No. 21-954

In the Supreme Court of the United States

JOSEPH R. BIDEN, JR.,
PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

STATE OF TEXAS, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, regulation, and rule:

In the Supreme Court of the United States

No. 21-954

JOSEPH R. BIDEN, JR.,
PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

STATE OF TEXAS, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

The court of appeals affirmed a permanent injunction compelling the Department of Homeland Security (DHS) to implement the discretionary Migrant Protection Protocols (MPP) "until" two conditions are satisfied: (1) DHS "has sufficient detention capacity to detain all aliens subject to mandatory detention under [8 U.S.C. 1225]," and (2) MPP "has been lawfully rescinded in compliance with the [Administrative Procedure Act (APA)]." Pet. App. 212a. The court further held that the Secretary's October 29 decision rescinding MPP cannot satisfy the injunction's APA condition because it had no legal effect. Respondents' brief in opposition reinforces the need for this Court's review of the court of appeals' unprecedented and consequential decision.

Respondents do not seriously dispute that the court of appeals' novel interpretation of Section 1225 warrants review. Nor could they: Respondents concede (Br. in Opp. 32-33) that the court's interpretation declares unlawful the border-management practices of every administration in the last quarter-century. And respondents acknowledge (*id.* at 1-2) that the injunction's detention-capacity condition would compel DHS to continue the short-lived MPP program *in perpetuity* unless Congress significantly increased DHS's appropriations for immigration detention.

The brief in opposition also confirms that this Court should review the court of appeals' holding that the October 29 decision had no "legal effect." Pet. App. 35a. Respondents acknowledge (*e.g.,* Br. in Opp. 21-22) that the court conclusively determined that, despite the Secretary's comprehensive explanation, the October 29 decision has no legal effect and cannot be considered in evaluating whether DHS has now terminated MPP in compliance with the APA. This Court has often granted certiorari to review decisions invalidating important immigration policies, including MPP itself. *Wolf* v. *Innovation Law Lab*, 141 S. Ct. 617 (2020). It should do the same here.

Contrary to respondents' assertions, there is no barrier to this Court's review of either question presented. The court of appeals' interpretation of Section 1225 was the only basis for its affirmance of the injunction's first condition. And the court's separate holding that the October 29 decision had no legal effect means that the decision cannot satisfy the injunction's second condition. It is that holding—not the various procedural conclusions respondents now highlight—that would im-

properly force DHS to issue yet *another* decision in order to terminate MPP.

Finally, respondents offer no good reason to delay this Court's review beyond this Term. The injunction is compelling the Executive Branch to maintain a controversial policy that the Secretary has determined is contrary to the interests of the United States; to divert resources from other critical priorities; and to engage in ongoing coordination with Mexico. Pet. 11-12, 15, 32-34. That continuing intrusion on the Executive's constitutional and statutory authority to manage the border and conduct the Nation's foreign policy warrants immediate review. The Court should grant certiorari and set the case for argument in April 2022.

A. The Decision Below Is Incorrect

Respondents offer no persuasive defense of the court of appeals' resolution of either question presented.

1. Respondents echo (Br. in Opp. 22) the court of appeals' conclusion that DHS "must" use MPP. That assertion founders on the statutory text providing that the Secretary "*may* return" certain noncitizens to Mexico pending removal proceedings. 8 U.S.C. 1225(b)(2)(C) (emphasis added). Respondents do not dispute that Section 1225(b)(2)(C)'s use of "may" confers discretion. But they insist (Br. in Opp. 24) that this concededly "discretionary option" becomes "obligatory" whenever DHS lacks the resources to satisfy a purported detention mandate in Section 1225(b)(2)(A). That is doubly mistaken.

First, even if Section 1225(b)(2)(A) imposed such an inflexible detention requirement, it could not transform Section 1225(b)(2)(C) from a discretionary provision into a mandatory one. Respondents observe (Br. in Opp. 24) that subparagraphs (b)(2)(A) and (b)(2)(C) are

part of the same paragraph and cross-reference each other. But that shows only that Congress gave the Secretary, as an alternative to detention, an *elective* return authority. If Congress had wanted to mandate contiguous-territory return whenever DHS lacks adequate detention capacity—notwithstanding the enormous foreign-policy consequences of such a mandate, Pet. 18-19—then Congress would not have used the discretionary term "may."

