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.          )

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Pages:  1 through 122

Place:  Washington, D.C.

Date:  April 26, 2022
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3   JOSEPH R. BIDEN, JR.,   )

4   PRESIDENT OF THE UNITED STATES,   )

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7   v.   ) No. 21-954

8   TEXAS, ET AL.,   )

9   Respondents.   )

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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.

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 1                    P R O C E E D I N G S

 2                                    (10:00 a.m.)

 3              CHIEF JUSTICE ROBERTS:  We will hear

 4    argument first this morning in Case 21-954,

 5    Biden against Texas.

 6              General Prelogar.

 7         ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

 8                 ON BEHALF OF THE PETITIONERS

 9              GENERAL PRELOGAR:  Mr. Chief Justice,

10    and may it please the Court:

11              The Secretary of Homeland Security

12    exercised his statutory discretion to make a

13    policy judgment.  He found that the benefits of

14    MPP were outweighed by its domestic,

15    humanitarian, and foreign policy costs.  Yet,

16    the lower courts ordered DHS to reinstate MPP in

17    perpetuity, requiring ongoing negotiations with

18    Mexico to send thousands of non-citizens into

19    its territory.  That was error.

20              On the first question, Section 1225

21    confers a discretionary return authority that

22    the Secretary may use, not a mandate.  Nothing

23    in the statutory text or history compels DHS to

24    use MPP whenever Congress fails to provide

25    sufficient funds for universal detention.
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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: 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   And, 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 order

21   that we need to detain more people or we need to

22   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 policy saying everybody covered has

13   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: And don't you think

20   that that's a -- I mean, you might be right, but

21   don't you think that's a far-reaching argument?

22   Don't you think that goes well beyond anything

23   that would come to -- that we would have thought

24   about in -- in Garland versus Gonzalez? Don't

25   you think that deserved briefing?

1   GENERAL PRELOGAR: Well, certainly,

2   Justice Alito, I defer to this Court and how

3   it's choosing to resolve those issues in Aleman

4   Gonzalez. With respect to additional briefing,

5   we did include briefing on this issue at the

6   stay stage in this case as well, so I would

7   refer to our -- our briefing.

8   JUSTICE ALITO: Well, did you say

9   anything about the APA in -- in the Gonzalez

10   case?

11   GENERAL PRELOGAR: I'm sorry that I

12   can't recall right now whether we -- we briefed

13   that issue there. If you're telling me we

14   didn't, I assume we did not.

15   JUSTICE ALITO: On the jurisdictional

16   question, you think that we should go back and

17   read what you've submitted below? It wasn't

18   important enough for you to submit it to us

19   directly?

20   GENERAL PRELOGAR: We did brief this

21   issue at the stay stage in this case, and this

22   Court, we understand, issued -- denied the stay

23   nevertheless and found a likelihood of success

24   on the merits with respect to the procedural APA

25   claim on the June 1 memorandum. So that's why

1   we didn't renew our briefing on this issue at

2   the merits stage.

3   JUSTICE SOTOMAYOR: Counsel --

4   JUSTICE KAGAN: General --

5   JUSTICE SOTOMAYOR: -- are you taking

6   the position that 1252(f)(1) also eliminates

7   declaratory judgment rulings?

8   GENERAL PRELOGAR: We --

9   JUSTICE SOTOMAYOR: There is a

10   difference between issuing an injunction

11   vacating an agency action and issuing a

12   declaratory judgment that agency action is

13   unauthorized and letting that come to this Court

14   to decide what remedy is appropriate, whether an

15   injunction is appropriate or not if you decide

16   not to follow the statement, correct? There's

17   nothing in a declaratory judgment rule that

18   forces you to.

19   You might be subjecting yourself to

20   contempt, but you can stay that pending review

21   by this Court, couldn't you?

22   GENERAL PRELOGAR: That's right,

23   Justice Sotomayor. So I think that it would be

24   possible for the Court to draw that distinction

25   and distinguish between declaratory relief and

1   injunctive relief. Of course, if there were

2   other --

3   JUSTICE SOTOMAYOR: You don't see

4   anything in 12 -- in the language of 1252(f)(1)

5   that stops declaratory relief. It says --

6   GENERAL PRELOGAR: I believe, when

7   Aleman Gonzalez was argued, we -- we suggested

8   that that was an open question, and I recognize

9   that it's a more difficult question. Here, I

10   think that it's clear that our (f)(1) argument

11   applies because we're facing a nationwide

12   permanent injunction in this case.

13   JUSTICE GORSUCH: I -- I --

14   JUSTICE SOTOMAYOR: Now what do we --

15   JUSTICE GORSUCH: Hold on. Hold on.

16   I'm sorry.

17   JUSTICE SOTOMAYOR: I'm sorry. Go

18   ahead.

19   JUSTICE GORSUCH: I wanted to follow

20   up on that.

21   JUSTICE SOTOMAYOR: Go ahead.

22   JUSTICE GORSUCH: Okay. I -- I --

23   I -- I would just appreciate an answer to

24   Justice Sotomayor's question about declaratory

25   relief and the government's position with

1   respect to 1252(f).

2   GENERAL PRELOGAR: I'm sorry, a

3   clarification?

4   JUSTICE GORSUCH: Yeah. Just --

5   GENERAL PRELOGAR: So I'll do my best

6   --

7   JUSTICE GORSUCH: -- the -- the --

8   does --

9   GENERAL PRELOGAR: -- and I should

10   confess that I didn't go back to review the oral

11   argument transcript in Aleman Gonzalez.

12   JUSTICE GORSUCH: No, no, no.

13   GENERAL PRELOGAR: But I think we took

14   the position there that it's an unsettled

15   question, how this would apply in the context of

16   declaratory relief.

17   And so, you know, I -- I want to be

18   consistent with that position, but I recognize

19   it's a harder issue for us, and I think that

20   there would be a path for the Court to determine

21   that there's a distinction between declaratory

22   relief and injunctive relief, which is, of

23   course, the primary focus of that provision.

24   JUSTICE GORSUCH: No, I understand

25   it's an open question and a difficult one. I

1   just wonder whether the government has a view on

2   it one way or the other.

3   GENERAL PRELOGAR: Our view is that

4   it -- that it also could foreclose review of

5   declaratory relief, but I recognize the Court

6   could conclude otherwise.

7   JUSTICE GORSUCH: Why would it

8   foreclose declaratory relief?

9   GENERAL PRELOGAR: I'm sorry, Justice

10   Gorsuch, I'm -- I don't have further information

11   at this time. If you'd like us to submit

12   supplemental briefing on this issue, we would be

13   happy to do so to try to clarify that position.

14   JUSTICE GORSUCH: But it is the

15   government's position that it -- it does

16   foreclose declaratory relief too?

17   GENERAL PRELOGAR: I believe that's

18   the position we took at oral argument in Aleman

19   Gonzalez, recognizing it was a tougher issue.

20   JUSTICE GORSUCH: Thank you.

21   GENERAL PRELOGAR: If I could turn to

22   the -- the various textual clues and textual

23   clues that we think fortify our interpretation

24   of the contiguous territory return provision in

25   this case, there are really four key things that

 1   I want to focus on that I think demonstrate that

 2   the district court's interpretation here went

 3   seriously awry.

 4   And the first thing, of course, is the

 5   text, which was emphasized, that Congress used

 6   the "may return" language, which is clearly

 7   discretionary. On Respondents' interpretation,

 8   what Congress really meant is the Secretary may

 9   return, unless detention capacity is lacking, in

10   which case he must return.

11   But Congress nowhere put that

12   condition precedent into the statute, and I

13   think it's really significant that Congress

14   failed to do so because, on Respondents'

15   reading, this would have been mandatory from the

16   outset and at all times thereafter.

17   In 1996, when Congress enacted this

18   provision, there was not sufficient detention

19   capacity at that time, and Respondents don't

20   dispute that that has remained continuously the

21   case. So I think it's particularly notable that

22   their interpretation of the statute would have

23   run counter to the text all along.

24   I would point as well --

25   JUSTICE KAVANAUGH: Is there any

1   indication in connection with the '96 Act that

2   anyone in Congress expected that if there

3   were -- was not sufficient detention capacity,

4   that hundreds of thousands of people would be

5   just paroled into the United States without

6   being lawfully admitted?

7   Did anyone say that in Congress?

8   GENERAL PRELOGAR: I don't think that

9   there was express history on that point, but

10   Congress was focused on the detention issue and

11   it thought that the new expedited removal

12   provisions that it had added to the statute at

13   the same time would function to alleviate part

14   of the strain on detention of resources.

15   So I think that history actually shows

16   that Congress here wasn't thinking that

17   contiguous territory return would -- would be

18   the solution to this issue. Instead, they were

19   focused on expedited removal to do so.

20   And it's no mystery about where this

21   provision came from, contiguous territory

22   return. It was a much narrower and more

23   discrete problem, which was that the Board of

24   Immigration Appeals in the Sanchez-Avila case

25   had just concluded in 1996 that the executive's

1   prior discretionary practice of sometimes

2   returning some non-citizens to contiguous

3   territory required express statutory

4   authorization if it was going to continue. And

5   Congress provided that express statutory

6   authorization in 1225(b)(2)(C).

7   But there is no indication that it

8   meant to go further and actually transform that

9   -- that prior practice and turn it into an

10   ongoing mandate that DHS must implement this on

11   a border-wide basis consistently based on a lack

12   of detention appropriations.

13   JUSTICE KAVANAUGH: I think --

14   JUSTICE ALITO: Well, the Fifth --

15   JUSTICE KAVANAUGH: Go ahead.

16   JUSTICE ALITO: The -- the Fifth

17   Circuit reasoned that -- it didn't -- it didn't

18   deny that the -- that the provision you're

19   talking about uses the term "may," but it said

20   that if you read the relevant statutory

21   provisions, they give DHS three options.

22   One is to return these individuals to

23   Mexico or Canada. The second is to detain them.

24   Third is to have case-by-case determinations

25   regarding humanitarian issues and -- and public

1   benefit. And 1220 -- a cornerstone of that is

2   that 1220 -- 1225(b)(2)(A) says "the alien shall

3   be detained." Right?

4   GENERAL PRELOGAR: That's correct.

5   JUSTICE ALITO: And you now read that

6   to be discretionary in light of Castle Rock, is

7   that correct?

8   GENERAL PRELOGAR: No. To be clear,

9   Justice Alito -- and I appreciate the

10   opportunity to offer clarification on this

11   point -- we are not suggesting that that

12   language in (b)(2)(A) is -- essentially

13   functions as a "may," that Congress didn't

14   express a preference on this issue.

15   What we think, though, is that against

16   the background of Castle Rock, it's appropriate

17   for DHS to take account of its limited detention

18   capacity for purposes of exercising its various

19   authorities, and that includes the express

20   release authorities.

21   So there's parole you mentioned -- you

22   left off the list Section 1226(a). We think

23   that's another important source of authority for

24   DHS here.

25   JUSTICE ALITO: Well, that -- that

1 sound -- what you just said sounded to me like a

2 lot of words that means that we have discretion,

3 we have prosecutorial discretion, to decide

4 whether to detain. "Shall be detained" doesn't

5 literally mean shall be detained.

6   GENERAL PRELOGAR: I think what it

7 means --

8   JUSTICE ALITO: Is that correct?

9   GENERAL PRELOGAR: Well, I think, in

10 this context, what "shall be detained" means is

11 that Congress expected us to use the detention

12 capacity that we have. And that's what we're

13 doing. DHS detains tens of thousands of

14 individuals on any given day. Respondents'

15 interpretation that would remove any discretion

16 would mean that DHS can't take account of that

17 limited capacity in making prioritization

18 decisions.

19   So, if they're really right and if DHS

20 has to fill up those beds on a first come basis,

21 then the upshot is that it's going to run out of

22 space and not have capacity to detain those with

23 criminal histories or who represent a national

24 security threat or have final orders of removal

25 and might be particularly likely to abscond.

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

 2   interpretation of --

 3   JUSTICE SOTOMAYOR: Is there --

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

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

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

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

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

 9   pleasure of writing the opinion for the Court,

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

11   government's brief in that case took exactly the

12   opposite position from what the -- the

13   government is taking here.

14   And I went back and looked at it, and

15   that is exactly the case. You stressed that

16   "shall be detained" means shall be detained. I

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

18   the language, "shall be detained."

19   And you went on. This is a brief

20   filed by your predecessor, Mr. Gershengorn.

21   "Unlike the word 'may,' which implies

22   discretion, the word 'shall' usually connotes a

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

24   detained' clearly means what it says, because

25   Congress said 'may' when it meant 'may.'

1   Congress crafted only one exception to that

2   rule. Congress provided that the Secretary

3   'may' parole into the United States any alien

4   applying for admission on a case-by-case basis

5   for urgent humanitarian reasons or significant

6   public benefit."

