No. 21-954

In the Supreme Court of the United States

JOSEPH R. BIDEN, JR., *et al.*,
Petitioners,

v.

STATE OF TEXAS, STATE OF MISSOURI,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

The Petition should be denied for two reasons. *First*, the second Question Presented suffers from fatal vehicle problems of the Government's own making. The Petition does not challenge the principal basis for the decision below—*i.e.*, that the June 1 termination of the Migrant Protection Protocols (MPP) violated the APA. Instead, the Government contends that the Fifth Circuit should have given "legal effect" to DHS's post-appeal October memoranda re-terminating MPP. But the Fifth Circuit considered the "legal effect" of those October memoranda only in the course of *holding* that the case was not moot and that the Government was not entitled to the equitable remedy of vacatur. The Petition does not challenge those *holdings*, and each rested on multiple independent, alternative bases that the Petition also does not challenge. Moreover, the unchallenged APA holding provides an independent basis for the district court's injunction, so the same vehicle problem afflicts the entire Petition. "This Court reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987). It should adhere to that principle here.

Second, the first Question Presented does not warrant review for the additional reason that the Fifth Circuit's statutory holding is well-reasoned and correct. Subparagraph (b)(2)(A) of § 1225 provides that DHS "shall" detain arriving aliens pending removal proceedings, while subparagraph (b)(2)(C) provides that DHS "may" return them to contiguous territory pending such proceedings. DHS lacks capacity to detain most arriving aliens, so under the circumstances, contiguous-territory-return is the *only*

way DHS can avoid violating its detention obligations. When one has both a duty and an optional method of fulfilling the duty, and under the circumstances the option is the *only* way to fulfill that duty, the option becomes obligatory. The Government's arguments ignore the plain language of the statute, contradict recent decisions of this Court, and turn the statute on its head by transforming a mandatory-detention regime into a class-wide release program.

The Petition should be denied.

STATEMENT

A. Adoption and Successful Implementation of MPP.

In 2018, the United States experienced a surge of illegal aliens arriving at the southern border, which created a "humanitarian and border security crisis." App.156a. Many arriving aliens claimed asylum, but "most aliens lacked meritorious claims for asylum." App.157a. As a result, "illegal aliens with *meritless* asylum claims were being released into the United States" in large numbers, where many "disappeared … and simply became fugitives." *Id.*

"In response, the Trump Administration implemented a program known as the Migrant Protection Protocols" on December 20, 2018. *Id.* MPP rested on the Secretary of Homeland Security's authority under 8 U.S.C. § 1225(b)(2)(C) "to return to Mexico certain third-country nationals … arriving in the United States from Mexico for the duration of their removal proceedings." App.157a-158a. MPP ensured that "aliens attempting to enter the U.S. illegally or without documentation, including those

who claim asylum, will no longer be released into the country, where they often fail to file an asylum application and/or disappear…." App.158a.

DHS began implementing MPP in January 2019, and soon expanded the program "nationwide." *Id.* In addition, "the United States obtained the Government of Mexico's agreement to temporarily permit" arriving aliens to remain in Mexico pending removal proceedings. *Id.*

On October 28, 2019, DHS issued a memorandum assessing MPP, which "found MPP to be effective." App.160a. According to that assessment, MPP "has been an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system." App.160a. DHS specifically found both that (1) MPP directly reduced the numbers of aliens unlawfully released into the United States by requiring thousands to remain in Mexico pending removal proceedings, and (2) MPP deterred aliens from attempting to cross the border illegally in the first place. *Id.* at 160a-161a. DHS further found that after MPP was implemented, total border encounters had decreased by 64 percent, with border encounters with Northern Triangle aliens (who had driven the 2018 surge) decreasing by 80 percent. *Id.* at 160a.

DHS found a causal link between MPP and this massive reduction in border encounters: "DHS has observed a connection between MPP implementation and decreasing enforcement actions at the border—including a rapid and substantial decline in apprehensions in those areas where the most amenable aliens have been processed and returned to Mexico pursuant to MPP." *Id.*

"DHS also found that MPP is restoring integrity to the immigration system." App.161a (cleaned up). Due to the reduction in meritless claims, "MPP returnees with meritorious claims can be granted relief or protection within months, rather than remaining in limbo for years." App.161a. Moreover, "aliens without meritorious claims—which no longer constitute a free ticket into the United States—are beginning to voluntarily return home." *Id.*

"By December 31, 2020, DHS had enrolled 68,039 aliens in the MPP program." App.162. "DHS concluded its review of MPP and found it to be a 'cornerstone' of DHS's efforts to restore integrity to the immigration system." App.163a. The "broken system" had created "perverse incentives" for aliens to attempt to enter the United States illegally. App.163a. MPP had "effectively … reduce[d] the incentive for aliens to assert claims for relief or protection, many of which may be meritless, as a means to enter the United States to live and work during the pendency of multi-year immigration proceedings." *Id.* "Even more importantly, MPP also provide[d] an opportunity for those entitled to relief to obtain it within a matter of months." *Id.*

B. Suspension and Termination of MPP.

In late 2020, senior DHS officials "specifically warned" the Biden transition team that "the suspension of the MPP, along with other policies, would lead to a resurgence of illegal aliens attempting to illegally enter" the United States. App.166a. "They were warned the increased volume was predictable and would overwhelm Border Patrol's capacity and facilities…." *Id.*

Nevertheless, on January 20, 2021, its first day in office, the incoming Administration suspended enrollments in MPP through a two-sentence, three-line memorandum. App.167a. "Since that day, DHS has not offered a single justification for suspending new enrollments in the program during the period of review." App.167a.

Although DHS announced that it had merely "suspend[ed] new enrollments … pending further review of the program," App.361a, in fact, DHS began the process of permanently terminating MPP almost immediately. App.207a-208a; *see also infra*, Part III.

Immediately after the suspension of MPP, the surge of illegal border crossings resumed, rising to unprecedented levels. App.170a. This created the most catastrophic and prolonged border crisis in modern American history. "Since MPP's termination, the number of enforcement encounters on the southwest border has skyrocketed." App.170a. "Defendants' data shows encounters jumping from 75,000 in January 2021, when MPP was suspended, to about 173,000 in April 2021, when this case was filed." *Id.* "CBP data shows nearly 189,000 encounters occurred in June 2021." *Id.* "Based on current trends, the Department expects that total encounters this fiscal year are likely to be **the highest ever recorded**." App.171a n.9. Subsequent experience confirmed this prediction. *See, e.g.,* D.Ct. Doc. 124, at 1 (reporting 178,840 total encounters in December 2021).