Respondents' hypothetical about broccoli and ketchup illustrates their error. They posit (Br. in Opp. 22) a parent who tells a child that he "*must*" eat broccoli and "*may*" add ketchup. As respondents recognize, those rules make ketchup optional: They justify an "instruction to eat the broccoli, with *or without* ketchup," *id.* at 23 (emphasis added), but not an instruction to eat ketchup. So too here: Respondents' reading of Section 1225(b)(2)(A), even if it were correct, could conceivably justify at most a requirement that DHS detain more people (eat the broccoli), but it cannot support an injunction compelling DHS to use its discretionary return authority (eat ketchup).

Second, and in any event, DHS does not violate any congressional command in Section 1225(b)(2)(A) when it lacks appropriations *from Congress* to detain all noncitizens potentially subject to detention. That follows directly from the background principles of enforcement discretion described in *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 760 (2005). Respondents deny (Br. in Opp. 26) that DHS has any enforcement "discretion regarding *detention* of arriving aliens," but that ignores *Castle Rock*'s recognition that the Executive must consider resource constraints when performing its enforcement duties. And that is true whether it is mak-

ing arrests or choosing which noncitizens to detain in the limited space that Congress has funded.

That discretion is especially clear here because Congress has specifically authorized the Secretary to release noncitizens rather than detain them, including through discretionary parole. See *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 837 (2018); Pet. 21-22. Respondents assert (Br. in Opp. 30-31) that DHS's longstanding parole practices are inconsistent with the statutory requirement that parole be granted on a "case-by-case" basis. 8 U.S.C. 1182(d)(5)(A). That is not so. DHS's appropriations necessarily impose an overall limit on detention. But in deciding *which* noncitizens to detain, the agency's regulations require case-by-case determinations about security, flight risk, and other factors related to the public interest. 8 C.F.R. 212.5(b); see Pet. 22-23.

What is more, respondents concede (Br. in Opp. 32) that their reading of Section 1225 has been rejected by every presidential administration since the relevant provisions were enacted. That includes the prior administration, which considered detention capacity in making parole decisions, Pet. 22, and declined to apply MPP to Mexican nationals and other classes of noncitizens, Pet. 24. Like its predecessors, the last administration thus did not ensure "that almost *no* arriving aliens [are] released in the United States pending removal proceedings," as respondents assert Section 1225 requires. Br. in Opp. 23. Respondents cannot reconcile their claim seeking MPP's reinstatement with their apparent view that MPP itself violates Section 1225 because it does not make maximum use of the contiguous-territory-return authority.

2. Respondents also fail to rehabilitate the court of appeals' holding that the Secretary's October 29 decision had "*zero* legal effect," Pet. App. 35a, and thus cannot satisfy the injunction's condition that MPP be "lawfully rescinded in compliance with the APA," *id.* at 212a. In *DHS* v. *Regents of the University of California*, 140 S. Ct. 1891 (2020), this Court held that an agency may respond to a judicial determination that it failed to explain a decision adequately by issuing a new decision with a more complete explanation. *Id.* at 1907-1908. Indeed, that is a fundamental principle of administrative law. Pet. 26-28. And that is what the Secretary did on October 29. Pet. 25-26, 31.

a. Respondents assert (Br. in Opp. 17) that the October 29 decision was a *post hoc* rationalization, not a new decision, because DHS purportedly sought only to justify its June 1 decision. That is wrong. The Secretary expressly "supersede[d] and rescind[ed] the June 1 memorandum" and issued a new decision. Pet. App. 263a. In so doing, he considered options besides terminating MPP, assessed a wide range of perspectives, and made a fresh determination to terminate the program. *Id.* at 259a-260a.

Nor have respondents come close to making the "strong showing of bad faith or improper behavior" necessary to justify an inquiry into the Secretary's "mental processes." *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2573-2574 (2019) (citations omitted). Their principal asserted evidence of pretext is the Secretary's September 29 announcement of his intent to terminate MPP again, which they contend (Br. in Opp. 18, 20) prejudged the question. But that announcement was issued after multiple weeks of work following the district court's remand, see Pet. App. 286a-287a, and by its

terms reflected only the Secretary's present "[i]ntention," *id.* at 28a. It is hardly unusual for an agency to announce its intent to take an action some weeks before acting, and neither respondents nor the court of appeals have cited even a single decision finding pretext or prejudgment based on circumstances remotely like those present here.