7   GENERAL PRELOGAR: Let me respond to

8   that in two ways if I could, Justice Alito. And

9   the first is to make clear that, of course,

10   there we were addressing a very different type

11   of argument, which is whether Section 1225

12   contains effectively an implicit statutory

13   entitlement to release on bond, which is what

14   the non-citizens in that case were claiming.

15   And -- and we said then and remain of the view

16   and this Court said in Jennings that that's not

17   a proper interpretation of that "shall be

18   detained" language.

19   But we had no occasion in that case

20   and this Court had no occasion in that case to

21   consider how to interpret these provisions of

22   the INA against the backdrop of traditional

23   enforcement discretion principles. And I would

24   point in particular now to the -- the opinion of

25   Chief Judge Sutton in the Sixth Circuit, a

1   recent opinion we cite in our reply brief in the

2   Arizona case, that I think has a really useful

3   distillation of the relevant principles in this

4   context when you're looking at those types of

5   provisions in the INA in light of limited law

6   enforcement resources.

7   But the -- the second point I'll make

8   is that to the extent you are focused on this

9   differential use of "shall" and "may," I think

10   that only fortifies our principal contention in

11   this case, which is that the contiguous

12   territory return provision uses that

13   discretionary "may return," and it's

14   Respondents' position that would actually fail

15   to give effect to Congress's drafting choices by

16   turning that into a mandate.

17   JUSTICE SOTOMAYOR: Counsel --

18   JUSTICE KAGAN: Do you think that as

19   to each non-citizen, that you have to comply

20   with one of the four, let's call them now,

21   because you added bond, that you have to comply

22   with one of the four options that the statute

23   gives you? Or do you think that there is a kind

24   of residual discretion so that even if an

25   immigrant could not be paroled under 1182, you

1   could release that immigrant -- you could still

2   release that immigrant rather than detain him?

3   GENERAL PRELOGAR: So I think the

4   question of residual discretion is a difficult

5   one. And we haven't had to process that here

6   because we think that DHS is complying with

7   those four statutory options. Our position is

8   that DHS is faithfully implementing both the

9   parole provision in 1182(d)(5) and the bond and

10   conditional parole provision in Section 1226(a).

11   And I think that its implementation of

12   those provisions suffices in itself to resolve

13   this case because Respondents as the plaintiffs

14   alleged and said that DHS was violating those

15   obligations but came forward with no evidence to

16   substantiate that claim.

17   JUSTICE KAGAN: I mean, I think

18   General Stone's position is sort of we don't

19   need evidence because it's kind of laughable on

20   its face to think that you're paroling this many

21   people by using case-by-case determinations

22   rather than, I think, his word is "en masse."

23   GENERAL PRELOGAR: Well, those kinds

24   of arguments just don't engage with the

25   statutory text here. 1182(d)(5) has a

1   procedural requirement, case-by-case

2   adjudication. DHS does that. It does not grant

3   parole to any individual non-citizen without

4   reviewing the individual case and making an

5   assessment of individualized factors like flight

6   risk, likelihood of absconding, and whether the

7   release of that individual would advance an

8   urgent humanitarian reason or a substantial

9   public -- a significant public benefit. And

10   that's, of course, the substantive criteria.

11   Our position is that DHS can

12   permissibly take account of its detention

13   capacity in determining that there is a

14   significant public benefit from releasing a

15   low-priority individual who's not a flight risk,

16   who doesn't have a criminal history, if that

17   would preserve a bed space for someone who's a

18   higher priority under our detention policies.

19   JUSTICE KAGAN: But you're saying we

20   don't need -- or you don't need to argue for

21   residual discretion because you're not using any

22   residual discretion? You're saying that --

23   GENERAL PRELOGAR: That's right.

24   JUSTICE KAGAN: -- that everything

25   fits --

 1   GENERAL PRELOGAR: We are not using

 2   residual discretion here.

 3   JUSTICE KAGAN: -- within these four

 4   categories?

 5   GENERAL PRELOGAR: That's correct. We

 6   think that we do not need residual discretion

 7   here, and I think that it's an interesting

 8   question, but it's largely an academic one

 9   because, here, DHS's release authorities amply

10   justify what it's doing on the ground.

11   JUSTICE SOTOMAYOR: Counsel, can you

12   tell me what "case-by-case review" means? You

13   -- you -- part of your answer addressed it, but

14   each alien is interviewed?

15   GENERAL PRELOGAR: That's right. So

16   what DHS does --

17   JUSTICE SOTOMAYOR: Is a background

18   check done on them?

19   GENERAL PRELOGAR: There is usually a

20   criminal background check done. There's a

21   biometric records check that's completed. And

22   DHS reviews that information and makes judgments

23   about things like flight risk and security

24   concerns for purposes of administering these

25   provisions.

1   JUSTICE SOTOMAYOR: I'm assuming

2   there's a terrorist list of some sort or a

3   database that you look at as well?

4   GENERAL PRELOGAR: I assume so as

5   well, although I haven't checked with DHS on

6   that.

7   JUSTICE SOTOMAYOR: All right. So --

8   and you -- presumably, you find out what ties or

9   not the person has to the United States and

10   whether they've absconded before, et cetera?

11   GENERAL PRELOGAR: That's right. So,

12   by regulation, DHS is required to take into

13   account those kinds of considerations insofar as

14   they bear on flight risk, and the parole

15   determination will only be made after making a

16   judgment that the person does not likely present

17   a flight risk.

18   JUSTICE SOTOMAYOR: Now your

19   adversary, General Stone, points to a lot of

20   legislative history that Congress intended

21   1182(d)(5)(A) to be narrow. Virtually all of

22   the history that he points to is a House

23   committee report, correct?

24   GENERAL PRELOGAR: That's right. And

25   it was a committee report that addressed a

1   different version of the statute, not the one

2   that was enacted.

3   JUSTICE SOTOMAYOR: So, with respect

4   to this version of the statute, was there

5   anywhere a directive by Congress to limit the

6   number of people?

7   GENERAL PRELOGAR: No, there's

8   certainly nothing in the text of the statute

9   that Congress enacted that places that kind of

10   cap. Instead, Congress directed how parole

11   determinations need to be made case by case, and

12   it set forth that substantive criteria of the

13   bases for parole, but it nowhere suggested that

14   there is a numerical cap on the number of people

15   who can receive parole.

16   JUSTICE SOTOMAYOR: Now please tell me

17   how you satisfy the urgent humanitarian reasons

18   or significant public benefit requirements of

19   the statute.

20   GENERAL PRELOGAR: We satisfy that

21   because there is a significant public benefit in

22   ensuring that DHS doesn't run out of detention

23   space to house individuals who are higher

24   priorities for detention because of their

25   criminal records or because they might be

 1   particularly likely to abscond or because

 2   Congress itself has directed that they should be

 3   detained without release under provisions like

 4   1231(a)(2), 1226(c).

 5   And DHS's judgment in implementing the

 6   statute has been, I think, properly interpreted

 7   against the background of enforcement discretion

 8   here, that that serves a significant public

 9   benefit in ensuring that it doesn't run out of

10   capacity when someone is a low-priority

11   individual because they're -- they don't have a

12   criminal history, they're not a danger to

13   society, they aren't likely to abscond.

14   JUSTICE SOTOMAYOR: How about the

15   issue of whether you have enough resources to

16   detain all these people, feed them, clothe them?

17   If you don't, you're going to let them starve

18   and you're going to have the horrific conditions

19   that have gotten so much public attention,

20   correct?

21   GENERAL PRELOGAR: Well, certainly,

22   DHS is committed to providing humanitarian

23   conditions for detention. But I do think that

24   the report --

25   JUSTICE SOTOMAYOR: If you had to

 1   detain everybody, could you?

 2   GENERAL PRELOGAR: No. And no one

 3   disputes that. DHS does not have sufficient

 4   detention capacity. Congress knows that.

 5   Congress was aware of that in 1996

 6   when it enacted this -- this provision, and

 7   there is no indication that Congress intended

 8   the safety valve here to be contiguous territory

 9   return.

10   JUSTICE KAGAN: Well, what are the

11   numbers with respect to that, both now and in

12   the past in terms of the percentage of people

13   who are stopped or encountered or, you know,

14   arrested at the border -- think of those as

15   synonyms, I didn't mean to -- versus the number

16   that you can detain?

17   GENERAL PRELOGAR: So let me give you

18   a -- a sense of the current numbers. I'll point

19   to the recent monthly reports that we've been

20   filing in accordance with the district court's

21   reporting requirement of the injunction.

22   The most recent numbers are from March

23   2022. At -- at that juncture, DHS apprehended

24   about 220,000 people at the border. There were

25   -- that was the number of border encounters. At

1   that point in time, DHS was appropriated for a

2   little under 32,000 detention beds, counting

3   some COVID restrictions, some court restrictions

4   in place.

5   And the average daily amount of

6   detention over that same month was also at about

7   32,000 individuals. That's ICE being a little

8   under its capacity and CBP being over capacity.

9   So I think that it's -- it's kind of

10   self-evident and no one disputes here that there

11   is a tremendous shortfall and that DHS could not

12   detain everyone who it's encountering at the

13   border.

14   JUSTICE BREYER: Is 320 -- you say

15   220,000 come in?

16   GENERAL PRELOGAR: Yes, about 220,000

17   encounters.

18   JUSTICE BREYER: How -- per what? Per

19   what? Per month, per day, per week, per what?

20   GENERAL PRELOGAR: This was in March

21   2021 --

22   JUSTICE BREYER: For a month?

23   GENERAL PRELOGAR: -- is the most

24   recent --

25   JUSTICE BREYER: In a month. You're

1   saying 220,000 in a month or 220,000 in a week

2   or what?

3   GENERAL PRELOGAR: No, in one month.

4   Those were the numbers.

5   JUSTICE BREYER: In one month?

6   GENERAL PRELOGAR: Now, of course, it

7   fluctuates.

8   JUSTICE BREYER: So 220,000 come to

9   the border and about 30,000 or so, 38,000 are

10   detained, and the rest are paroled?

11   GENERAL PRELOGAR: Well, there are a

12   variety of tools that DHS uses. They're not all

13   paroled. Some are expelled under Title 42.

14   JUSTICE BREYER: These are the ones

15   who are --

16   GENERAL PRELOGAR: Some have been

17   expedited removal.

18   JUSTICE BREYER: So how many are

19   paroled about?

20   GENERAL PRELOGAR: In March 2021, I

21   believe the parole figure was about 37,000, and

22   then there were another 43,000 that received

23   bond or conditional parole under Section

24   1226(a).

25   JUSTICE BREYER: So that what

1　　happened. So there were 110,000 or 120,000, we

2　　don't know what happened to them? Where did

3　　they go?

4　　　　　　　　GENERAL PRELOGAR: Many of them were

5　　expelled pursuant to Title 42.

6　　　　　　　　JUSTICE BREYER: I see.

7　　　　　　　　GENERAL PRELOGAR: Others were --

8　　　　　　　　JUSTICE BREYER: Okay. So half of

9　　them --

10　　　　　　　　GENERAL PRELOGAR: -- processed under

11　　other conditions.

12　　　　　　　　JUSTICE BREYER: -- they say you have

13　　no business here and it comes right under here

14　　that they're not -- oh, under 42, in other

15　　words, under the --

16　　　　　　　　GENERAL PRELOGAR: The public health

17　　order --

18　　　　　　　　JUSTICE BREYER: Under public health.

19　　　　　　　　GENERAL PRELOGAR: -- that CDC had

20　　issued. That -- that number, though, also

21　　includes other processing under Title 8

22　　authority, so it includes things like expedited

23　　removal.

24　　　　　　　　JUSTICE BREYER: Now -- now suppose --

25　　I mean, here, I'm worried about -- suppose I

1   accept your argument for -- hypothetically,

2   let's assume that. And then I say I see (b) has

3   to do with people whom the immigration person at

4   the border says you're inadmissible or you want

5   asylum and it tells you what to do.

6   But now we go to our part, which is

7   other people who come in. So I don't know if

8   they're inadmissible or not. Maybe, maybe not.

9   That's -- that's -- that's what we're -- this is

10   number 2, is that right?

11   GENERAL PRELOGAR: I'm sorry, you're

12   looking at 1225(b)(2) --

13   JUSTICE BREYER: Yeah. Yeah.

14   GENERAL PRELOGAR: -- (B)?

15   JUSTICE BREYER: It says inspection of

16   other aliens. Those are the aliens who were not

17   in the first part, which is the first part --

18   GENERAL PRELOGAR: Oh, I'm sorry,

19   you're looking at, right, (b)(1). So you're

20   looking at the -- the provisions about --

21   JUSTICE BREYER: (b)(1) are certain

22   people where they say you're inadmissible,

23   good-bye, or they say you want asylum and here's

24   the procedure.

25   GENERAL PRELOGAR: That's right.

 1   JUSTICE BREYER: Then it says

 2   inspection of other aliens. That's what we're

 3   talking about.

 4   GENERAL PRELOGAR: That's correct,

 5   yes.

 6   JUSTICE BREYER: Okay. Who are the

 7   others? The others are the ones you don't know

 8   if they're inadmissible or not?