Based largely on the Government's evidence, the district court found that the termination of MPP had directly contributed to the current border crisis.

App.169a. "[T]he termination of MPP has contributed to the current border surge." *Id.* "MPP removed 'perverse incentives' which enticed aliens with 'a free ticket into the United States.'" *Id.* At trial, the Government conceded that MPP had deterred unlawful entries into the United States. App.170a. MPP also directly reduced the number of illegal aliens unlawfully released into the United States. "Even if the termination of MPP played *no* role in the increasing number of migrants, the lack of MPP as a tool to manage the influx means that more aliens will be released and paroled into the United States as the surge continues to overwhelm DHS's detainment capacity." App.170a.

The current border crisis has created a humanitarian catastrophe. The enormous numbers of illegal aliens provide the ideal conditions for organized cartels to commit human smuggling, human trafficking, drug trafficking, and brutal sexual exploitation of migrants. "Forced labor" and "commercial sexual exploitation" are the typical fate of human-trafficking victims. D.Ct. Doc. 31-2, at 108. "Unaccompanied and undocumented minors are extremely vulnerable to traffickers and other abusers." *Id.* at 111. Along with labor trafficking, extortion, and abandonment of minors, "sexual violence has become an inescapable part of the collective migrant journey." D.Ct. Doc. 31-1, at 112.

C. Proceedings in the Case.

On April 13, 2021, Missouri and Texas filed suit in the Northern District of Texas, challenging the unexplained three-line suspension of MPP. App.150a. The States alleged that the suspension was arbitrary

and capricious, *inter alia*, for failing to consider the benefits of MPP, including its own favorable assessment of the program; failing to consider the States' reliance interests; failing to consider more limited policies within the ambit of the existing program; and perpetuating the systematic violation of the Secretary's mandatory detention obligations in 8 U.S.C. § 1225. App.190a-200a. The States also alleged that the suspension directly violated § 1225. App.200a-202a.

The States sought a preliminary injunction, App.9a, and the district court ordered the Government to file the administrative record. On May 31, the Government filed an administrative record for the January 20 decision that consisted solely of the three-line suspension memorandum. App.207a n.16.

The next day, June 1, the Secretary issued a seven-page memorandum permanently terminating MPP. App.346a-360a. Even though the States had raised their claims on April 13, the June 1 memorandum failed to consider or discuss DHS's own favorable assessment of MPP, the impact on the States or their reliance interests, any more limited policies within the ambit of the existing program, or the impact of the MPP's termination on the Department's mandatory detention obligations under 8 U.S.C. § 1225. *See id.*

Meanwhile, the Government promptly claimed that its new memorandum mooted the States' case. App.167a. But the States had already filed an amended complaint, raising similar challenges to the June 1 termination decision. App.219a. On June 22, the Government to filed an administrative record for

the June 1 termination decision that did not include DHS's highly favorable assessment of MPP from October 28, 2019. App.48a.

The parties agreed to consolidate the preliminary injunction with trial on the merits under Rule 65(a)(2). App.10a. The district court held a one-day bench trial on July 22, 2021. App.48a. At 3:27 p.m. on July 20, less than two days before trial, the Government filed a "Notice of Filing Corrected Administrative Record," which purported to add the October 28, 2019 assessment to the administrative record. App.48a. Over the States' objection, the district court permitted the Government to supplement, but cautioned that the Government had come "perilously close to undermining the presumption of administrative regularity." App.48a.

On August 13, 2021, the district court issued its final judgment and permanent injunction, holding that the June 1 termination decision had been unlawful on two independent grounds. App.149a-213a. First, the district court held that the termination violated the APA because DHS had "ignored critical factors," including "the main benefits of MPP," the States' reliance interests, more limited policies within the ambit of MPP, and the impact of terminating MPP on DHS's detention obligations under 8 U.S.C. § 1225. App.190a-200a. In addition, the district court held that terminating MPP was unlawful because it directly caused DHS to violate its mandatory detention obligations under § 1225. App.200a-202a. The district court entered a permanent injunction requiring DHS "to enforce and implement MPP *in good faith*" until it could be lawfully terminated. App.212a.

The Government sought a stay pending appeal from the Fifth Circuit, which was denied. App.215a-253a. The Government then sought a stay of injunction in this Court, which this Court denied. App.214a. This Court stated that "[t]he applicants have failed to show a likelihood of success on the claim that the memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious." *Id.*

The Fifth Circuit expedited the Government's appeal. App.11a. While briefing was underway, on September 29, DHS announced its intention "to issue in the coming weeks a new memorandum terminating the Migrant Protection Protocols." App.28a. DHS stated that, "[i]n issuing a new memorandum terminating MPP, the Department intends to address the concerns raised by the courts with respect to the prior memorandum." App.28a.

On October 29, 2021, after the Fifth Circuit appeal was fully briefed and two business days before oral argument, DHS issued two new memoranda ("October Memoranda") purporting to re-terminate MPP. App.257a-345a. The October Memoranda "did not purport to alter the Termination Decision in any way; they merely offered additional reasons for it." App.11a. Hours later, the Government filed a 26-page "Suggestion of Mootness and Opposed Motion to Vacate the Judgment Below and Remand for Further Proceedings," arguing that the new memoranda mooted its own appeal and that the Fifth Circuit should therefore vacate the injunction. App.11a.

The Fifth Circuit held that the appeal was not moot, App.33a-53a, and that the Government was not

entitled to the equitable remedy of vacatur, App.123a-126a. Both holdings rested on multiple alternative grounds independent of the legal effect of the October Memoranda. *See id.*

On the merits, the Fifth Circuit affirmed the district court's holding that the termination of MPP was arbitrary and capricious under the APA, holding that DHS had failed to consider "(1) the States' legitimate reliance interests, (2) MPP's benefits, (3) potential alternatives to MPP, and (4) the legal implications of terminating MPP." App.103a; *see also* App.103a-113a. The Fifth Circuit also affirmed the district court's alternative holding that the termination decision violated § 1225. App.113a-123a.