Respondents also repeat the court of appeals' conclusion that the October 29 decision is "one part nullity and one part impending." Br. in Opp. 16 (quoting Pet. App. 35a). But the Secretary's decision was not a nullity because it "supersede[d] and rescind[ed]" not just the June 1 memorandum but all previous agency memoranda "to implement MPP," and the decision was not impending but "[e]ffective immediately." Pet. App. 263a-264a. That the Secretary delayed *implementation* of the October 29 termination decision, *id.* at 264a, simply reflected his obligation to comply with the district court's injunction.

Tellingly, moreover, respondents offer (Br. in Opp. 19) virtually no defense of the court of appeals' extensive reliance on the reopening doctrine. See Pet. App. 23a-30a. Respondents simply assert (Br. in Opp. 19) that the doctrine "presents a very close analogue" to this case without responding to any of the government's contrary arguments. Pet. 29-30. Their halfhearted defense of a critical premise of the decision below confirms its error.

b. Respondents assert (Br. in Opp. 21) that by issuing a new decision while also pursuing an appeal, DHS took an "unprecedented" step that "violate[d] basic principles of appellate practice." But respondents identify no such principle. Agencies may attempt to fix alleged deficiencies while litigation is ongoing. See, *e.g.*,

Southern Utah Wilderness Alliance v. *Smith*, 110 F.3d 724, 727 (10th Cir. 1997); *Natural Res. Def. Council, Inc.* v. *United States Nuclear Regulatory Comm'n*, 680 F.2d 810, 813 (D.C. Cir. 1982). It is respondents' insistence that DHS was forced to choose between an appeal and a new decision that contradicts both fundamental principles of administrative law and common sense.

As to administrative law, neither the court of appeals nor respondents have cited any authority holding, or even suggesting, that an agency must forgo an appeal to issue a new decision on remand from a district court. As to common sense, respondents offer no good answer to the petition's observation that the government had to pursue an appeal of the portion of the injunction embodying the district court's unprecedented interpretation of Section 1225, but reasonably chose to obviate the need for further litigation about the adequacy of the June 1 decision's explanation by issuing a new decision. Pet. 28. Respondents' alternative approaches (Br. in Opp. 21-22) would have required the government either to burden the courts with unnecessary litigation over an explanation that DHS was prepared to reconsider or to seek review of the Section 1225 holding only through the uncertain vehicle of a motion under Federal Rule of Civil Procedure 60(b).

Finally, respondents object (*e.g.*, Br. in Opp. 8, 13) to the timing of DHS's October 29 decision. But the government sought to ensure that the new decision did not disrupt the appellate process, urging the court of appeals to stay briefing pending the Secretary's decision and then to wholly or partially return the case to the district court so it could consider the October 29 decision in the first instance. Pet. 11-12, 30-31. And even if respondents' objections to the government's litigation

conduct had merit, they could not justify the court of appeals' holding that the Secretary's comprehensive October 29 decision was a legal nullity.

B. No Vehicle Problems Preclude This Court's Review

Respondents' purported vehicle problems provide no reason to deny review.

1. Respondents first assert (Br. in Opp. 11) that the government's decision not to challenge the lower courts' holding that the June 1 decision was arbitrary and capricious is a "fatal vehicle problem" because "[t]his APA holding provided an independent basis for the decision" below. That is wrong. The decision below affirmed an injunction with two independent conditions, and the lower courts' APA holding cannot support the requirement that DHS maintain MPP in perpetuity unless Congress appropriates funds to detain all noncitizens subject to detention under Section 1225(b)(2)(A). Pet. App. 212a. Instead, that portion of the decision below rests solely on the lower courts' interpretation of Section 1225, which is the subject of the petition's first question presented.