 9   GENERAL PRELOGAR: So these are the

10   ones who wouldn't be inadmissible under the

11   grounds that are specified in (b)(1).

12   JUSTICE BREYER: Okay. Okay. We got

13   that.

14   GENERAL PRELOGAR: It also can be

15   applied --

16   JUSTICE BREYER: Now it says there are

17   three things you can do. One is, as you say,

18   confine them, you know, detain. And then number

19   B is an exception, and number C is send them

20   back to Mexico with the word "may," okay? So

21   we've got those three things right equally under

22   the statute.

23   And you say it says "may." So what

24   happens if you say no? And it seems to say

25   "shall be detained." And that's what we're

1   talking about. Suppose you just don't detain

2   them, vast numbers. You parole them. You say,

3   I can do that because of 1182. So I got the

4   structure in my mind.

5   But you are not doing what they said

6   which shall be detained. Well, we can parole

7   them case by case. Okay. Suppose you lose on

8   that. At that point, you have Congress telling

9   you "shall be detained" and you're not doing it.

10   What happens? I'm asking you that

11   because the words are important. And the reason

12   I ask you that is this is not the first time

13   Congress has said to an agency, do it. Do it by

14   May 15. May 15 comes. They haven't done it.

15   That happens more than you might think.

16   Okay. So there's a case law history

17   there of what judges did when the government

18   just didn't do what Congress told them within

19   the time frame they were supposed to do it.

20   Have you looked at that? Do you know

21   what that was? My impression, very vaguely, at

22   a distance, was the judge sort of tried to work

23   things out. They sort of tried to negotiate

24   with the agency. They sort of -- they -- they

25   didn't just order them detained or order the

1   SALT regulation issued because they couldn't.

2   What happened? And does that have any

3   instruction for us?

4   GENERAL PRELOGAR: Well, I think,

5   here, I -- I have a couple of reactions to that,

6   Justice Breyer, and I hope I can work through

7   them. I -- I first want to push back on the

8   idea of how you describe the -- the statutory

9   structure only insofar as I think that it's

10   wrong to treat this as a self-contained unit.

11   It's not as though Congress sat down

12   at one point in time and thought this is going

13   to be our universal solution for how to deal

14   with these encounters at the border with this

15   class of non-citizen.

16   Instead, all of these provisions were

17   added to the statute at different times and for

18   different reasons. The "shall be detained"

19   language came in 1903. That was first. Then

20   Congress added the parole authority in 1952 in

21   the INA, and that was actually a -- a

22   codification of the executive's prior practice

23   of granting parole even when it didn't have

24   express statutory authority to do so.

25   It was only in 1996 that Congress

1   added the (c) that you referred to, contiguous

2   territory return. And so I just want to push

3   back on the suggestion that this was all at one

4   point in time with Congress kind of thinking

5   about these --

6   JUSTICE BREYER: So that -- that --

7   that suggests the argument that you gave up on.

8   And that was the argument that "shall" doesn't

9   literally mean shall this instant. It means

10   shall as best you can.

11   Now you've given -- you've given up on

12   that argument, I think, or have you?

13   GENERAL PRELOGAR: Well, no. I think

14   "shall" properly interpreted means that we

15   should use the detention capacity that we've

16   been afforded here. I think the -- the argument

17   --

18   JUSTICE BREYER: Did you ask for more?

19   GENERAL PRELOGAR: -- in my response

20   to Justice Kagan --

21   JUSTICE BREYER: Did you ask Congress

22   for more?

23   GENERAL PRELOGAR: -- was that we have

24   express statutory release authorities here, and

25   we think that all of these releases are

1   happening in conformance with the INA.

2   Left off your list as well was

3   1226(a). This is an important source of

4   authority for DHS. This is a provision that

5   applies as all agree to anyone who is in the

6   United States, and so that means --

7   JUSTICE BREYER: Yeah, but these are

8   people coming to the border. I thought 1226(a)

9   does just what you say, it applies to people who

10   are already here. And I didn't think --

11   GENERAL PRELOGAR: Yeah. But that

12   applies --

13   JUSTICE BREYER: -- therefore, it

14   applied to this case particularly because I

15   think, here, we're dealing with people who come

16   up to the border. Am I -- tell me why I'm wrong

17   on that.

18   GENERAL PRELOGAR: You're wrong on

19   that because DHS's long-standing interpretation

20   has been that 1226(a) applies to those who have

21   crossed the border between ports of entry and

22   are shortly thereafter apprehended. So that's

23   an important category of the group of

24   non-citizens that we're talking about here.

25   And it memorialized that understanding

1   in regulations shortly after IIRIRA was enacted,

2   and as well that has been the agency's

3   consistent interpretation across the -- the

4   subsequent 25 years.

5   JUSTICE KAVANAUGH: The October memo

6   does not rely on 1226.

7   GENERAL PRELOGAR: Justice Kavanaugh,

8   I -- I -- I think that the October memo, of

9   course, wasn't focused on any of these issues

10   about detention or release because the Secretary

11   was making a judgment about whether to continue

12   with MPP, and that was his policy judgment

13   weighing all of the costs and benefits of the

14   program.

15   JUSTICE KAVANAUGH: Now, in the

16   section about the relationship between MPP and

17   statutory mandates, it was all about significant

18   public benefit under the parole authority.

19   GENERAL PRELOGAR: That's right, that

20   he discussed that at length because that is an

21   important source of DHS's authority here. I

22   believe he also referred to the authority that's

23   conferred by Section 1226(a).

24   JUSTICE BREYER: I need to know this

25   for this reason, that I -- I think -- suppose we

1   do exactly what you suggested we might do, "may"

2   means may. Okay? End of the matter.

3   Then the thing goes back. At that

4   point, I'm guessing, but somebody might say,

5   okay, "may" means may. You don't have to send

6   them back to Mexico, but you do have to detain

7   them. No, we don't, because of the two statutes

8   you mentioned. Yes, you do, because they don't

9   apply. There will be an argument.

10   I don't know if, one, we should

11   foresee that argument and take a view or, two,

12   we should foresee that argument and not take a

13   view or, three, we should just forget about that

14   and just say whether "may" means may.

15   GENERAL PRELOGAR: I think that is the

16   simplest --

17   JUSTICE BREYER: What's your view?

18   GENERAL PRELOGAR: That is the

19   simplest way to resolve this case. We certainly

20   agree that "may" means "may." And that's really

21   the only issue that's directly teed up for this

22   Court's review in light of the injunction.

23   We are actively litigating those other

24   issues in other cases brought by states with

25   respect to our interpretation of 1225(b)(2)(A),

1   with respect to our application of the release

2   authorities, and I think that that is a better

3   context where it's not essentially relying on

4   those release and detention authorities as a

5   collateral way to force the reimposition of MPP.

6   CHIEF JUSTICE ROBERTS: Your --

7   JUSTICE KAGAN: General, I could --

8   CHIEF JUSTICE ROBERTS: Go ahead.

9   JUSTICE KAGAN: I could understand

10   General Stone saying back to you, well, you

11   know, "may" means "may," but you have to read

12   that "may" within the entire statutory structure

13   and within the set of authorizations that you

14   have.

15   And, essentially, the "may" would

16   become a "shall" if you couldn't meet the

17   obligations -- if you -- if -- if you were using

18   completely residual discretionary authority,

19   right, so that if you couldn't parole people

20   under 1182, give them bond under whatever that

21   provision is, et cetera, et cetera, and you were

22   just throwing up your hands in the air and

23   saying, well, we have to do something, so now

24   we're operating outside the statute entirely, I

25   could see him saying, well, in that case, the

1   "may" becomes a "shall." It's kind of a

2   springing mandate if you can't satisfy your

3   obligations in another way.

4   So I have to think, am I wrong about

5   this, that your argument depends on the fact

6   that you say you are satisfying your obligations

7   in other ways. If you weren't, wouldn't you

8   have a harder argument?

9   GENERAL PRELOGAR: No, I don't think

10   so. I think that's actually an easy argument in

11   this case. We certainly do think that we're

12   satisfying those other provisions, so the

13   predicate of Texas's suit fails here.

14   But even if this Court disagreed or

15   thought there was room for doubt, there is no

16   way to interpret Section 1225(b)(2)(C) to be

17   that kind of springing mandate.

18   First, there's a textual problem.

19   Congress said "may return." On their view, it's

20   been mandatory from the get-go and at all times

21   thereafter, and it would be inexplicable for

22   Congress to use that discretionary language if

23   it wanted to have detention capacity be the

24   trigger.

25   Second, I would point to the

1   significant foreign policy consequences that are

2   implicated by that interpretation. We cannot

3   unilaterally implement foreign -- contiguous

4   territory return. Instead, each exercise of

5   this authority requires ongoing negotiation and

6   cooperation and coordination with Mexico. And

7   there again, it's implausible that Congress

8   would have demanded that we do that, that the

9   executive branch engage in those negotiations,

10   without saying so expressly and just using "may

11   return."

12   Third, I'd point to the history. No

13   one at any point in time during the legislative

14   drafting acknowledged that the -- the provision

15   would have this kind of effect that they're

16   attributing to it. Instead, the history is

17   clear that this was just responding to that BIA

18   decision and overturning the conclusion that the

19   executive's prior discretionary use of the

20   authority required authorization with no

21   indication that Congress was changing it into a

22   mandate.

23   And then, fourth and finally, I would

24   point to the consistent executive interpretation

25   of this provision. No one's interpreted the INA

1   this way before. Every presidential

2   administration has understood this to just be a

3   purely discretionary authority. That goes for

4   the prior administration. On their view, MPP

5   itself would be unlawful because it doesn't

6   maximize the use of contiguous territory return.

7   JUSTICE ALITO: Part of --

8   CHIEF JUSTICE ROBERTS: General, your

9   interpretation of the statute, I think, is

10   entirely manipulable. You use -- the -- the

11   statute has what seems to be a serious

12   limitation on parole, significant public

13   benefit.

14   And yet, you say that goes down due to

15   the fact that you have limited detention. So --

16   and you have limited detention. It's not like

17   you're going to hit a number there which is

18   going to take care of everything. More than

19   30,000 are going to come in at a time, and you

20   say, well, it's not -- it's actually less than

21   that because we have to save a number of beds --

22   beds for this.

23   So you can have a phrase in the

24   statute mean what you want it to mean to

25   accommodate as many people at the border by

1   releasing them as -- as you want, right? There

2   is no limit, as you read the statute, to the

3   number of people that you can release into the

4   United States, right?

5   GENERAL PRELOGAR: Congress did not

6   create a limit in that statute, but, of course,

7   it's Congress itself that's making these

8   appropriations decisions about how much bed

9   space to give us.

10   CHIEF JUSTICE ROBERTS: Well, right.

11   But -- but -- but, if Congress wants there to be

12   the release of a significant or whatever number,

13   all they have to do is not fund the detention

14   facilities to keep the number low, and then you

15   would have whatever authority you want to -- to

16   extend the number of people released into the

17   United States to as great an extent as you want.

18   And you say, well, we're not going to

19   -- don't worry about MPP. And, you know, maybe

20   that's your decision, but you're sort of making

21   it even harder for you to do anything other than

22   release the people encountered at the border

23   into the United States.

24   GENERAL PRELOGAR: Well, this is a

25   statutory --

1   CHIEF JUSTICE ROBERTS: Even though --

2   I don't mean to repeat myself, but it's a

3   significant question. Even though the statute

4   that allows you to release people into the

5   United States says there has to be a significant

6   public benefit.

7   And you say there's a significant

8   public benefit when there aren't enough

9   people -- there aren't enough beds in detention.

10   So there's no limit at all on how many you can

11   release into the United States.

12   GENERAL PRELOGAR: Well, I think the

13   inherent limit, of course, is the detention

14   capacity. Congress didn't define that as a

15   significant public interest.

16   CHIEF JUSTICE ROBERTS: Well, yeah.

17   No, I'm putting that to one side because

18   everybody knows that's not nearly enough beds to

19   take care of the problem.

20   GENERAL PRELOGAR: That's right. And

21   -- and this has been the agency's --

22   CHIEF JUSTICE ROBERTS: If you don't

23   think it's a problem, you don't want to have --

24   you should add more beds anyway.

25   GENERAL PRELOGAR: Well, this is the

1   agency's consistent interpretation of the parole

2   provision. Congress has never disapproved it.

3   It has known that DHS is exercising its parole

4   authority that way.

5   But, Mr. Chief Justice, to the extent

6   that the impetus for this question is the sense

7   that contiguous territory return could take care

8   of that issue, I want to forcefully push back on

9   that idea because contiguous territory return

10   cannot be the solution here. Over the life of

11   the program in the prior administration, only

12   6.5 percent of individuals we encountered at the

13   border were enrolled in MPP.

14   It has inherent constraints. The

15   statute limits who can be enrolled in MPP. You

16   have to be arriving by land from contiguous

17   territory. We're constrained by what Mexico is

18   willing to consent to with respect to who it

19   will allow to be enrolled into the program, and

20   it's placed important limitations on our

21   exercise of that.