REASONS FOR DENYING THE PETITION

The Petition suffers from fatal vehicle problems of the Government's own making. Moreover, the Fifth Circuit's opinion does not warrant this Court's review because it was well-reasoned and correct.

I. The Petition Suffers From Fatal Vehicle Problems.

The Petition fails to challenge independent alternative bases for the Fifth Circuit's holdings, and fails even to specify which holding(s) of the Fifth Circuit it seeks this Court's review.

A. The Petition does not challenge the lower courts' holding that terminating MPP on June 1 violated the APA.

First, the Petition does not challenge the district court's and Fifth Circuit's holdings that the June 1 termination decision was arbitrary and capricious under the APA. *See* Pet (I). The Government has thus

abandoned its defense of the June 1 decision. *Id.* This APA holding provided an independent basis for the decision in both courts below. App.103a-113a, 190a-200a. The Petition's failure to challenge it presents a fatal vehicle problem. This Court's "power is to correct wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945). "This Court reviews judgments, not statements in opinions," *California* v. *Rooney*, 483 U.S. 307, 311 (1987), and it has "adhered with some rigor to th[is] principle." *Camreta* v. *Greene*, 563 U.S. 692, 704 (2011). Further, this Court "ordinarily do[es] not consider questions outside those presented in the petition for certiorari," *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992), and it should not do so here. Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

B. The Government fails to challenge multiple independent grounds for the Fifth Circuit's holdings.

The Government attempts to explain its conspicuous omission by arguing in its second Question Presented that the Fifth Circuit erred by holding that the October Memoranda re-re-terminating MPP had "no legal effect." Pet. (I). But this Question suffers from its own host of vehicle problems.

The Fifth Circuit did not determine that the October Memoranda "had no legal effect" in a vacuum. Indeed, the Government's question obscures two of the Fifth Circuit's several *holdings*: (1) that the appeal was not moot, App.33a-53a (Part II.B); and (2) that the Government was not entitled to the equitable

remedy of vacatur, App.123a-126a (Part V.A). The Fifth Circuit also addressed the October Memoranda in holding (3) that the October Memoranda had not retroactively "un-finalized" the June 1 final agency action. App.21a-33a (Part II.A).

The Fifth Circuit rested each of these holdings on multiple alternative grounds, independent of the October Memoranda's "legal effect," that the Government does not raise in any Question Presented or address in its Petition. Any challenge to these alternative bases is forfeited. *Yee*, 503 U.S. at 535. And even if the Government had challenged them, these alternative grounds present splitless, factbound, and meritless questions that do not warrant this Court's review.

First, the Fifth Circuit held that the October Memoranda had "no legal effect" in rejecting the Government's argument that those Memoranda had mooted the appeal. App.33a-53a. But the Government no longer contends that the appeal is moot—instead, it asks this Court to decide (some of) the merits. Pet. (I). And the Fifth Circuit's mootness holding rested on three further independent grounds, that: (1) the Court could still grant effectual relief even if the October Memoranda had legal effect, App.37a-45a; (2) even if they had legal effect, the October Memoranda constituted a voluntary cessation of unlawful conduct by the losing party, which does not ordinarily moot a case, App.45a-52a; and (3) "independent principles of appellate law," such as the record rule and the fact that the Fifth Circuit is a "court of review, not of first view," meant that "the merits of DHS's actions on October 29 are not before us," App.52a-53a.

The Fifth Circuit explicitly noted that each of these holdings was *independent* of its determination that the October Memoranda had "no legal effect." App.37a, App.45a, App.52a. The Petition does not challenge—or even discuss—any of these independent bases for the Fifth Circuit's mootness holding.

Second, the Fifth Circuit held that the October Memoranda did not entitle the Government to the equitable remedy of vacatur. App.123a-126a. Again, the Government does not directly challenge this *holding* of the Fifth Circuit, and the issue is not raised in either Question Presented. And again, the underlying question is splitless, factbound, and meritless.

Moreover, the Fifth Circuit's holding on vacatur is supported by at least two alternative bases that the Petition does not challenge or discuss. First, the Fifth Circuit held that "DHS's litigation tactics tilt the equities decidedly against vacatur." App.124a. As the Fifth Circuit noted, the Government had repeatedly engaged in "gamesmanship," App.47a, including multiple attempts to moot the case by issuing new memos and perpetrating other ambushes on the eve of critical deadlines. Issuing the October Memoranda two days before oral argument was the latest tactic in this long course of inequitable conduct. As the Fifth Circuit emphasized at the outset of its opinion, "the vacatur DHS requests is an equitable remedy, which is unavailable to parties with unclean hands. The Government's litigation tactics disqualify it from such equitable relief." App.3a.

In addition, the Fifth Circuit alternatively held that, even if the October Memoranda had legal effect,

DHS would not be entitled to the equitable remedy of vacatur because the October Memoranda constituted voluntary cessation of unlawful conduct by the losing party. App.124a, 126a; *see also* App.45a-52a. As the Fifth Circuit noted, "mootness attributable to a voluntary act of a nonprevailing party ordinarily does not justify vacatur of a judgment under review." App.124a (quoting *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs.*, 528 U.S. 167, 194 n.6 (2000)). Here, regardless of the October Memoranda's "legal effect," the Fifth Circuit determined that "the Government comes nowhere near overcoming *Laidlaw*'s strong presumption against vacatur in a situation of voluntarily caused mootness." App.126a. Again, the Petition does not challenge this alternative holding.

Third, the Fifth Circuit held that the October Memoranda did not undermine its jurisdiction because they did not retroactively "un-finalize" the June 1 termination decision. App.21a-32a. The Petition does not challenge this holding, or even specifically address it. Pet. 24-31.