The lower courts' holding that the June 1 decision was insufficiently explained was the basis for the injunction's second condition, which requires DHS to maintain MPP until it has been "lawfully rescinded in compliance with the APA." Pet. App. 212a. But whatever the merits of the lower courts' conclusion, the government no longer needs relief from that portion of the injunction because the Secretary has superseded and rescinded the June 1 decision. *Id.* at 263a. The government does not need to request *vacatur* of the injunction's condition that MPP be rescinded in compliance with the APA, because DHS's action in reconsidering the matter and issuing the October 29 decision *satisfies* that condition.

The only barrier at present to satisfying the injunction's APA condition is the court of appeals' holding, repeated throughout its opinion, that the October 29 decision has no legal effect. See Pet. 26-29. A favorable ruling from this Court on the second question presented would eliminate that barrier. Thus, far from being an "advisory opinion," *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) (cited at Br. in Opp. 11), a ruling for the government on both questions presented would afford complete relief: The injunction's first condition would be vacated, and the only present barrier to satisfying the second condition would be eliminated.

To be sure, if this Court resolves the second question presented in the government's favor, respondents might move the district court to bar DHS from implementing the October 29 decision on the ground that it is arbitrary and capricious. But at least in that case, the district court would be able to consider the October 29 decision on the merits. Absent this Court's intervention, the court of appeals' opinion prevents any consideration of that decision by erroneously holding that it is a legal nullity.

2. For similar reasons, respondents err in asserting (Br. in Opp. 11-16) that the petition's second question presented improperly challenges an aspect of the court of appeals' reasoning rather than a distinct holding. Respondents identify various holdings by the court of appeals supporting its decision to affirm the injunction's APA condition. Br. in Opp. 11-15. But as explained, the government no longer needs vacatur of that condition because the October 29 decision would satisfy that condition if, contrary to the court of appeals' holding, it has legal effect. Pet. 28-29. *That* is the holding challenged in the second question presented.

While respondents attempt to portray the court of appeals' express finding that the October 29 decision lacks legal effect as a mere "'statement[] in [an] opinion[],'" rather than a "holding[]," Br. in Opp. 15 (citation omitted), the court's determination conclusively prevents the government from satisfying the injunction's APA condition. See Pet. 27-29. Respondents do not dispute that point—they embrace it. They describe the October 29 decision as an "impermissible *post hoc* rationalization[]," Br. in Opp. 18 (quoting *Regents*, 140 S. Ct. at 1909), and they contend that the court of appeals' holding means that DHS must set aside the October 29 decision and issue yet *another* decision to terminate MPP, see *id.* at 21. The second question presented properly seeks review of that central holding, which is both consequential and wrong.

C. The Decision Below Warrants Review This Term

Apart from their misplaced vehicle arguments, respondents do not and could not dispute that this case warrants certiorari. And they provide no good reason to delay review until next Term.

The decision below compels the government to maintain a controversial border-wide immigration program with sensitive policy and diplomatic implications. It requires the Executive Branch to undertake ongoing coordination with Mexico and demands that multiple federal agencies reallocate significant resources. And it adopts an unprecedented interpretation of the immigration-detention statutes, with potential repercussions extending far beyond this case. See Pet. 32-34.

Respondents dispute virtually none of that. Instead, they address only one of the injunction's many harms: its effects on foreign relations. They suggest (Br. in Opp. 34-35) that there would have been no ill effect if

the government had told Mexico that all changes to MPP would be managed through litigation. But sending non-Mexican nationals who have reached United States soil (even at a port of entry) back into Mexico necessarily has substantial foreign-relations consequences, and MPP has always required Mexico's cooperation. Pet. 6-7. Respondents also cannot dispute that the injunction forces DHS to prioritize MPP over other initiatives that DHS believes will be more effective.

If the Court grants certiorari, it should set the case for argument in April 2022. The Court has expedited merits briefing to a comparable degree in other recent cases. See, *e.g.*, *Ramirez* v. *Collier*, 142 S. Ct. 50 (2021) (No. 21-5592); *Department of Commerce* v. *New York*, 139 S. Ct. 953 (2019) (No. 18-966). Respondents do not suggest that they would suffer any prejudice from such modest expedition. And delaying this Court's review until next Term could unnecessarily perpetuate the ongoing harms of the lower courts' injunction until 2023.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted and the case should be set for argument in April 2022.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

FEBRUARY 2022