22   There were entire categories of people

23   who were excluded from MPP, like all Mexican

24   nationals. Our international commitments, our

25   non-refoulement obligations likewise provide a

1   constraint here.

2   So, to the extent that you are

3   concerned about how parole operates, that

4   concern doesn't go away based on implementing

5   MPP. And, in fact, in the prior administration,

6   when MPP was in full force, still DHS was

7   implementing its parole decisions this way as

8   it's always done consistently for the past 25

9   years.

10   JUSTICE SOTOMAYOR: Counsel --

11   JUSTICE BARRETT: Do you --

12   JUSTICE SOTOMAYOR: I'm sorry,

13   General.

14   JUSTICE BARRETT: Well, I don't want

15   to -- I know we were into seriatim time, so I

16   don't want to --

17   CHIEF JUSTICE ROBERTS: No, not just

18   yet. Justice Sotomayor?

19   JUSTICE SOTOMAYOR: General, going

20   back to Justice Breyer's question, assuming just

21   for the sake of argument that there's no

22   injunctive power in the court below the way

23   you're arguing, how would we ever reach the

24   question that Justice Breyer raised, which is

25   the district court being wrong on its assumption

1   that this "may" is a "shall"? How do we reach

2   that question if the injunction was erroneously

3   issued?

4   GENERAL PRELOGAR: We think that

5   question would be appropriately reached in the

6   case of an individual non-citizen. And there

7   is, of course, jurisdiction preserved to reserve

8   those kind of claims in those types of cases.

9   This was Congress channeling the review to those

10   cases in order to --

11   JUSTICE SOTOMAYOR: So you would say

12   under an -- we should just say an injunction of

13   any kind is improper?

14   GENERAL PRELOGAR: Yes. We think that

15   that is the correct interpretation of

16   1252(f)(1).

17   JUSTICE SOTOMAYOR: Would we need to

18   reach the declaratory judgment issue in your

19   mind, or should we just simply address whether

20   what's before us, which is the injunction, that

21   it's improper?

22   GENERAL PRELOGAR: I think, here, the

23   Court could just reach the injunction and

24   declare that that's improper.

25   JUSTICE BARRETT: General Prelogar,

 1   can I ask you a question about significant

 2   public benefit? You've identified the number of

 3   beds and the need to prioritize as the public

 4   benefit that DHS is taking into account and --

 5   when deciding whether to parole.

 6   Can you -- is it your position that

 7   you cannot consider the significant public

 8   benefit in not releasing into Mexico? In other

 9   words, that you're only looking at the

10   significant public benefit of releasing into the

11   United States but not in choosing that option

12   versus the other?

13   GENERAL PRELOGAR: So I think, with

14   respect to kind of how this is working on the

15   ground, the -- the individual immigration

16   officers -- and there are thousands of them who

17   would be responsible for making these decisions

18   -- are -- are focused on the actual detention

19   capacity at that moment.

20   With respect to the broader question,

21   though, about using contiguous territory return

22   versus releasing into the interior, I think

23   that's ultimately a policy judgment for the

24   Secretary. It's not as though return to Mexico

25   is costless. It involves an enormous investment

1   of our diplomatic resources and our engagement

2   with that bilateral negotiation.

3   And so I think that the Secretary is

4   well justified in thinking that in light of the

5   tremendous costs that he identified with the

6   program and in light of his determination that

7   it actually detracted from other strategies and

8   programs he thought would be more effective in

9   stemming the tide of irregular migration, that

10   he was well justified in making that policy

11   determination.

12   CHIEF JUSTICE ROBERTS: Thank you --

13   JUSTICE BARRETT: Let me go back to

14   the individual -- oh, sorry.

15   CHIEF JUSTICE ROBERTS: Go ahead,

16   finish up.

17   JUSTICE BARRETT: For the individual

18   determinations. So you would say that it is not

19   DHS's practice or responsibility with respect to

20   any individual non-citizen to decide the

21   significant public benefit of paroling into the

22   United States versus sending that particular

23   non-citizen back to Mexico?

24   GENERAL PRELOGAR: Well, while MPP was

25   operational, I should -- I should take the

1   opportunity to clarify. My understanding is

2   that the officers were making those kinds of

3   discretionary decisions, and, in fact, the vast

4   majority of -- of -- of non-citizens who were

5   eligible for MPP, or at least a substantial

6   number, were actually diverted out of the

7   program.

8   And that's why the -- the numbers are

9   only about 6.5 percent of those we encountered

10   at the border were enrolled in the program. So

11   there was discretion to not put an individual in

12   MPP while the program was in effect.

13   JUSTICE SOTOMAYOR: Counsel --

14   CHIEF JUSTICE ROBERTS: Thank you.

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

16   Justice Thomas, anything further?

17   Justice Breyer?

18   Justice Alito?

19   JUSTICE ALITO: The parole decisions

20   are supposed to be made on a case-by-case basis,

21   right?

22   GENERAL PRELOGAR: That's correct.

23   JUSTICE ALITO: And the statistics

24   that you cite and the statistics that the

25   Respondents provided in their brief about the

1   number of individuals who are being paroled

2   every month are -- are very high.

3   So what does it mean for there to be a

4   case-by-case determination? Let's think of --

5   think of the example of people who want to go to

6   a baseball game at Nationals' Park.

7   So they all line up, they try to get

8   through the turnstile, and somebody says -- goes

9   through a little checklist. Do they have a

10   ticket? Yes. Do they have a gun? No gun. Do

11   they have alcohol? No alcohol. Something to

12   throw on the field? Nothing to throw on the

13   field. Fireworks? Nothing. No fireworks,

14   fine.

15   Is that a case-by-case determination

16   in your -- in your view?

17   GENERAL PRELOGAR: I think that that

18   would satisfy the --

19   JUSTICE ALITO: And that's what you're

20   doing.

21   GENERAL PRELOGAR: -- legal

22   requirement.

23   JUSTICE ALITO: That's basically what

24   you're doing. You've got a little checklist and

25   you're going -- and, you know, boom, boom, boom,

1   and that's how you can process. Maybe you're

2   right, but that's -- that's what you think

3   Congress meant by a case-by-case determination?

4   GENERAL PRELOGAR: Yes, we think that

5   Congress required us to give individualized

6   attention to each non-citizen and make an

7   assessment about the categories like flight risk

8   and security concern, and DHS is doing that on

9   the ground.

10   CHIEF JUSTICE ROBERTS: Justice

11   Sotomayor?

12   JUSTICE SOTOMAYOR: Counsel, before

13   the MPP program at issue, I thought that there

14   were a lot fewer people, but there were people

15   who were sent back under MPP, correct?

16   GENERAL PRELOGAR: I wouldn't call

17   that MPP. That's kind of the broad programmatic

18   use of contiguous territory return. I think

19   what you're referring to was the executive's

20   prior practice on an ad hoc basis of sometimes

21   returning individuals, usually monthly.

22   JUSTICE SOTOMAYOR: Then I understood

23   this wrong? I thought that each asylum officer,

24   there were two -- I understood from my reading

25   there were two criterias for MPP. There was a

1   set of criteria that's different than the parole

2   criteria and that asylum officers determined

3   whether to exercise this -- if the person fit

4   below the MPP criteria, they would be sent back.

5   GENERAL PRELOGAR: Yes, I apologize.

6   I thought you were referring to the prior

7   executive practice before MPP itself was

8   implemented. But, yes, under MPP, there was

9   that discretion to choose whether to enroll

10   individuals who were eligible in the program.

11   And, of course, there were entire

12   categories of individuals who were excluded from

13   eligibility.

14   JUSTICE SOTOMAYOR: Under the prior

15   administration?

16   GENERAL PRELOGAR: That's correct, and

17   under this administration as well.

18   CHIEF JUSTICE ROBERTS: Justice Kagan?

19   JUSTICE KAGAN: I have two rather

20   different questions.

21   First, to go back to Justice Alito's

22   question when he said aren't you just really

23   using a checklist. And then, at the end of your

24   answer, you said, well, you know, what we're

25   doing with respect to each individual is trying

 1   to assess flight risk and danger.

 2   So that is not just a like are you a

 3   flight risk check, right? That involves

 4   something or other. So what do you do with this

 5   many people? I mean, you have a lot of officers

 6   too, but what do you do to determine flight risk

 7   and danger?

 8   GENERAL PRELOGAR: So this relates to

 9   the colloquy I was having with Justice Sotomayor

10   where we conduct criminal records checks. We

11   take biometric records checks. We assess ties

12   to the community and -- and assess other factors

13   that might bear on the flight risk question.

14   And I do want to push back on the idea

15   that this is anything like just formality, going

16   through a checklist. DHS takes seriously its

17   obligation to responsibly allocate the limited

18   law enforcement resource here of detention beds.

19   And it's not as though it's not giving attention

20   to each individual non-citizen to make these

21   determinations.

22   JUSTICE KAGAN: Okay. My -- my second

23   question takes you to someplace that we -- we

24   have not been, which is the second question

25   presented, and I just wanted to ask, there's --

 1   there's a lot of skepticism on the Fifth

 2   Circuit's part that there was a second

 3   assessment of this question.

 4   In other words, the Fifth Circuit

 5   said, oh, you're just sort of adding stuff to

 6   the first one. So -- and you say, no, this was

 7   an independent assessment.

 8   I mean, how are we to make that

 9   decision? What is -- what do you look for in

10   determining whether an assessment is new?

11   I mean, the DACA case basically points

12   to two paths that the agency can take, and one

13   is just to kind of use the initial assessment as

14   a base and -- and -- and -- and add some stuff

15   maybe, and the other is no, you can start anew,

16   start afresh.

17   How do we decide whether you've

18   started afresh?

19   GENERAL PRELOGAR: Well, I think you

20   look in the first instance to the agency action

21   itself. And -- and, here, the October 29

22   termination decision was by its own terms a new

23   agency action. The Secretary said, I hereby

24   terminate MPP. And I think that that's

25   fundamentally different than the situation the

 1   Court confronted in the DACA case, where the

 2   agency action by its own terms just supplied

 3   additional reasoning and said this is not a new

 4   decision, this is additional context for a

 5   decision that was made long ago.

 6   But, here, Secretary Majorkas did the

 7   opposite. He took Option 2 in Regents. He

 8   accept the remand. He engaged in a thorough

 9   process of reconsideration. He -- he showed his

10   work. He described in considerable detail

11   exactly what he did, the meetings he held with

12   stakeholders, those in border communities, state

13   and local law enforcement officials, advocates

14   and proponents for and against MPP. He

15   described the material he had consulted, the

16   congressional records, the litigation records,

17   all of the agency internal memoranda.

18   And then, over dozens of pages, he

19   explained the considerations he had taken into

20   account and the conclusions he reached. And I

21   think, on that record, this doesn't present a

22   difficult question because there's no doubt that

23   that qualifies as a new agency action.

24   And the Fifth Circuit's contrary

25   conclusion rested on this inapposite reopening

1   doctrine from the D.C. Circuit about statute of

2   limitations issues that Respondents aren't even

3   seeking to defend or mention in this Court. So

4   I think whatever hard questions could

5   theoretically arise, this isn't one of them.

6   CHIEF JUSTICE ROBERTS: Justice

7   Gorsuch?

8   Justice Kavanaugh?

9   JUSTICE KAVANAUGH: I have several

10   questions. If you had sufficient detention

11   capacity, could you still exercise your

12   discretion to parole people into the United

13   States?

14   GENERAL PRELOGAR: I think, at that

15   point, we couldn't count as a significant public

16   interest any resource constraints because, under

17   the hypothetical, there wouldn't be those

18   resource constraints.

19   That wouldn't, of course, supplant

20   the -- the authority that DHS has to take into

21   account other humanitarian reasons or other

22   significant public interests, but I -- I

23   certainly agree that at that juncture, we

24   wouldn't be relying on these allocation of

25   resource constraints for purposes of -- of

1   complying with that requirement.

2   JUSTICE KAVANAUGH: And why is that?

3   GENERAL PRELOGAR: Because, at that

4   point, there wouldn't be a significant public

5   interest in trying to preserve the limited

6   resource.

7   JUSTICE KAVANAUGH: Why would you have

8   to detain them, though?

9   GENERAL PRELOGAR: Well, as I said

10   before, we understand Section 1225(b)(2)(A) to

11   set forth Congress's expectation that we should

12   use the detention capacity that we've been

13   afforded.

14   So we're not saying that's a "may" or

15   that Congress was neutral on the issue. We're

16   simply pointing to the fact that, in this

17   circumstance, where Congress hasn't given us the

18   bed space and no one disputes that, it's not

19   only permissible but responsible for DHS to take

20   that into account in its detention and release

21   decisions.

22   JUSTICE KAVANAUGH: Okay. So you

23   agree that Congress has expressed a preference

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

25   GENERAL PRELOGAR: Yes, we do. We

1   don't think that that is a -- a "may" or simply

2   neutrality on the issue.