Moreover, the Fifth Circuit's holding rested on multiple independent bases—which, again, the Government fails to even raise, let alone challenge. First, the Fifth Circuit held that that "subsequent events can't un-finalize a final agency action." App.31a. This would still hold true even if the October Memoranda had accomplished a new "final agency action," and thus it provides an independent basis for the Fifth Circuit's holding. *See id.* Second, as noted above, the Fifth Circuit held that "independent principles of appellate law," such as the record rule and the fact that the Fifth Circuit is a "court of review,

not of first view," meant that "the merits of DHS's actions on October 29 are not before us." App.52a-53a. Again, the Government never challenges this holding or explains why it is incorrect. Third, the Fifth Circuit's holding rested on its determination that "[t]he Government's contrary view would never allow a court to make a final determination that any given action is final." App.31a. Instead, the Court "would be stuck in eternal limbo, waiting for the agency to give some carved-in-stone sign that the action in question is here to stay for good," which "would have absurd jurisdictional consequences." *Id.* The Government fails to address this alternative basis as well.

All this points to a deeper problem: The Government does not specify which of the Fifth Circuit's three holdings, if any, it purports to challenge. *See* Pet. (I) (Question Presented 2: "Whether the court of appeals erred by concluding that the Secretary's new decision terminating MPP had no legal effect."); *id.* at 24-31. Instead, it seeks review of a specific step in the Fifth Circuit's *legal reasoning* supporting these holdings. *See id.* But again, "[t]his Court reviews judgments, not statements in opinions." *Rooney*, 483 U.S. at 311. And for each relevant holding, the Fifth Circuit arrived at its destination through multiple independent paths, most of which did not rely on the "legal effect" of the October Memoranda.

Perhaps the Government is strategically reserving these arguments and will provide them in its reply brief. If so, that would stretch the phrase "fairly included therein" in Rule 14.1(a) beyond recognition. *See Yee*, 503 U.S. at 537 (holding that "a question

related to the one petitioners presented, and perhaps *complementary* to the one petitioners presented," as not "fairly included therein"). In any event, a reply brief is too late to cure these problems. *See* STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE 511 (10th ed. 2013). And a brief on the merits would be far too late. *Taylor v. Freeland & Konz*, 503 U.S. 638, 645 (1992).

C. The Government's Second Question Presented Is Meritless.

Even if the second Question did not suffer from fatal vehicle problems, it would be meritless and unworthy of review.

As an initial matter, the Fifth Circuit's holding that the October Memoranda had no present "legal effect" was indisputably correct. As the Fifth Circuit noted, the October 29 Memoranda purported to do two things: (1) rescind the June 1 memorandum terminating MPP; and (2) re-terminate MPP, but *not until the district court's injunction may be judicially vacated in the future*. App.35a. But, as the Fifth Circuit noted, the district court had already accomplished (1) by vacating the June 1 memorandum and decision, and (2) has not yet happened. *Id.* Thus, the October Memoranda's "legal effect is one part nullity and one part impending." *Id.* The Government does not seriously dispute this reasoning, and its other arguments are unconvincing.

First, the Government argues that it is "routine" for a federal agency to pursue the "dual-track" approach of simultaneously appealing an adverse decision *and* issuing a new memorandum on remand while its own appeal challenging the remand is

pending. Pet. 24, 28. But the Government fails to cite a single case where any previous agency has had the chutzpah to attempt this. Pet. 24-31. To the extent it could, it would only highlight that this Court's review is unwarranted: if the Government "routine[ly]" treats the appellate process as a mere alternative to its own administrative process, then it cannot maintain that it requires this Court's discretionary intervention.

Second, citing *Department of Homeland Security* v. *Regents of the University of California*, 140 S. Ct. 1891 (2020), the Government contends that the October Memoranda "deal[t] the problem afresh" instead of merely providing additional reasons as "*post hoc* rationalizations" for an already-completed decision. Pet. 25-26. Given the factual and procedural history of this case, only the most naïve of observers could have believed that DHS returned to the issue "afresh" when it issued the October Memoranda. DHS's own declarants attested that DHS began permanently dismantling MPP in January and February 2021, several months *before* it formally terminated the program. App.207a-208a; *see infra* Part III. Since then, DHS engaged in a long course of inequitable conduct and maneuvering in attempt to frustrate judicial review of that decision, attempting to "moot" the case with new memos issued just before critical court deadlines, and "supplementing" the administrative record by backfilling a critical document on the eve of trial. The October Memoranda were the latest gambit in what the Fifth Circuit variously described as "unclean hands," "litigation tactics," a "pattern of belated shifts," "eleventh-hour" surprises, "gamesmanship," throwing a "last-minute wrench," and playing "a game of heads I win, tails I

win, *and* I win without even bothering to flip the coin." App.3a, 47a, 48a, 50a, 124a, 125a.

Moreover, DHS's September 29 press release openly stated—both in the title, and three times in the body—that it was *not* considering MPP afresh, and that "terminating" MPP was a foregone conclusion. App.28a. This statement was consistent with every action that DHS had taken since January 20 and that it would take afterward.

Against this evidence, the Government cites only its self-serving recital in the October Memoranda themselves that it considered the issues anew, claiming that this recital is entitled to the "'presumption of regularity' owed to agency action." Pet. 31 (quoting *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415 (1971)). But the Fifth Circuit effectively found that any such presumption—if it applied at all—was demonstrably overcome. This Court, likewise, is "not required to exhibit a naiveté from which ordinary citizens are free." *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States* v. *Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)).

This case presents even more compelling reasons than in *Regents* to conclude that the agency's later memoranda "can be viewed only as impermissible *post hoc* rationalizations." 140 S. Ct. 1909. Indeed, the "multiple-memorandum agency process" in *Regents* was "strikingly similar to the process here." App.44a. As *Regents* predicted, DHS's "belated justifications" in this case have "forc[ed] both litigants and courts to chase a moving target." 140 S. Ct. at 1909. "[T]he

Government should turn square corners in dealing with the people." *Id.* It has not done so here.

The Government also urges that the October Memoranda should be viewed as DHS's fresh look at the problem, because (1) they were issued after a remand order to reconsider the issue, and (2) they were issued by the agency head rather than through "arguments of appellate counsel" or "litigation affidavits." Pet. 27. The Government does not explain how these new Memoranda were properly before the Fifth Circuit *at all*, since they were issued long after *the Government* brought the case on appeal—unlike in *Regents*. In any event, one of the dissenting opinions in *Regents* made very similar arguments. *See* 140 S. Ct. at 1933-34 (Kavanaugh, J., dissenting). Those arguments should fail here as well. 140 S. Ct. at 1909.

