor, the United States' approach to  
4     mootness here, when it argued below, was  
5     something along the lines of that they'd evaded  
6     review by accomplishing repetition. And so we  
7     believe there are good reasons that this case  
8     wouldn't be moot if that, in fact, had been  
9     joined by the United States.

10           Nothing in the Fifth Circuit's opinion  
11     below, nor should from this Court, rest on  
12     whether or not the APA merits of the October  
13     memoranda are good, bad, or otherwise. That's a  
14     matter for them when they return to the district  
15     court and seek relief from the injunction.

16           JUSTICE KAVANAUGH: So -- so the  
17     questions I was pushing you on, how to interpret  
18     "significant public benefit," I also alluded to  
19     the fact there are State Farm issues potentially  
20     that did they have discretion, did they  
21     reasonably exercise their discretion and have  
22     they sufficiently explained their exercise of  
23     discretion, very similar to the State Farm  
24     opinion itself.

25           You're saying those concerns which I

1 was pressing your friend on the other side about  
2 are not before us?

3 MR. STONE: No, Your Honor, but to the  
4 extent this Court were to reach them -- in their  
5 reply brief, they candidly acknowledged --

6 JUSTICE KAVANAUGH: Well, can I just  
7 stop -- they're not before us or --

8 MR. STONE: They're not before you, in  
9 part because there's no administrative record.

10 JUSTICE KAVANAUGH: Okay.

11 CHIEF JUSTICE ROBERTS: Thank you --

12 JUSTICE KAVANAUGH: So -- okay.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 General.

15 Justice Thomas, anything further?

16 Justice Breyer?

17 Justice Alito?

18 Justice Sotomayor, anything further?

19 Justice Kagan?

20 Justice Gorsuch?

21 Justice Kavanaugh?

22 JUSTICE KAVANAUGH: How -- how do you  
23 see this playing out then on the October memo?

24 MR. STONE: That this Court should  
25 affirm the district -- the Fifth Circuit's

1     affirmance of the district court's injunction  
2     and that with the October memoranda and the  
3     October administrative record, the United States  
4     should go to the district court, seek relief  
5     under Rule 60(b)(5) and say either we have fully  
6     satisfied both conditions or, at minimum for the  
7     APA purposes, we have satisfied the APA  
8     compliance condition.

9             And if they have, then, of course, it  
10     would be an abuse of discretion for the district  
11     court to deny modifying or satisfying that  
12     injunction as a matter of law. And if they  
13     haven't, then, of course, we'll litigate that  
14     there.

15             CHIEF JUSTICE ROBERTS: Justice  
16     Barrett, anything further?

17             Thank you, counsel.

18             Rebuttal, General Prelogar?

19             REBUTTAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

20                     ON BEHALF OF THE PETITIONERS

21             GENERAL PRELOGAR: Thank you,  
22     Mr. Chief Justice.

23             Let me make one quick factual  
24     correction, and then I'll turn to a couple of  
25     points on the statutory question in the case.

1           First, I just want to respond on the  
2 facts with respect to our monthly reports to the  
3 district court, General Stone has misunderstood  
4 the data in that report. All of the parole  
5 decisions that DHS is making are on a  
6 case-by-case basis. The different categories on  
7 that report refer to different ways that DHS  
8 codes this data in its database, but those are  
9 all following DHS's own regulations, which  
10 themselves require case-by-case assessment.

11           The orders of recognizance that are  
12 referred to in that report are the -- the grants  
13 of conditional parole under Section 1226(a).  
14 Texas hasn't even challenged our reliance on  
15 1226(a) in this case.

16           Turning to the statutory issue, my  
17 friend conceded to Justice Thomas that MPP  
18 itself was unlawful. He's conceded that on his  
19 interpretation, every presidential  
20 administration has been openly violating the  
21 INA. I think that that is incredibly powerful  
22 and persuasive evidence that that interpretation  
23 is incorrect.

24           Second, I want to respond, Justice  
25 Kavanaugh, to some of your questions about

1 significant public interest. We have not just  
2 generated that -- that consideration of  
3 detention capacity for purposes of this case.  
4 That has been the executive branch's uniform,  
5 consistent interpretation of how our parole  
6 authority operates. It's encompassed in our  
7 regulations, contrary to what General Stone  
8 said, based on that catch-all category that you  
9 referenced that specifically authorizes release  
10 for other significant public interests.

11           And it makes sense because, in a world  
12 where we don't have sufficient beds, as everyone  
13 acknowledges, there is a imperative public  
14 interest in ensuring that we are detaining the  
15 people who might be criminals or who might  
16 abscond or who threaten our national security  
17 and not simply filling those beds on a first  
18 come basis with no accounting for the limited  
19 detention capacity.

20           Finally, I -- I'd like to leave the  
21 Court with a few concluding thoughts on the  
22 extraordinary nature of the district court's  
23 injunction in this case and particularly with  
24 respect to its effects on foreign relations.

25           As I've explained, the executive



1 cannot implement MPP unilaterally. General  
2 Stone is simply wrong about that. Mexico has  
3 its own sovereignty here, and we are sending  
4 individuals on its -- onto its territory. So we  
5 need to get Mexico's consent to operate the  
6 program.

7           That gives Mexico an important point  
8 of leverage, as Justice Kagan emphasized, in  
9 those negotiations. And that's what the  
10 district court has ordered here. It has ordered  
11 us to conduct those ongoing negotiations with  
12 Mexico. It's not just to start up the program.  
13 It is coordinating on all of the day-to-day  
14 logistics of operating a massive cross-border  
15 program like this.

16           The individuals who are returned under  
17 MPP need a place to live. They need work  
18 authorization. They need access to counsel.  
19 They need to be protected against predatory  
20 violence from gangs and cartels. We need to  
21 coordinate on the logistics of transferring them  
22 back and forth across the border into the United  
23 States for their immigration hearings and then  
24 back to Mexico to continue to await the results  
25 of those proceedings.

1           And in all of that, we have to have  
2 ongoing logistical negotiations with Mexico.  
3 The State Department has told me that it has a  
4 weekly call with the Department of State, the  
5 Department of Homeland Security, and their  
6 counterparts in the Government of Mexico to talk  
7 about regional migration and negotiate with  
8 respect to all of these logistical details.

9           So I think the idea here that there is  
10 a single district court in Texas that is  
11 mandating those results, that is compelling the  
12 executive to engage in those ongoing  
13 negotiations, and is doing though -- so under  
14 the constant threat of a contempt motion from  
15 Texas to supervise our good-faith negotiations  
16 with Mexico shows that something has powerfully  
17 gone awry here.

18           This is not how our constitutional  
19 structure is supposed to operate, and this is  
20 not the statute that Congress drafted.

21           So we'd ask the Court to reverse the  
22 flawed judgment below.

23           CHIEF JUSTICE ROBERTS: Thank you,  
24 General, General.

25           The case is submitted.

1                   (Whereupon, at 11:47 a.m., the case  
2 was submitted.)  
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## Official - Subject to Final Review

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