3   JUSTICE KAVANAUGH: Okay. Switching

4   gears, I don't know if this is before us, so my

5   first question is, is the State Farm issue with

6   respect to the October memo before us or not?

7   Because, if so, I have a lot of State

8   Farm-related questions to ask you. I'll

9   probably ask you them anyway, but is this before

10   us or not?

11   GENERAL PRELOGAR: So we didn't ask

12   this Court to review the substance of the

13   October 29 memorandum and in recognition that

14   the lower courts haven't considered that issue.

15   Respondents did brief that issue at the -- the

16   end of their brief, and we responded to that in

17   our reply brief.

18   We think, if the Court reaches that

19   issue, it should clearly reject their arguments,

20   their exceedingly weak arguments, that this

21   wasn't reasoned decision-making, but I, of

22   course, acknowledge that the lower courts

23   haven't had an opportunity to consider that

24   issue.

25   And I would say that I think the

 1   problem that we're -- we're trying to address

 2   here and the thing we're asking the Court to do

 3   is reverse the Fifth Circuit's flawed conclusion

 4   that this just isn't an agency action at all.

 5   JUSTICE KAVANAUGH: Okay. On the if

 6   -- if State Farm is before us, if it's not

 7   before us here, when will it be before us?

 8   GENERAL PRELOGAR: So we fully expect

 9   that Texas will amend its complaint back in

10   district court and we'll be litigating that

11   issue then.

12   JUSTICE KAVANAUGH: Okay. Well, I'll

13   ask a couple just in --

14   GENERAL PRELOGAR: Although, if you

15   are interested in reaching it, then I'm happy to

16   defend it.

17   JUSTICE KAVANAUGH: Well, I'll just

18   ask a couple questions in case we reach it.

19   There were two parts of the explanation in the

20   October memo that jumped out to me as

21   potentially State Farm-type issues.

22   One is that you said -- the -- the

23   memo says that the choice to bring people into

24   the country is because, otherwise, other more

25   dangerous people would come into the country.

 1   In other words, you have a choice between the

 2   less dangerous or more dangerous coming into the

 3   country. That's on page 28 of the memo.

 4   And that strikes me as a false choice

 5   because the other option, of course, is to send

 6   people to Mexico. So that's one issue.

 7   The other issue is I don't see -- and

 8   this follows up on Justice Barrett's questions

 9   -- any real explanation in the October memo of

10   what "public" means and "significant public

11   benefit." Is that the American public? Is that

12   the non-citizen public? Who is that?

13   And if it's the American public,

14   there's no real explanation of how the public is

15   benefitted by more people coming into the United

16   States who are not lawfully admitted into the

17   United States rather than trying, if feasible,

18   for some of those people to remain in Mexico.

19   I'm not saying what the best exercise

20   of policy discretion is there. I'm saying I

21   think the October memo doesn't quite get into

22   what is public benefit, what does it mean, how

23   are we supposed to assess that.

24   GENERAL PRELOGAR: So if I can, I

25   think actually the October 29 memo largely

1   addressed both of those issues by reference to

2   the concerns about detention capacity and their

3   recognition that DHS has not been appropriated

4   to detain each and every non-citizen we

5   encounter by -- by orders of magnitude.

6   And so what Secretary Majorkas was

7   acknowledging there is that in applying those

8   release authorities, and it's not just parole,

9   of course, but it's also bond under 1226(a),

10   it's appropriate to take account of that limited

11   resource.

12   With respect to how that intersects

13   with the use of contiguous territory return,

14   Secretary Majorkas gave that sustained attention

15   in the memorandum. He explained that there were

16   enormous costs associated with maintaining that

17   program, and with respect to our diplomatic

18   negotiations with Mexico, that we had to divert

19   resources away from other types of bilateral

20   negotiations and cooperation we wished to

21   pursue, that it also drained resources with

22   respect to how DHS can pursue some other

23   policies, and -- and that for all of those

24   reasons, on balance, he found, after giving the

25   issue sustained attention, that MPP just wasn't

        1   worth the tremendous costs that it imposed.

        2   And if I could make one final point to

        3   this line of questioning, I think, again, I want

        4   to make clear that it's not as though, to the

        5   extent you have concerns about significant

        6   public benefit, that MPP cures those concerns.

        7   There are inherent limits on the number of

        8   people we can enroll. Mexico now, under the

        9   court-ordered injunction reimplementation of

       10   MPP, is requiring that we process those removal

       11   cases within 180 days. And -- and that's a big

       12   change from how MPP operated before, because it

       13   didn't function as intended. There were huge

       14   backlogs. People remained in Mexico far longer

       15   than anyone had anticipated. There were

       16   horrible problems of predatory violence. And to

       17   honor that commitment to Mexico, we are very

       18   much constrained in the number of people we can

       19   enroll in the program.

       20   JUSTICE KAVANAUGH: And I think this

       21   is Justice Barrett's earlier question. I want

       22   to try to get a precise answer on this. In

       23   considering significant public benefit, is it

       24   appropriate for the Secretary to consider the

       25   possibility of some people remaining in Mexico,

1   against the possibility of all the people for

2   whom there is not detention capacity coming into

3   the United States?

4   GENERAL PRELOGAR: Yes. I think that

5   the Secretary could take that consideration into

6   account. Here I think that he analyzed at

7   length the tremendous cost imposed by MPP and

8   keeping this program up and running. He

9   identified other strategies that he wished to

10   pursue that he thought would be --

11   JUSTICE KAVANAUGH: Do you think --

12   GENERAL PRELOGAR: -- more effective

13   than MPP.

14   JUSTICE KAVANAUGH: Do you think the

15   memo sufficiently grapples with what the 19

16   states' amicus brief asserts with respect to the

17   costs to the states and to the people in the

18   United States in terms of increased

19   expenditures? Again, not saying which way that

20   should come out. Do you think that's

21   sufficiently addressed in the October memo?

22   GENERAL PRELOGAR: I do think it is.

23   The Secretary took seriously the concern that

24   the district court had raised that in the June

25   1st termination decision, he hadn't

1   appropriately accounted for the asserted

2   reliance interests of states.

3   There was an entire section of the

4   October 29 memorandum where the Secretary worked

5   through all of the concerns that states had

6   raised. And I think that that certainly

7   satisfies the APA's requirement of reasoned

8   decision-making.

9   JUSTICE KAVANAUGH: Thank you.

10   CHIEF JUSTICE ROBERTS: Justice

11   Barrett?

12   JUSTICE BARRETT: Thank you, Justice

13   Kavanaugh. You did a better job asking my

14   questions than I did before.

15   General Prelogar, I just want to

16   follow up one last thing. The -- the question

17   that I have is one of statutory interpretation

18   and what significant public benefit means. And

19   as you say, Congress has expressed a preference

20   for detention. And capacity is -- is a limit on

21   that and -- and it seems like the primary driver

22   of your assessment of significant public

23   benefit.

24   I guess my question is, on the

25   case-by-case basis when DHS assesses whether any

1   individual non-citizen -- whether there would be

2   a significant public benefit to release and

3   parole rather than send back to Mexico or other

4   contiguous territory, what is the benefit? Is

5   that a limit -- you know, the Chief Justice said

6   that if you're only considering capacity, that's

7   a pretty capacious term and there might not be

8   any limit.

9   So do you have to -- do you have to

10   take into account, as a matter of statutory

11   interpretation, the public benefit, the

12   significant public benefit of choosing that

13   option, the parole into the United States

14   option, rather than sending back to Mexico or

15   whatever contiguous territory?

16   GENERAL PRELOGAR: Well, I -- I think

17   that Congress in enacting these various

18   provisions in no way signaled that it was

19   necessary to think about contiguous territory

20   return with respect to each of these parole

21   decisions.

22   Again, I think that Congress would not

23   have used the unexplained and purely

24   discretionary "may" return language if it meant

25   to try to transform how the government was

1   thinking about its parole determinations.

2   And so, you know, here I think that,

3   on the ground, DHS immigration officers are

4   looking at each individual non-citizen to make

5   those judgments. And in -- in making those

6   judgments, it's not even clear that there would

7   be an alternative to return to Mexico for all of

8   the reasons I listed before, because of the

9   exclusions under the program, the

10   non-refoulement obligations, the fact that

11   Mexico would never agree or consent to accept

12   everyone that we are currently paroling.

13   So for all of those reasons, I just

14   don't think the statutory structure can work

15   that way.

16   JUSTICE BARRETT: And does that go

17   back to your point that we shouldn't look at

18   this, when you -- you were responding to Justice

19   Breyer earlier saying that you would resist the

20   characterization of this as a unit because each

21   of these provisions was passed at a different

22   time? Is that driving part of your answer here,

23   that significant public benefit shouldn't -- we

24   shouldn't interpret that as any kind of

25   instruction to the agency to take into account

 1   its various options because each of these

 2   provisions, you're arguing, should be more

 3   stand-alone?

 4   GENERAL PRELOGAR: I think that is

 5   absolutely part of it, that it's wrong to think

 6   about 1225 as being that kind of self-contained

 7   unit. And -- and I would point as well to the

 8   fact that we know from the statutory history

 9   exactly what Congress was aiming at, with the

10   contiguous territory return provision. It

11   wasn't weighing in on how to make those kinds of

12   judgments about significant public benefit.

13   Instead, it was simply trying to

14   reverse that BIA decision that had disapproved

15   the prior kind of ad hoc executive practice of

16   occasionally returning some non-citizens to

17   contiguous territory.

18   JUSTICE BARRETT: Thank you.

19   CHIEF JUSTICE ROBERTS: Justice

20   Breyer?

21   JUSTICE BREYER: Just -- I mean, it

22   may well be wiser just to focus on "may," okay,

23   but just -- it might happen that we go beyond

24   that and consider this later memo, the October

25   memo, et cetera. What's making me worried about

1   that -- I'm not sure if you want to say -- and

2   you don't have to -- but what is the

3   administration's view of the detention versus

4   the parole? That is, has the administration

5   asked Congress for more money for detention?

6   What -- and how is that relevant? That's

7   floating around in my mind. So don't answer if

8   you don't want to. If you have something you

9   want to say on it, do.

10   GENERAL PRELOGAR: Well, Congress is,

11   of course, responsible for making those

12   appropriations decisions. And the -- the

13   government has submitted budget requests to

14   Congress, trying to balance a variety of

15   different considerations here. Among other

16   things, we asked for more resources for

17   immigration judges, who could speed the

18   processing of cases that would allow us to

19   detain more individuals with fewer beds because

20   we'd be able to remove them more quickly by

21   resolving their cases more quickly.

22   We've also asked for funding for

23   alternatives to detention, which would help us

24   supervise a greater number of people and ensure

25   that they're not absconding, that they appear

1   for their hearings. We've asked for more

2   resources for enforcement at the southwest

3   border, to hire additional officers. And so all

4   of these ways, I think that we are seriously

5   engaging with the -- whatever challenges exist

6   at the border.

7   CHIEF JUSTICE ROBERTS: Thank you,

8   General.

9   General Stone.

10   ORAL ARGUMENT OF JUDD E. STONE, II

11   ON BEHALF OF THE RESPONDENTS

12   MR. STONE: Thank you, Mr. Chief

13   Justice, and may it please the Court:

14   This case presents a procedural

15   question about the October memoranda's effect on

16   Petitioner's appeal and a substantive question

17   about Petitioner's obligations under

18   Section 1225(b)(2).

19   The answer to the procedural question

20   is straightforward. The Fifth Circuit announced

21   only two holdings according to the October's

22   memoranda's effect on this appeal. The first is

23   that the termination of MPP via the October

24   memoranda did not deprive the June termination

25   of its status as final agency action for

1   purposes of that court's jurisdiction. The

2   second is that the Fifth Circuit concluded that

3   those memoranda did not moot this case.

4   Petitioners did not challenge the

5   first in their opening brief, and thus Texas did

6   not address the reopening doctrine, and

7   Petitioners have affirmatively disclaimed any

8   challenge to the Fifth Circuit's mootness

9   holding in their reply brief. Because

10   Petitioners challenge neither holding, neither

11   -- the October memoranda provide no basis to

12   disturb the judgment.

13   Petitioners instead asked this Court

14   to evaluate the merits of potential APA

15   challenges to the October memos in the first

16   instance and without an administrative record,

17   and then to decide that those memos satisfy the

18   district court's injunction. This is not the

19   proper forum for Petitioners to initially seek

20   such relief.

21   This Court should also affirm the

22   Fifth Circuit on the substantive question of

23   Petitioners' detention obligations under 1225.

24   Jennings held that executive officials must

25   detain aliens who fall within the 1225(b)(2)'s

 1   scope. And that holding all but forecloses the

 2   executive -- Petitioners' arguments under Castle

 3   Rock and past practice that subsection (b)(2)(A)

 4   is discretionary.

 5   There are just two other ways to

 6   satisfy this detention mandate. This Court in

 7   Jennings mentioned one, parole under

 8   Section 1182(d)(5). The other is to return,

 9   rather than to detain, certain aliens under

10   1182(b)(2)(C).