The Government faults the Fifth Circuit for relying on the D.C. Circuit's "reopening" doctrine to assess whether DHS had actually reopened the termination decision. Pet. 29-30 (citing *Nat'l Ass'n of Reversionary Prop. Owners* v. *Surface Transp. Bd.*, 158 F.3d 135, 141 (D.C. Cir. 1998) ("*NARPO*")). But the reopening doctrine presents a very close analogue to the question whether the October Memoranda actually reconsidered the termination decision, *see NARPO*, 158 F.3d at 141, and the Government offers no better analogue. For the reasons explained by the Fifth Circuit, App.28a-30a, the reopening doctrine's factors provide helpful guidance for determining whether "the agency actually reconsidered the rule." *NARPO*, 158 F.3d at 141. In any event, the result would be the same under any test, because "the overall context establishes beyond doubt that DHS didn't reopen the Termination Decision." App.30a.

In the alternative, the Government argues that "where … an agency 'explicitly' reconsiders a prior decision," it has reopened the prior action. Pet. 30 (citing *Public Citizen* v. *Nuclear Regulatory Comm'n*, 901 F.2d 147, 151 (D.C. Cir. 1990)). But here, the agency "explicitly," *id.*, stated that it was *not* reconsidering the termination decision in its September 29 announcement, which the Fifth Circuit noted was "the closest thing this case has to an NPRM." App.28a. That announcement was entitled "DHS Announces Intention to Issue New Memo *Terminating* MPP," and it stated three times in the body that it would issue a new memorandum "*terminating*" MPP. *Id.* (emphases added). As the Fifth Circuit stated, "[t]he title leaves nothing to the imagination, and neither does the text." App.29a. "The announcement set forth DHS's *conclusion* in unmistakable terms." *Id.*

The Government suggests that the agency might have genuinely reconsidered the decision in the weeks between the district court's judgment and the September 29 announcement. But the Government cites nothing concrete to support this inference, and it would contradict everything the agency did both before and after that time period. Again, this Court need not indulge "naiveté" here. *Dep't of Commerce*, 139 S. Ct. at 2575.

Further, the Government offers no meaningful response to the Fifth Circuit's fundamental criticisms of its "dual-track" approach. *See* App.124a-126a. The Fifth Circuit pointed out that the Government could have *either* (1) declined to pursue an appeal, issued a new agency action on remand, and sought relief from the district court from its final judgment under Rule

60(b) (whose ruling it could then appeal); *or* (2) pursued the appeal to final judgment, and then, if it lost the appeal, reconsidered the termination decision on remand and *then* sought relief under Rule 60(b) (and, if necessary, appealed again). App.124a-125a. What's more, the Government "could've switched from Option 2 to Option 1 at any time." App.126a n.19. But the Government's attempt to do *both at the same time* is unprecedented and violates basic principles of appellate practice. "Just as a litigant cannot notice an appeal and then continue litigating the case in the district court, an agency cannot notice an appeal and then act as if it has accepted the remand order." App.52a.

The Government complains that the Fifth Circuit's ruling "leaves DHS no viable pathway for providing that additional consideration and explanation," Pet. 27, but that is plainly incorrect. Whenever the appellate process is concluded, the agency will have a full opportunity to reconsider its decision on remand and then seek reconsideration from the district court—provided it genuinely reconsiders the decision the next time. What DHS cannot do is to *both* challenge the remand order on appeal *and* try to destroy appellate jurisdiction by purporting to comply with it at the same time. App.126a. As the Fifth Circuit said, "the Government made the bed it's attempting to not sleep in." App.37a.

The Government contends that its "dual-track approach was particularly necessary here," because "the agency had to pursue its appeal to obtain review of the district court's unprecedented interpretation of Section 1225." Pet. 28; *id.* at 13. But the Government could have pursued appellate review of the Section

1225 holding on direct appeal without reissuing a new memorandum in the midst of its appeal, as both its stay motions and its Petition demonstrate. To be sure, it should have also challenged the district court's APA holding, but the litigation consequences of its failure to do so are entirely of the Government's making.

Moreover, the Government implies that it could not raise the Section 1225 issue in a Rule 60(b) motion, Pet.28, but it cites no authority for that claim. The district court vacated the agency action and remanded in part because of DHS's failure to consider its statutory obligations under Section 1225. It is far from clear why the Government could not have challenged the statutory holding in its Rule 60(b) motion, and raised that issue on appeal, had it pursued the Fifth Circuit's Option 1.

In sum, the Government does not get a second do-over while it is challenging the judicial invalidation of its first do-over on appeal. And it emphatically does not get an endless succession of do-overs every time it faces a permanent injunction against an unlawful agency action. "To describe the Government's position is to demonstrate its absurdity." App.34a.

II. Section 1225 Mandates Detention, and DHS Must Use Available Tools, Including MPP, to Fulfill That Mandate.

Suppose a parent says to her child: "You *must* eat all your broccoli. If you wish, you *may* eat it with ketchup." And suppose the child responds: "It is impossible to eat my broccoli without ketchup because broccoli makes me choke and gag, and I cannot swallow it. I could get it down with ketchup. But you have offered me *discretion* on whether to eat it with

ketchup. I exercise that discretion and decline to use ketchup. Therefore, I will eat no broccoli." This response would undoubtedly be met with peals of laughter, and a renewed instruction to eat the broccoli, with or without ketchup.

The Government's position here is no different. Section 1225(b)(2)(A) provides that the Secretary *must* detain arriving applicants for admission pending removal proceedings, unless the alien is clearly and undoubtedly entitled to admission. 8 U.S.C. § 1225(b)(2)(A) ("… *shall* be detained…."); *see also id.* §§ 1225(b)(1)(B)(ii), (b)(1)(B)(iii)(IV) (same). Section 1225(b)(2)(C) provides that, in the alternative, the Secretary *may* return such an alien to contiguous territory pending removal proceedings. The Government lacks capacity to detain the vast majority of arriving applicants for admission. Pet.15-16. And the Government declines to exercise its discretion to return arriving aliens to Mexico. Thus, the Government contends, it may continue to systematically violate its detention obligations under § 1225(b)(2)(A) by unlawfully releasing tens of thousands of aliens per month into the United States, while steadfastly refusing to exercise its option to return a single alien to Mexico during removal proceedings.