11   The Fifth Circuit concluded that the

12   executive was not permitted to rescind MPP and

13   thus to increase its total number of violations

14   of Section 1225(b)(2)(A)'s mandate in lieu of

15   exercising that authority. If this Court

16   agrees, it need go no further.

17   I welcome the Court's questions.

18   JUSTICE THOMAS: General Stone, the --

19   I know there's not much briefing, but I would

20   like your reaction to the 1252(f)(1) problem

21   that we've discussed.

22   MR. STONE: Certainly, Your Honor. In

23   candor, I can only give general observations

24   because United States confined that to a

25   footnote and we viewed it as certainly

1   inapplicable.

2   That 1252(f)(1) specifically prohibits

3   the district court from enjoining the operation

4   or application of the -- of Title 4 of the

5   Immigration and Nationality Act, our APA

6   challenge is against their rescission of a

7   program that would, in fact, exercise their

8   powers underneath (b)(2)(C).

9   So we see -- in our view, (f)(1) has,

10   just simply nothing -- no role to play here.

11   JUSTICE THOMAS: Well, I don't know

12   whether we can dispose of it that easily, but

13   going to the merits, the -- do you think with

14   your reading of the -- of 1225, do you think

15   that the MPP as implemented complied with the --

16   with 1225?

17   MR. STONE: MPP as implemented reduced

18   the number of violations. It did not fully

19   satisfy the executive mandate, but so far as it

20   went, it complied with the executive's

21   obligations to return, rather than detain the

22   aliens enrolled in MPP.

23   JUSTICE THOMAS: So you could have

24   brought -- you could have brought the same

25   lawsuit against the last administration under

1   your reading of 1225?

2   MR. STONE: We could have brought a

3   related lawsuit, Your Honor. We would still be

4   required to queue to the Administrative

5   Procedures Act's limitations and, at that point,

6   we would be saying that the Administration was

7   required to take a certain specific action,

8   which is to say craft a policy in which they

9   would have otherwise some discretion about how

10   to use (b)(2)(A), (b)(2)(C) and 1182. I think

11   that --

12   JUSTICE THOMAS: So has any

13   administration ever complied with 1225 under

14   your reading?

15   MR. STONE: I assume not, Your Honor.

16   Petitioners suggest that no administration, no

17   executive has fully complied with their

18   detention obligations. That certainly doesn't

19   prove that past administrations assumed those

20   obligations could be essentially -- could be

21   shirked in the event that they preferred not to

22   use one of Congress's allowed statutory tools

23   but I have no reason to think that that's

24   incorrect.

25   JUSTICE THOMAS: Wouldn't -- assuming

1   you're right, wouldn't it be odd for Congress to

2   leave in place a statute that would appear to be

3   impossible to comply with?

4   MR. STONE: No, Your Honor. Congress,

5   as -- as my friends on the other side mentioned,

6   had this mandatory detention obligation for over

7   a century. It has added authorities to enable

8   the executive to attempt to meet it

9   additionally.

10   Now, to some extent, I think some of

11   the problems of the question that you're getting

12   at is what happens when Congress doesn't provide

13   enough money to be able to actually require that

14   to be satisfied.

15   Then the executive has to do the best

16   it can with the obligated -- with the -- with

17   the amount of money that's been appropriated to

18   it and the other lawful -- the other lawful

19   authorities it's been provided.

20   JUSTICE THOMAS: So you're -- we're

21   just talking then about how much an -- an

22   administration would be out of compliance

23   because they would all be out of compliance

24   under your --

25   MR. STONE: Yes, Your Honor. Each

1   individual -- each individual who is subject to

2   mandatory detention, as this Court described it

3   in Jennings, under 1225(b)(2)(A), who is not

4   either detained, returned pursuant to (b)(2)(C)

5   or otherwise paroled on a case-by-case basis is

6   a separate divisible violation of the

7   Immigration and Nationality Act.

8   To what extent, again, that there

9   might be relief in any of those circumstances,

10   especially if, you know, we're talking about

11   them individually, that's a different case.

12   JUSTICE SOTOMAYOR: Counsel, I have a

13   different view of history and perhaps you'll

14   deal with mine. And that is that when Congress

15   knows that something's happening and it responds

16   or it fails to respond, that that tells us

17   something about its intent.

18   And the General said that the "shall"

19   language has been in existence since the turn of

20   the century and that in no time in American

21   history has any administration followed your

22   interpretation and attempted to detain every

23   single illegal immigrant.

24   On top of that, that they have been

25   paroling or bailing out people in the face of

1   that language since the turn of the century.

2   And that the most that Congress has done is

3   passed 1182 and 1226(a), the parole and the bail

4   provisions.

5   And at least in the bail application,

6   there's no limit. It just says the attorney

7   general can do this. In the 1182, it has set

8   parameters, but it didn't set the parameters of

9   the extensive legislative history you cited in

10   your brief that it intended to limit the number

11   to a narrow few. That was the House bill that

12   was rejected. And it set no limit in the 1182.

13   So what do I do if I'm a person who

14   views that history and says, whatever Congress

15   didn't do, which is give enough resources or

16   pass legislation that said be inhumane and

17   detain every person without any resources, that

18   we should accept what the practices have been

19   through generations of presidents?

20   MR. STONE: I think, Your Honor, if I

21   understand your question correctly, you should

22   first start with two things. The first is this

23   Court's unequivocal detention mandate in

24   Jennings.

25   I would describe Section

1   1225(b)(2)(A). That was only in 2018. So to

2   the extent that past admissions might have

3   thought there was some room for discretion on

4   their part, that -- that was a mandatory

5   provision as something this Court resolved --

6   JUSTICE SOTOMAYOR: Just deal -- just

7   deal with the history involving 1182 and

8   1226(a).

9   MR. STONE: Certainly.

10   JUSTICE SOTOMAYOR: That's been used

11   since both provisions were passed, and exactly

12   in this way, essentially.

13   MR. STONE: The history of 1182(d)(5),

14   the specific amendment that -- that Congress

15   passed to that, previously the section had said

16   something to the effect of that parole could be

17   provided by the attorney general if he

18   determined that there was -- it was in the

19   public interest.

20   The 1996 amendment specifically

21   inserted the case-by-case requirement and made

22   an obligation that there had to be either a

23   significant public benefit or urgent

24   humanitarian reason. And so that undoubtedly

25   narrowed the executive's discretion in at least

1   those two ways.

2   It also had a third component, which

3   required the duration of that parole be only so

4   long as that reason or that benefit maintains

5   its -- kept being the case.

6   So to illustrate what kinds of

7   benefits those might be, Petitioners actually

8   have certain regulations. Let me call to your

9   attention 8 CFR 212.5 which discusses three

10   kinds of circumstances among others that might

11   satisfy as one or the other.

12   One being an individual for whom

13   essentially they've got a medical condition for

14   detention is simply incompatible or will worsen

15   it significantly.

16   Another being a pregnant woman. And a

17   third 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   CHIEF JUSTICE ROBERTS: So you're --

5   but -- but --

6   MR. STONE: Of course -- I'm sorry to

7   interrupt.

8   CHIEF JUSTICE ROBERTS: The only --

9   the only point I would make is that that remains

10   true, but given their termination of MPP, the

11   most that does as I can see it is make it more

12   difficult for them to comply with the law.

13   I think it's a bit much for Texas to

14   substitute itself for the Secretary and say that

15   you may want to terminate this, but you have to

16   keep it because it will reduce to a slight

17   extent your violations of the law.

18   MR. STONE: Certainly not, Your Honor.

19   And Texas isn't seeking injunctive relief to

20   require the administration to take any

21   particular view -- any particular view of the

22   immigration policy.

23   Texas is bringing a garden variety or

24   two garden variety APA claims, one of which are

25   sort of the traditional arbitrary and capricious

1   that I mentioned earlier during my opening. The

2   other is that, in fact, this is not consistent

3   with Section 1225 because this will predictably,

4   and this is a finding of fact that was made by

5   the district court after it was hotly contested

6   on trial on the merits, that the -- the

7   rescission of MPP will cause the government to

8   systemically increase its 1225(a) obligation --

9   or its violation of its 1225(b)(2)(A)

10   obligations.

11   That's the reason in the APA sense

12   that rescission doesn't comply with law.

13   There's -- now to speak to the --

14   JUSTICE KAGAN: But General Stone,

15   it -- it doesn't really seem like a garden

16   variety APA thing to -- to basically tell the

17   executive how to implement its foreign and

18   immigration policy.

19   And that's what this does. It puts

20   the United States essentially at the mercy of

21   Mexico. Mexico knows that, you know, if we come

22   out your way, well, Mexico has all the leverage

23   in the world to say: Well, you want to do that?

24   You want to comply with the Court's order? Here

25   are 20 things that you need to do for us. Or

 1   maybe Mexico says: No, we'd like to see you

 2   squirm and not be able to comply with the

 3   Court's order, and so we won't allow you to do

 4   the program regardless.

 5   And either way, I mean, it puts Mexico

 6   in a position vis-α-vis the United States which

 7   I don't think it's really Texas's position to

 8   require.

 9   MR. STONE: A couple of points, Your

10   Honor. The first is whether or not this

11   required in order to be implemented initially

12   Mexico's consent was a question of fact

13   litigated on the merits in the district court.

14   The district court made a finding of

15   fact, which I don't understand Petitioners to be

16   challenging for clear error, that the United

17   States was able to initially implement MPP --

18   JUSTICE KAGAN: Mexico can change --

19   MR. STONE: -- without Mexico's

20   consent.

21   JUSTICE KAGAN: -- its -- its -- its

22   mind any day.

23   MR. STONE: Well, certainly, Your

24   Honor, and to the extent that Petitioners were

25   to show, well, Mexico has changed its mind and

 1   thus we no longer --

 2   JUSTICE KAGAN: Or Mexico can change

 3   the conditions that it imposes for consenting

 4   any day. And the point is that requiring the

 5   Secretary to do something like this essentially

 6   says to Mexico: It's all yours. You have

 7   control.

 8   I mean, they do have control. You're

 9   -- you're putting the Secretary's immigration

10   decisions in the hands of Mexico.

11   MR. STONE: I disagree, Your Honor.

12   Three quick points, the first of which being

13   this Court recognized in Massachusetts versus

14   EPA that though the President undoubtedly has

15   broad foreign policy discretion powers in

16   dealing with foreign governments, that doesn't

17   give the President a basis for ignoring a

18   congressional command.

19   The second is that the district

20   court's injunction here does not, in fact,

21   require negotiation with Mexico by its own

22   terms. In fact, had the President or had -- had

23   the United States gone to the district court and

24   sought to modify the injunction on the basis

25   that they can no longer implement MPP in good

1   faith because of Mexican noncompliance, that

2   strikes me as a very strong reason by which the

3   district court would be required in the rubric

4   of a Rule 50 -- 60(b)(5) motion to permit it to

5   not have to continue MPP or --

6   JUSTICE KAGAN: Yeah, you're putting a

7   district court in the position of assessing the

8   Secretary's determinations about what its

9   negotiations with Mexico have been like, about

10   whether Mexico is demanding too much, about

11   which conditions Mexico is -- I mean, how can a

12   district court do that?

13   MR. STONE: Certainly not, Your Honor.

14   Certainly not. The district court would not be

15   able to sort of supermand over the negotiations

16   with Mexico. It only has to continue

17   implementing MPP in good faith.

18   And if it turns out in good faith

19   because of Mexican non-consent or obstruction

20   the amount is none, then that's all the

21   injunction requires in the first place.

22   JUSTICE KAGAN: But -- but somehow the

23   Secretary has to walk in and convince a district

24   court that Mexico's conditions are too stringent

25   and it can no longer implement MPP or it can

1   only implement it with -- you know, to a certain

2   extent or -- and that that's a daily obligation

3   on the part of the Secretary, to walk into

4   district court and say, you know, what Mexico is

5   asking, what the U.S. Government is willing to

6   give, et cetera, et cetera.

7   MR. STONE: Certainly not a daily

8   obligation, Your Honor. I can only imagine the

9   Secretary having to do anything like that if we

10   sought to enforce the permanent injunction.

11   JUSTICE BREYER: But I think the

12   question -- the question is the same question

13   that I -- that I have. Think of this Court.

14   And this Court is basically being asked, the

15   only question I saw relevant here, is what about

16   the Mexico program? And you have a procedural

17   argument and you have a substantive argument.

18   Okay? Let's look at the presumptive argument.

19   Remember -- isn't this true? One,

20   there are cases written by, if not me, at least

21   by people I knew in this Court which said, where

22   Congress and the President want something, the

23   political branches have greater than ordinary

24   responsibility for determining immigration

25   policy. And, here, Congress has not

1   appropriated the detention money.

2   Two, opinions written by people I

3   actually didn't know, like John Marshall, you

4   know, have said that where --

5   (Laughter.)