In this manner, the Government confines itself in a "box" of "can'ts-and-don't-wants." App.120a. It takes a statutory regime that explicitly directs that almost *no* arriving aliens shall be released in the United States pending removal proceedings, and transforms it into a regime where almost *all* arriving aliens are released into the United States pending removal proceedings. That is a "powerful indication"

that the Government "has made a mess of this statute." *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 669 (2006) (Scalia, J., dissenting).

Indeed, the Government's position violates both plain English and common sense. When one has both (1) an obligation to do something, and (2) a discretionary option that offers a potential means to fulfill the obligation; but (3) under the circumstances, the discretionary obligation is the *only* method of fulfilling the obligation; then the discretionary option becomes obligatory.

The Government responds by stoutly insisting that "may" means "may" in § 1225(b)(2)(C), and thus it can "never" be ordered to employ its contiguous-territory-return authority. Pet. 16. But to make this argument, the Government must divorce subparagraph (C) from subparagraph (A) of the *same statutory paragraph*, and "focus[] on § 1225(b)(2)(C) in isolation." App.79a. This is unreasonable. Not only are (b)(2)(A) and (b)(2)(C) contained in the same statutory paragraph (*i.e.*, (b)(2)), but *they explicitly cross-reference each other*. *See* 8 U.S.C. § 1225(b)(2)(A) ("Subject to subparagraphs (B) and (C)…."); *id.* § 1225(b)(2)(C) ("In the case of an alien described in subparagraph (A)…"). Through these cross-references, both subparagraphs establish beyond doubt that the contiguous-territory-return authority in (b)(2)(C) constitutes an *alternative* to the mandatory-detention regime of (b)(2)(A). *See id.*

In the Fifth Circuit's words, (b)(2)(C) is a "statutory safety valve to address that [detention-capacity] problem." App.4a. Subparagraph (b)(2)(C) "is, of course, discretionary. But it does not undo the

obvious fact that (A) is otherwise mandatory." App.116a. "Reading both [subparagraphs] together, rather than the first in isolation," "informs the grant of authority" in paragraph (b)(2) as a whole. *Alabama Association of Realtors* v. *Dep't of Health and Human Servs.*, 141 S. Ct. 2485, 2488 (2021).

The Government's other arguments fare no better. Having insisted that "may" means "may" in (b)(2)(C), Pet. 16, the Government then pivots to contend that "shall" *also* means "may" in (b)(2)(A). Pet. 20-21 (citing *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 760 (2005)). But in *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), this Court rejected the same interpretation of the same phrase "shall be detained" in the same statutory provision. *Jennings* repeatedly held that the phrase "shall be detained" in 8 U.S.C. § 1225(b)(2)(A), like the same phrase in (b)(1)(B)(ii), requires *mandatory* detention. "Read most naturally, §§ 1225(b)(1) and 1225(b)(2) … *mandate detention* of applicants for admission until certain proceedings have concluded." *Jennings*, 138 S. Ct. at 842 (emphasis added). "[Sections] 1225(b)(1) and (b)(2) do not use the word 'may.' Instead, they unequivocally *mandate* that aliens falling within their scope 'shall' be detained." *Id.* at 844 (emphasis added). "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Id.* (quoting *Kingdomware Technologies, Inc.* v. *United States*, 136 S. Ct. 1969, 1977 (2016)). "[Section] 1225(b)(2) *requires* detention for a removal proceeding." *Id.* (emphasis added). "[Sections 1225(b)(1) and (b)(2) *mandate detention* of aliens throughout the completion of applicable proceedings…." *Id.* at 845

(emphasis added). *Jennings* squarely forecloses the Government's argument to the contrary.

Sanchez-Avila, on which the Government relies, reached the same conclusion. *In re Sanchez-Avila*, 21 I. & N. Dec. 444, 457 (1996). *Sanchez-Avila* held that, in § 1225, "Congress contemplated that aliens seeking admission to the United States, who did not appear to be clearly admissible, in the ordinary course would be detained in custody for further proceedings," and that "[t]he language of section 235(b) [*i.e.*, § 1225(b)] stating that an alien 'shall be detained for further inquiry' … clearly indicates such an intent." *Id.* As *Sanchez-Avila* noted, "[i]t is not surprising that the statute was drafted in this manner because, when enacted in 1952, detention in the exclusion context was the norm." *Id.* And *Sanchez-Avila* decisively confirms that, from the beginning, the Government viewed contiguous-territory return as an *alternative* or safety valve to alleviate the burdens of mandatory detention. *Id.* at 450, 451.

In light of *Jennings*, the Government's reliance on *Castle Rock* is misplaced. Pet. 20-21. *Castle Rock* addressed Colorado's domestic-violence protective-order law, 545 U.S. at 752, while *Jennings* addressed the operative phrase in the very federal statute at issue here, 138 S. Ct. at 842-48. Moreover, *Castle Rock* is readily distinguishable because it addressed "the deep-rooted nature of law-*enforcement* discretion." 545 U.S. at 761 (emphasis added). But the Government cites no evidence of any "deep-rooted" tradition of discretion regarding *detention* of arriving aliens pre-dating the enactment of § 1225(b)(2)(A) in 1952, and *Sanchez-Avila* specifically found that no such tradition existed. 21 I. & N. Dec. at 457. Thus,

as both lower courts correctly found, "[t]he MPP program is not about enforcement proceedings *at all*. Any alien eligible for MPP has already been placed into enforcement proceedings under Section 1229a. The only question MPP answers is *where* the alien will *be* while the federal government pursues removal—in the United States or in Mexico." App.99a (quoting App.187a).

The Government counters that "enforcement discretion encompasses not just choices about whether to enforce, but also choices about *how* to enforce." Pet. 21. It supports this *ipse dixit* only with a "*cf.*" citation of *Arizona* v. *United States*, 567 U.S. 387, 396 (2012), which provides only a generalized statement that "immigration officials" exercise "broad discretion." *Id.* Contrary to the Government, the question where someone should remain while enforcement proceedings are ongoing is not a question of "enforcement discretion," because it presumes that "enforcement" is already occurring. App.99a.