6   JUSTICE BREYER: -- where -- where

7   Congress -- where foreign affairs is involved,

8   you don't have to be as -- you can be as

9   specific as Justice Kagan said or not, but

10   foreign affairs is involved. And, Judges, this

11   is above your pay grade, okay? Stay out of it

12   as much as you can.

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

14   And, four, there is no indication --

15   this has been in existence for years passed at

16   different times and there is no indication that

17   Congress tied that "may" which is in Section (C)

18   to the detention which is in detention (A). You

19   have created a very good argument. But Congress

20   nowhere can -- has said anything like that. To

21   the contrary, they didn't pass the money.

22   So, one, Congress. Two, foreign.

23   Three, "may." Four, at different times with no

24   connection. And you heard their policy

25   arguments.

1   Now you may disagree with their policy

2   arguments, but it's pretty hard to say those

3   policy arguments are beyond the pale created by

4   one, two, three, and four. Well, what's your

5   response?

6   MR. STONE: I may --

7   JUSTICE BREYER: I'm making an

8   argument, but what's your response?

9   MR. STONE: Respectfully, I may need

10   help keeping all four questions straight in my

11   head. So --

12   JUSTICE BREYER: Well, one was foreign

13   affairs. Two is immigration. Three is the fact

14   they use the word "may." And four is the fact

15   that, in fact, it passed at different times and

16   no evidence of any connection in Congress

17   between (C) and (A).

18   MR. STONE: The Congress and foreign

19   affairs piece I think I can address

20   simultaneously.

21   First of all, again, as I just said to

22   Justice Kagan, nothing about this injunction

23   actually requires negotiation with a foreign

24   power, but in the extent -- that to some extent

25   this Court thought that it did, the -- of

        1   course, the foreign affairs power is shared

        2   between Congress and the President.

        3   JUSTICE KAGAN: I'm sorry, I have to

        4   stop you there, General. You can get the other

        5   four questions, but what do you mean it doesn't

        6   require negotiation with the foreign power?

        7   What are we supposed to do? Just drive

        8   truckloads of people into Mexico and leave them

        9   without negotiating with Mexico?

        10   MR. STONE: First of all, MPP has to

        11   be continued in good faith, and to the extent

        12   that Mexico does not consent or otherwise

        13   obstruct, again, I think that would be an

        14   excellent reason for the government to go back

        15   to the district court and seek relief from the

        16   injunction.

        17   Second, the particular authority on

        18   which MPP relies, (b)(2)(C), was passed in 1996

        19   where Congress was very well aware of the

        20   country through which most inadmissible aliens

        21   arriving on land proceed. And Congress did not

        22   see fit to require the consent of a foreign

        23   country before giving this as a supplemental

        24   tool to the United States to discharge its

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

1   If that has foreign policy

2   consequences, that's a function of the fact that

3   Congress has foreign policy decisions it makes

4   as well. Congress made one of them through

5   (b)(2)(C). And all we've asked the district

6   court to do is to prevent the United States from

7   increasing its number of 1225(b)(2)(A)

8   violations.

9   So, to the extent that there's a

10 foreign policy implication, at most, it comes

11 from the fact that Congress, well aware of the

12 fact that we'd be dealing essentially with

13 Mexico here, made a -- made a decision regarding

14 (b)(2)(C) and then directed the President, you

15 must do this, except unless you do this.

16   JUSTICE KAGAN: Well, that's a good

17 segue into Justice Breyer's "may" question,

18 because, actually, Congress just said "may."

19 Congress, aware that Mexico is a sovereign

20 nation, did not think it appropriate to say you

21 must ship people back to Mexico. It understood

22 that there was going to have to be discretion

23 and -- and significant foreign policy

24 considerations involved in that choice.

25   MR. STONE: To speak to the "shall"

1   and "may" components, it's not that (b)(2)(C)

2   ever stops being a "may"; it's that when the

3   only choice the United States has is either to

4   exercise (b)(2)(C), assuming it can do so

5   lawfully, or to violate the law -- Petitioners

6   are not free simply to violate the law. That is

7   a -- that is a bedrock of their take-care

8   obligations. And if they can lawfully exercise

9   their authority under (b)(2)(C), they must do so

10   so as to not violate 1225(b)(2)(A).

11   Now there might be --

12   JUSTICE KAVANAUGH: But the premise --

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

14   JUSTICE KAVANAUGH: Keep going.

15   Sorry. Go ahead.

16   MR. STONE: I -- I was just going to

17   say there might be a limited circumstance under

18   a specific case where some other mandatory

19   federal law prevents the exercise in that

20   condition, but those are the edge cases.

21   CHIEF JUSTICE ROBERTS: You can't

22   avoid Justice Breyer's -- the remainder -- the

23   three-quarters of his question that are still

24   outstanding.

25   (Laughter.)

1   JUSTICE KAVANAUGH: Immigration,

2   "may," and Congress.

3   MR. STONE: I -- I hope I've spoken at

4   least to the foreign -- to the foreign policy

5   component with Congress, which is to say that

6   Congress certainly memorialized a preferred

7   foreign policy through (b)(2)(C).

8   To the extent that Congress has, in

9   fact, not appropriated a sufficient number -- a

10   sufficient amount of money in order to detain

11   everyone simultaneously, it has several

12   different options it's given, and then, at most

13   -- at most, what that means is that the

14   executive has to do the best it can with the

15   resources it has.

16   It -- it's a bit of a strange argument

17   here for Petitioners to say they have limited

18   resources when, again, the district court found

19   that the use of MPP would cause fewer

20   individuals to attempt to -- to migrate

21   illegally or inadmissibly and that those

22   individuals, of course, would not require

23   detention capacity. So, as a matter of fact,

24   again, here, after a full trial on the merits,

25   MPP costs -- reduces detention costs.

1   Again, my friends on the other side

2   occasionally sort of tussle with these facts as

3   though that we're in a sort of posture of where

4   we're asking for a stay as opposed to we're

5   defending a final judgment to the district court

6   with extensive factual findings. But, here, we

7   are. And -- and to one -- I'm sorry, I don't

8   want to -- I don't want to sort of speak to --

9   JUSTICE KAVANAUGH: Are you done?

10   MR. STONE: -- or forget any of your

11   other questions.

12   JUSTICE KAVANAUGH: The -- the heart

13   of this case, I think, is what does "significant

14   public benefit" mean under 1182, because your

15   arguments make a lot of sense, but the other

16   side's -- the government's arguments make a lot

17   of sense when they articulate the significant

18   public benefit exception.

19   And the question comes down to, what

20   does that mean? What does it encompass

21   reasonably, more a State Farm-type question?

22   And have they reasonably explained why this

23   would be a significant public benefit?

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

25   mean, I -- yes, 1225 does have a mandatory

1   detention. It does have the "may" for return to

2   Mexico. But 1182 is the key because it has this

3   phrase "significant public benefit" for paroling

4   everyone in the United States. And they say,

5   consistent with past practice, that that

6   language authorizes in a situation of limited

7   capacity for parole to be into the United

8   States.

9   So you need to deal with "significant

10   public benefit."

11   MR. STONE: Absolutely, Justice

12   Kavanaugh. So to speak -- there's sort of a

13   factual question here about what the United

14   States will do that was found as a matter of

15   fact by the district court. And then a legal

16   question is the extent of significant public

17   benefit. They're sort of interrelated, so let

18   me try and start with the fact.

19   Through page -- through Findings of

20   Fact 41, 42, and 44 and on paragraphs 106 and

21   107, which I believe are around 201(a) and

22   202(a) of -- of its decision, the district court

23   determined after this question was litigated

24   about what the United States would do, in fact,

25   if it had rescinded MPP, the district court

1   determined that the United States would release

2   additional individuals illegally into the United

3   States.

4   It acknowledged in a footnote right

5   before that conclusion that it knew that 1182

6   provided an authority for release on a

7   case-by-case basis, relied on parts of the

8   administrative record to state that that could

9   not be used or could not as a matter of fact be

10   used in order to supplement -- in order to

11   supplement detention or return, and then said to

12   the extent that the United States were to

13   attempt to do so by saying, oh, I didn't really

14   --

15   JUSTICE KAVANAUGH: That's not really

16   getting at what "significant public benefit" is,

17   I don't think. I mean, "significant public

18   benefit," they say, is when there's limited

19   detention capacity, past practice and their

20   current application of this somewhat vague

21   provision, "significant public benefit,"

22   authorizes the government to parole people into

23   the United States on a case-by-case basis if

24   they're not too dangerous.

25   Why is that wrong either as a matter

1   of statutory interpretation, State Farm, or

2   their explanation?

3   MR. STONE: It's wrong both as a

4   matter of fact and as a matter of

5   interpretation.

6   As a matter of fact, let me turn you

7   to ECF 136, this same material that my friends

8   on the other side cited as their latest report

9   regarding compliance with the injunction, where

10   the United States lists --

11   JUSTICE KAVANAUGH: Why is it wrong as

12   a matter of interpretation? Can you flip the

13   order of your --

14   MR. STONE: Absolutely. Your Honor,

15   again, the United States has already interpreted

16   what it viewed a significant public benefit to

17   be and what it thinks case-by-case adjudication

18   is. So regulation 8 CFR 212.5 describes several

19   of those circumstances.

20   The notion that sort of public

21   benefits also can include the United States --

22   JUSTICE KAVANAUGH: But it has a

23   catch-all at the end of the regulation about

24   public interest.

25   MR. STONE: Certainly, Your Honor.

1   That no longer -- that no longer tracks the

2   statutory language, as is discussed in --

3   JUSTICE KAVANAUGH: Yeah, but if

4   you're pointing to the regulation, you're

5   omitting the -- the capacious term at the end of

6   the regulation if I -- if I'm reading it

7   correctly. Correct me if I'm wrong.

8   MR. STONE: As I believe we -- we

9   described in our brief, that's a relic of the

10   previous version.

11   JUSTICE KAVANAUGH: But it's still in

12   the reg, correct?

13   MR. STONE: Yes. And to the extent

14   that they -- they relied on that as a matter of

15   statutory interpretation, that would be wrong.

16   "Significant public benefit" --

17   JUSTICE KAVANAUGH: Okay.

18   MR. STONE: -- superimposed itself

19   upon what originally was "public interest."

20   The kinds of things that are described

21   as a public benefit here are specific

22   case-by-case individuals' sort of dire

23   circumstances, an individual with a serious

24   health problem or an individual who for public

25   benefit is going to be providing testimony.

1   The notion that Congress created a --

2   created a scheme where for -- in (b)(2)(A)

3   expressed an unequivocal detention obligation

4   but then said, because this isn't simply a

5   matter of whether or not -- of whether or not

6   there's going to be the exercise of parole, but

7   whether or not the United States wishes to use

8   its (b)(2)(C) authority that its -- its refusal

9   to use that authority and refusal to -- to --

10   and refusal to detain individuals is a

11   significant public benefit, certainly is a very

12   strange contradiction in the language of the

13   statute.

14   JUSTICE KAVANAUGH: So I -- I --

15   you -- you make a good point. I think the

16   examples they did cite were witness testimony.

17   And I agree with that.

18   But the phrase "significant public

19   benefit," you know, that's a common -- that's

20   not a common phrase, but "public interest" is a

21   common phrase in statutes. And D.C. Circuit,

22   this Court, give a lot of deference to agencies

23   to figure out how they're going to apply those

24   terms. And that's -- the language is a bit of

25   an issue for you unless you revert to the

1   structure of the statute expressed as a

2   preference for return to Mexico over parole.

3   MR. STONE: Again, not merely a

4   preference. That is a mandatory detention

5   obligation in this words -- in this Court's

6   words in Jennings.

7   JUSTICE KAVANAUGH: Yeah. But the

8   question -- I'm sorry to keep interrupting, but

9   the question is you can't meet that, and the

10   statute gives you -- the overall statutory

11   structure gives you two options then at least in

12   the "may," return to Mexico or parole into the

13   United States if significant public benefit.

14   And the question is, why can't an

15   administration say "significant public benefit"

16   is -- is triggered in this situation?

17   MR. STONE: I had two points, Your

18   Honor. The first were the statutory points and

19   the relationship between 1182 as a way of

20   satisfying (b)(2)(A) and (b)(2)(C)'s sort of

21   dual requirement.

22   The other part is a matter of fact

23   based on the -- the submission that the

24   Petitioners offered to the district court.

25   After -- and this is under their

1   captions, they list about 120,000 individuals

2   that they categorize as under 1225(b)(2), so

3   they're certainly 1225 individuals. Out of

4   those, they announced that they have -- that

5   they have paroled roughly, and this is rough

6   numbers, 40,000.

7   Of those, they've said they paroled

8   under -- on a case-by-case basis or for

9   significant public benefit about 6,000. And so

10   the actual practice right now certainly doesn't

11   map on to what Petitioners are describing.

12   I might also call attention to in that

13   document the United States flatly admits that it

14   is releasing on its own -- on their own

15   recognizance something on the order of 31,000

16   aliens who would -- who would be subject to

17   1225(d). That's precisely the kind of systemic

18   violation of law that, even if MPP would not

19   altogether alleviate, and it certainly wouldn't,

20   would at least reduce.