The Government invokes IIRIRA's "historical" context, by claiming that the Congress that enacted IIRIRA "did not appropriate adequate funds for the Executive Branch to detain all noncitizens described in Section 1225." Pet. 18. This argument proves nothing, because Congress's failure to provide resources to detain all arriving aliens is fully consistent with the Fifth Circuit's view that the Government's contiguous-territory-return authority is a "safety valve," App.4a, providing an alternative option to detention. Congress could easily have intended for the Government to *use* that safety valve and thought additional detention capacity unnecessary. Indeed, as the Government's own

authority demonstrates, Congress enacted (b)(2)(C) after INS insisted that it was *already employing* contiguous-territory return as "a well-known, widely practiced policy of long duration." *Sanchez-Avila*, 21 I. & N. Dec. at 461.

In any event, the Government's historical argument relies on ambiguous clues from other legislation to infer what Congress was really concerned with doing in IIRIRA, divorced from IIRIRA's s unambiguous text. But "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Servs.,* 523 U.S. 75, 79 (1998). Such oblique inferences cannot defeat the "unequivocal[]" meaning of § 1225(b)(2). *Jennings*, 138 S. Ct. at 844.

In addition, the Government urges that contiguous-territory return cannot be implemented without Mexico's "consent," and it doubts that, in 1996, "Congress would have conferred on Mexico the effective power to decide whether or not the Secretary employs contiguous-territory return." Pet. 18-19. This is wrong for two reasons. First, not all contiguous-territory return requires Mexico's consent, because "for at least some aliens, DHS can refuse admission at ports of entry in the first place." App.71a (citing 8 U.S.C. 1225(b)(2)(C)); *see also* App.208a n.17 ("The United States initiated MPP unilaterally pursuant to U.S. law, not pursuant to bilateral agreement or treaty with Mexico."); App.249a. "Part of MPP's function was to exercise that authority [to refuse entry] on a programmatic, widespread basis. And DHS can do *that* unilaterally." App.71a.

Second, as the Government's own authority shows, IIRIRA's contiguous-territory-return provision was enacted after the Government insisted that it was *already* exercising contiguous-territory return on a widespread basis. *Sanchez-Avila*, 21 I. & N. Dec. at 450. In 1996, INS contended that contiguous-territory return was "a longstanding practice which has survived years of scrutiny," by which "[l]arge numbers of aliens are placed in exclusion proceedings each year and are required to remain in Canada and Mexico pending their hearings." *Id.*; *see also id.* at 454, 459-60, 461. In 1996, Congress did not need to worry overmuch about INS's obtaining consent for what INS insisted that both Mexico and Canada were already consenting to on a widespread basis. *Id.*

The Government also relies on its parole authority under § 1182 as an alternative justification for its *en masse* releases. Pet. 19, 21-23. First, the Government faults the Court of Appeals for drawing "sweeping conclusions about DHS's [parole] practices without the benefit of a relevant record." Pet. 19. But the Government, which has been on clear notice of the States' § 1225 claims since April 13, stipulated to a bench trial at which it was allowed to present any evidence it wished. Any deficiency in the "relevant record," *id.*, is entirely of the Government's own making. If it wanted more "evidence" of its § 1182 parole practices to refute the States' § 1225 claims, it could and should have presented it at trial. To the extent that the Government's "trial evidence [was] not directed to how many applicants for admission are paroled and why," *id.* at 20, that deficiency is due to the Government's litigation decisions. As the district court found, "a perusal of the *entire* administrative

record shows *zero* evidence of DHS's detention capacity." App.199a.

Addressing the statute, the Government contends that 8 U.S.C. § 1182(d)(5)(A) authorizes the wholesale release into the United States of hundreds of thousands of aliens beyond DHS's detention capacity. Pet. 21-23. But Section 1182(d)(5)(A) provides that the Secretary "may … in his discretion parole into the United States temporarily under such conditions as he may prescribe *only on a case-by-case basis for urgent humanitarian reasons or significant public benefit* any alien applying for admission into the United States…" 8 U.S.C. § 1182(d)(5)(A) (emphasis added). Likewise, 8 U.S.C. § 1182(d)(5)(B) provides that alien refugees may be paroled only if the Secretary "determines that compelling reasons in the public interest *with respect to that particular alien* require that the alien be paroled into the United States…." 8 U.S.C. § 1182(d)(5)(B). The plain meaning of the emphasized language is to *prohibit* class-wide releases of aliens based on class-wide reasons, such as lack of detention capacity. App.117a. As the Fifth Circuit stated, "[t]he statute allows only case-by-case parole. Deciding to parole aliens *en masse* is the opposite of *case-by-case* decisionmaking." App.5a; *see also* App.120a.

Indeed, the Government's lack of detention capacity necessitates that, without MPP, thousands of aliens *will* be released into the United States, so any "case-by-case" consideration of detention capacity, Pet. 23, is *pro forma* and illusory. As the Fifth Circuit observed, "MPP's termination (*i.e.*, DHS's refusal to return above-capacity aliens to Mexico), coupled with DHS's limited detention capacity … *necessarily*

entails that DHS will parole those aliens. What else could it do?" App.101a.

In addition, the Government ignores IIRIRA's historical context by overlooking the whole point of the 1996 amendment, which was to curtail the Executive's *en masse* paroles. After "the executive branch on multiple occasions purported to use the parole power to bring in large groups of immigrants," "Congress twice amended 8 U.S.C. § 1182(d)(5) to limit the scope of the parole power and prevent the executive branch from using it as a programmatic policy tool." App.13a-14a. "By enacting [IIRIRA], Congress 'specifically narrowed the executive's discretion' to grant parole due to 'concern that parole … was being used by the executive to circumvent congressionally established immigration policy.'" App.201a n.13 (quoting *Cruz-Miguel* v. *Holder*, 650 F.3d 189, 199 & n.15 (2d Cir. 2011)).

In a footnote, the Government also contends that the class-wide release of arriving aliens is a valid exercise of its release authority under § 1226(a). Pet. 23 n.5. Again, this contradicts the plain language of the statute and this Court's opinion in *Jennings*. MPP applies to arriving aliens, but as *Jennings* explained, § 1226(a) governs the arrest, detention, and release of aliens who are already "present in the country." *Jennings*, 138 S. Ct. at 838. "Section 1226 generally governs the process of arresting and detaining that group of aliens," *i.e.*, those already "inside the United States." *Id.* For *arriving* aliens, § 1225 applies, not § 1226. App.118a. "[G]iven that both MPP and § 1225(b)(2) concern aliens *apprehended at the border*—in contrast to § 1226(a)'s concern with aliens 'already in the United States'—it's hard to see how the

latter provision is relevant to MPP at all." App.121a. Moreover, as the Fifth Circuit pointed out, § 1226(a) requires arrestees to receive bond or conditional parole. App.118a. But "[t]here is no indication that this is DHS's practice or its plan." App.121a.

The Government argues that "[t]he Executive Branch's consistent constructions of the INA's parole provisions are entitled to judicial deference." Pet. 22 (citing *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999)). But *Aguirre-Aguirre* merely held that INS was entitled to *Chevron* deference, *see id.*, and the Fifth Circuit correctly held that "[t]he Government … forfeited the *Chevron* issue by failing to mention it in its brief." App.43a; *cf. Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976) (issues forfeited in the lower courts are not "before" this Court). In any event, the Government's position contradicts the plain language of the statute, so no amount of deference under any doctrine could save it. And if the Court were to entertain whether deference could save the Government's interpretation, it should add a Question Presented as to whether any applicable deference doctrine should be overruled.

Finally, the Government argues that the Fifth Circuit's holding is "radical" because three presidential administrations before the Trump Administration systematically violated their detention obligations under § 1225(b)(2). Pet.23-24. But the Executive's longstanding disregard for the law provides an additional compelling reason to *enforce* that law, not to allow the Executive to keep disregarding it "by a sort of intellectual adverse possession." *Tyler Pipe Indus., Inc.* v. *Washington State Dep't of Revenue*, 483 U.S. 232, 265 (1987)

(Scalia, J., concurring in part and dissenting in part). MPP was the first attempt by the Executive to take its detention obligations under § 1225 seriously. It was explicitly adopted for the purpose of reducing the illegal release of thousands of arriving aliens into the country. App.8a, App.158a. The Executive's longstanding disregard for duly enacted statutes does not repeal those statutes.

The Government's own authority agrees. In *Sanchez-Avila*, the Government contended that its contiguous-territory-return practices should be upheld even in the absence of statutory authority, because they were longstanding and widespread, and had gone unchallenged for decades. *Sanchez-Avila*, 21 I. & N. Dec. at 459-60. The BIA rejected that argument, holding that the plain language of the statute should govern. It noted that the INS "argues that its practice in this regard has survived years of legal scrutiny, but ultimately points to no case that has specifically addressed and sanctioned the … practice in question." *Id.* at 459. So also here, the Government points to "no case that has specifically addressed and sanctioned" its *en masse* releases, while both *Jennings* and *Sanchez-Avila* indicate they are unlawful. "[T]he plain language of the statute controls over [the Government's alleged] practical necessity." *Id.* at 463.

In the end, it is the Government's position that is truly "radical." Pet. 23. Based on the statute's plain language, § 1225 mandates that very few arriving aliens should be released into the United States pending removal proceedings. On the Government's view, the vast majority of arriving aliens shall be so

released. The Government thus engages in a "radical" rewriting of the law.[1]

III. The Case Does Not Warrant Expedited Review.

The Government's request for expedited review should be denied because the Petition does not warrant review at all. *See supra* Parts I, II. Indeed, even if this Court were inclined to grant the Petition, the Government's bad-faith efforts to alternatingly delay and accelerate this case for litigation advantage provide a sufficient reason to refuse to expedite proceedings in this Court. App.3a, 47a, 48a, 50a, 124a, 125a.

The Government claims that MPP's reimplementation will have an adverse impact on foreign relations with Mexico, Pet.32-34, but its concerns are both self-inflicted and overstated. Regarding the injunction's supposed "disruptive consequences" on foreign relations, the district court found that "these problems are entirely self-inflicted." App.206a. Missouri and Texas "filed suit challenging the suspension of enrollments in MPP on April 13, 2021, which is nearly two months *before* DHS purported to terminate the program entirely in the June 1 Memorandum." App.206a; *see also* App.132a. But, notwithstanding that it had only *suspended* new enrollments in MPP at that time, DHS immediately

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[1] In a footnote, the Government argues that the lower courts lacked jurisdiction to enter injunctive relief under 8 U.S.C. § 1252(f)(1). Pet. 15 n.4. The Fifth Circuit and district court decisively refuted this argument. App.134a-136a, 184a.

began working with Mexico to *permanently dismantle* the program—and it was those unauthorized efforts that DHS contended were diplomatically difficult to backtrack.

"DHS argues, in a brief dated July 7, 2021, that it began acting 'to unwind MPP and its infrastructure,' *before* the June 1 Memorandum terminating MPP, which is only two months old." DHS argued on July 7 that "[n]ew initiatives" to replace MPP have been "in place for nearly *six months*." App.207a (quoting D.Ct. ECF No. 70, at 8). "In another portion" of their brief, "Defendants state MPP began being wound down on 'February 11, 2021.' Defendants also state that vacatur would nullify 'more than four months of diplomatic and programmatic engagement,' even though MPP had only been terminated for one month when that brief was submitted." App.207a-208a. These arguments "reduce[] the entire June 1 Memorandum into *post hoc* arguments for a decision that was already made." App.208a.

If DHS had acted forthrightly, instead of secretly working with Mexico to dismantle the program before it was actually terminated, "DHS could have avoided any disruptions by simply informing Mexico that termination of MPP would be subject to judicial review until the litigation was resolved. Mexico is capable of understanding that DHS is required to follow the laws of the United States which includes the APA and the INA." App.206a-207a (quotation marks omitted). In any event, "DHS's reliance on the effects of foreign affairs is unpersuasive. DHS's first duty is to uphold *American* law." App.209a. "[W]hile the President has broad authority in foreign affairs, that authority does not extend to the refusal to

execute domestic laws." *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007). DHS "cannot just point at diplomatic efforts as an excuse to not follow the APA or fulfill its statutory obligations." App.209a.

"Further, the mere fact that *some* foreign-relation issues are in play cannot suffice to defeat the injunction. The Government's contrary position would allow DHS to implement any immigration program it liked—no matter how far afield from the law—with impunity." App.132a. The Government's vague, declarations predicting diplomatic disruption, which "include[] the generous use of strawmen," App.134a n.23, cannot provide a blank check to violate the INA and the APA.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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