21   So my friend on the other side's

22   arguments to the effect of our actual practice

23   or our past practice with 1182(d) makes the

24   district court's finding that we will increase

25   our violations clearly erroneous or wrong or

1   just wrong as a matter of law is in the face of

2   their multiple, multiple reports where they

3   haven't even, as a matter of their own

4   assertions, contested that 1182 was being used

5   even as a matter of all of their paroles.

6   And this puts aside 1226 because these

7   are clearly 1225 aliens under their own heading.

8   JUSTICE BARRETT: Okay. But, General

9   Stone, returning you to the question of

10   interpretation, which you have to surmount, it's

11   not just a matter of fact, again, returning to

12   Justice Kavanaugh's question about significant

13   public interest, you lose, right, if -- if the

14   government is right about what "significant

15   public interest" is and that prioritizing the

16   beds, you know, based on who would be dangerous,

17   you know, who would be the worst aliens to

18   permit into the United States, right, if -- if

19   -- if they're right about that, if they're right

20   about "significant public interest," you lose.

21   Am I right?

22   MR. STONE: No, Your Honor.

23   JUSTICE BARRETT: Putting aside State

24   Farm and all that. I'm just talking on the --

25   on the statutory interpretation question.

1   MR. STONE: No, Your Honor, in part

2   because this injunction rests critically on what

3   the United States would do if it rescinded MPP.

4   As a matter of fact, along with -- and

5   I'll turn back to the statutory point, the

6   United States attempted to prove that it would,

7   in fact, use 1182(d)(5) to satisfy these

8   obligations and thus it could not be required to

9   continue MPP because that was unnecessary. It

10   wouldn't violate 1225 anyway.

11   That is a matter of fact that was

12   based on a trial in which this was hotly

13   disputed. So the United States would have to

14   prove both, that, in fact, it could use

15   1182(d)(5) to address the entire swath of

16   individuals who obviously are coming in under

17   different circumstances, under different

18   conditions, to do so and that it would do so in

19   fact in order to get a modification of the

20   injunction, which would belong below. So they

21   -- they must show both.

22   JUSTICE SOTOMAYOR: Counsel, can I get

23   --

24   JUSTICE ALITO: Does the statute allow

25   DHS to say that there would be a significant

1   public benefit in paroling an entire category of

2   aliens, a large class of aliens?

3   MR. STONE: Far from it, Your Honor.

4   The 1996 amendment to 1182(d)(5) specifically

5   inserted a case-by-case requirement. And,

6   again, read together with (b)(2)(A) and

7   (b)(2)(C), it's very difficult to see how the

8   significant public benefit, given a mandatory

9   detention obligation, could simply be the

10   preference not to detain or to return.

11   JUSTICE SOTOMAYOR: Counsel, I have

12   never seen Congress use a -- a "may" language in

13   the way you say. There are other parts of the

14   INA itself that says you do this or you do that.

15   If you can't do this, you do this other thing.

16   This is not an either/or. The

17   statute's not written that way.

18   And you said that it becomes mandatory

19   because they can't do A, but where does the

20   discretion fit in? Meaning they're not

21   challenging that they rescinded this problem --

22   this policy erroneously in June. They're saying

23   we did the right thing in October.

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

25   of these reasons. And we've explained why the

 1   cost of this program and running it is not in

 2   the best interest of the United States because

 3   we can detain more people and act more

 4   expeditiously if we spend that money a different

 5   way.

 6   You're now telling us that we as

 7   judges should be in the business of deciding

 8   whether that policy choice is one that we think

 9   who wants? That we as a Court want? Where does

10   Congress say that it shall need to do this,

11   because I don't see it in the language? They

12   left it discretionary.

13   Having left it discretionary, why

14   isn't that the answer itself, that the policy

15   has been terminated or the rescission of the

16   policy in June, which is what the district court

17   had before it, was terminated, and the

18   injunction has to be lifted until you prove that

19   the rescission was wrong?

20   MR. STONE: Three reasons, Your Honor.

21   The first of which being where the "may" becomes

22   mandatory. It's only in the limited

23   circumstance where the only -- that is the only

24   way that -- that the executive can --

25   JUSTICE SOTOMAYOR: It's already

         1   happened. They've done it. They did it and

         2   looked at it and said this doesn't make sense.

         3   Our discretion says we shouldn't use this.

         4   So that it's been considered. It was

         5   considered by the old administration. They

         6   followed it to an extent, not completely,

         7   because they carved out huge numbers of

         8   categories of people they weren't sending back.

         9   And you're telling me they violated it too.

        10   They now had it before them, they've given

        11   thought to it, and they've said as a matter of

        12   our discretion, continuing this program doesn't

        13   further the "shall" because we can do more with

        14   the money in other ways.

        15   MR. STONE: Respectfully, Your Honor,

        16   our arguments don't depend on the policy wisdom

        17   of MPP or any other particular approach to

        18   immigration. They rely in here -- and

        19   specifically on the APA merits of the June

        20   termination. We agree with the United States

        21   that the merits of the October termination under

        22   the APA are not properly before this Court and

        23   they weren't properly before --

        24   JUSTICE SOTOMAYOR: So why shouldn't

        25   we just lift this to say June is over with, it's

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1   not being challenged, there's a new program, you

2   don't need the injunction?

3   MR. STONE: In part because, Your

4   Honor, that would be one of two things, as I

5   understand it, either an appeal to mootness,

6   which of course they've already disclaimed

7   they're not challenging the Fifth Circuit's

8   holding on, or otherwise a request under Rule

9   60(b)(5) to set aside the injunction.

10   We're here after a trial on the merits

11   having received a permanent injunction.

12   JUSTICE SOTOMAYOR: Well, the

13   injunction might be moot, but the lawsuit is not

14   moot. They're -- they're claiming there are

15   still issues to be resolved, including the

16   October issue, but the reasons for the

17   injunction are over with. So why should we

18   leave extant an injunction that's not necessary?

19   MR. STONE: Your Honor, to the extent

20   that -- that they have not affirmatively

21   disclaimed the position that the injunction is

22   moot, it would be upon them to show that, in

23   fact, it had become moot because of their

24   intervening actions, which they don't attempt.

25   And then in response, of course, we'd

 1   cite this Court's voluntary cessation doctrine.

 2   In all candor, the United States' approach to

 3   mootness here, when it argued below, is

 4   something along the lines of that they'd evaded

 5   review by accomplishing repetition. And so we

 6   believe there's good reasons that this case

 7   wouldn't be moot if that, in fact, had been

 8   joined by the United States.

 9   Nothing in the Fifth Circuit's opinion

10   below, nor should from this Court, rest on

11   whether or not the APA merits of the October

12   memoranda are good, bad, or otherwise. That's a

13   matter for them when they return to the district

14   court and seek relief from this injunction.

15   JUSTICE KAVANAUGH: So -- so the

16   questions I was pushing you on, how to interpret

17   significant public benefit, I also alluded to

18   the fact that there are State Farm issues

19   potentially that they have discretion, that they

20   reasonably exercise their discretion and have

21   they sufficiently explained their exercise of

22   discretion, very similar to the State Farm

23   opinion itself.

24   You're saying those concerns which I

25   was pressing your friend on the other side about

1   are not before us?

2   MR. STONE: No, Your Honor, but to the

3   extent this Court were to reach them -- in their

4   reply brief, they candidly acknowledged --

5   JUSTICE KAVANAUGH: Well, can I just

6   stop -- they're not before us or --

7   MR. STONE: They're not before you in

8   part because there's no administrative record.

9   JUSTICE KAVANAUGH: Okay.

10   CHIEF JUSTICE ROBERTS: Thank you --

11   JUSTICE KAVANAUGH: And so -- okay.

12   CHIEF JUSTICE ROBERTS: Thank you,

13   General.

14   Justice Thomas, anything further?

15   Justice Breyer?

16   Justice Alito?

17   Justice Sotomayor, anything further?

18   Justice Kagan?

19   Justice Gorsuch?

20   Justice Kavanaugh?

21   JUSTICE KAVANAUGH: How -- how do you

22   see this playing out, then, on the October memo?

23   MR. STONE: That this Court should

24   affirm the district -- the Fifth Circuit's

25   affirmance of the district court's injunction

 1   and with the October memoranda and the October

 2   administrative record, the United States should

 3   go to the district court, seek relief under Rule

 4   60(b)(5) and say either we have fully satisfied

 5   both conditions or, at minimum for the APA

 6   purposes, we have satisfied the APA compliance

 7   condition.

 8   And if they have, then, of course, it

 9   would be an abuse of discretion for the district

10   court to deny modifying or satisfying that

11   injunction as a matter of law. And if they

12   haven't, then, of course, we'll litigate that

13   there.

14   CHIEF JUSTICE ROBERTS: Justice

15   Barrett, anything further?

16   Thank you, counsel.

17   Rebuttal, General Prelogar?

18   REBUTTAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

19   ON BEHALF OF THE PETITIONERS

20   GENERAL PRELOGAR: Thank you,

21   Mr. Chief Justice.

22   Let me make one quick factual

23   correction, and then I'll turn to a couple of

24   points on the statutory question in the case.

25   First, I just want to respond on the

1   facts with respect to our monthly reports to the

2   district court, General Stone has misunderstood

3   the data in that report. All of the parole

4   decisions that DHS is making are on a

5   case-by-case basis. The different categories on

6   that report refer to different ways that DHS

7   codes this data in its database, but those are

8   all following DHS's own regulations which

9   themselves require case-by-case assessment.

10   The orders of recognizance that are

11   referred to in that report are the -- the grants

12   of conditional parole under Section 1226(a).

13   Texas hasn't even challenged our reliance on

14   1226(a) in this case.

15   Turning to the statutory issue, my

16   friend conceded to Justice Thomas that MPP

17   itself was unlawful. He's conceded that on his

18   interpretation, every presidential

19   administration has been openly violating the

20   INA. I think that that is incredibly powerful

21   and persuasive evidence that that interpretation

22   is incorrect.

23   Second, I want to respond, Justice

24   Kavanaugh, to some of your questions about

25   significant public interest. We have not just

1   generated that -- that consideration of

2   detention capacity for purposes of this case.

3   That has been the executive branch's uniform,

4   consistent interpretation of how our parole

5   authority operates. It's encompassed in our

6   regulations, contrary to what General Stone

7   said, based on that catch-all category that you

8   referenced that specifically authorizes release

9   for other significant public interest.

10   And it makes sense because in a world

11   where we don't have sufficient beds as everyone

12   acknowledges, there is a imperative public

13   interest in ensuring that we are detaining the

14   people who might be criminals or who might

15   abscond or who threaten our national security,

16   and not simply filling those beds on a first

17   come basis with no accounting for the limited

18   detention capacity.

19   Finally, I -- I'd like to leave the

20   Court with a few concluding thoughts on the

21   extraordinary nature of the district court's

22   injunction in this case and particularly with

23   respect to its effects on foreign relations.

24   As I've explained, the executive

25   cannot implement MPP unilaterally. General

 1   Stone is simply wrong about that. Mexico has

 2   its own sovereignty here, and we are sending

 3   individuals on its -- onto its territory. So we

 4   need to get Mexico's consent to operate the

 5   program.

 6   That gives Mexico an important point

 7   of leverage, as Justice Kagan emphasized, in

 8   those negotiations. And that's what the

 9   district court has ordered here. It has ordered

10   us to conduct those ongoing negotiations with

11   Mexico. It's not just to start up the program.

12   It is coordinating on all of the day-to-day

13   logistics of operating a massive cross-border

14   program like this.

15   The individuals who are returned under

16   MPP need a place to live. They need work

17   authorization. They need access to counsel.

18   They need to be protected against predatory

19   violence from gangs and cartels. We need to

20   coordinate on the logistics of transferring them

21   back and forth across the border into the United

22   States for their immigration hearings, and then

23   back to Mexico to continue to await the results

24   of those proceedings.

25   And in all of that, we have to have

1   ongoing logistical negotiations with Mexico.

2   The State Department has told me that it has a

3   weekly call with the Department of State, the

4   Department of Homeland Security, and their

5   counterparts in the government of Mexico, to

6   talk about regional migration and negotiate with

7   respect to all of these logistical details.

8   So I think the idea here that there is

9   a single district court in Texas that is

10   mandating those results, that is compelling the

11   executive to engage in those ongoing

12   negotiations, and is doing though -- so under

13   the constant threat of a contempt motion from

14   Texas to supervise our good faith negotiations

15   with Mexico shows that something has powerfully

16   gone awry here.

17   This is not how our constitutional

18   structure is supposed to operate. And this is

19   not the statute that Congress drafted. So we'd

20   ask the Court to reverse the flawed judgment

21   below.

22   CHIEF JUSTICE ROBERTS: Thank you,

23   General, General.

24   The case is submitted. And we'll take

25   a short break.

1   (Whereupon, at 11:47 a.m., the case

2   was submitted.)

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