The Honorable Lauren King

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, Plaintiffs, v. JOSEPH R. BIDEN, President of the United States, *et al.*, Defendants.	**No. 2:17-cv-00094-LK** **DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY (LCR 7(n))**

TO THE HONORABLE LAUREN KING, UNITED STATES DISTRICT JUDGE, WESTERN DISTRICT OF WASHINGTON, AND TO ALL COUNSEL OF RECORD:

PLEASE TAKE NOTICE, pursuant to Local Civil Rule 7(n), that on October 20, 2021, the United States Court of Appeals for the Ninth Circuit issued an opinion in *Fraihat v. U.S. Immigr. and Customs Enf't*, 16 F.4th 613 (9th Cir. 2021), which is relevant to arguments made by Defendants in connection with their cross-motion for summary judgment lodged with the Court on May 4, 2021. A true and correct copy of this opinion is attached hereto and marked as "Attachment A." The arguments to which this opinion relate are identified by section, page and line numbers as follows:

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UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Office of Immigration Litigation
Ben Franklin Station, P.O. Box 878
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A. CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Opin. Pages	Brf. Sections	Brf. Page- and Line-numbers
618-19, 637-38 (III.A), 644-47 (III.C).	IV; VIII.C.2	pp. 38, *l.* 19 – p. 39, *l.* 9; pp. 67, *l.* 22 – p. 68, *l.* 4.
643 (III.B.)	VI.2.	p. 60, *ll.* 14 – 17.

B. DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

618-19, 637-38 (III.A), 644-47 (III.C).	II; IV.B.3.	p. 4, *ll.* 9 – 19, & n.2; p. 13, *l.* 16.

In addition, on June 30, 2022, the United States Supreme Court issued an opinion in *Biden v. Texas*, 142 S. Ct. 2528 (2022), which is also relevant to arguments made by Defendants in connection with their cross-motion for summary judgment lodged with the Court on May 4, 2021. A true and correct copy of this opinion is attached hereto and marked as "Attachment B." The arguments to which this opinion relate are identified by section, page and line numbers as follows:

A. CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Opin. Pages	Brf. Sections	Brf. Page- and Line-numbers
2546-47 (IV)	V.A.3; VIII.C.3	pp. 50, *l.* 19 – p. 51, *l.* 25; p. 69, *l.* 13.

B. DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

2546-47 (IV)	V.	p. 17, *ll.* 9 – 11.

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In addition, on February 13, 2024, the United States Court of Appeals for the Fourth Circuit issued an opinion in *Mestanek v. Jaddou*, 93 F.4th 164 (4th Cir. 2024), which is also relevant to arguments made by Defendants in connection with their cross-motion for summary judgment lodged with the Court on May 4, 2021. A true and correct copy of this opinion is attached hereto and marked as "Attachment C." The arguments to which this opinion relate are identified by section, page and line numbers as follows:

A. CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Opin. Pages	Brf. Sections	Brf. Page- and Line-numbers
170-72 (II.A)	III.B.2	pp. 33 *l.* 1 – p. 34, *l.* 22.
173-74 (II.D)	III.B.3.c	pp. 36, *l.* 21 – p. 37, *l.* 16.
174-75 (II.F)	VI.C.2	pp. 68 *l.* 15 – p. 70, *l.* 23.

B. DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

170-72 (II.A)	III; IV.B.1	p. 8, *ll. 21-22*; p. 11, *l.* 16.
173-74 (II.D)	IV.B.2	p. 12, *l.* 24 – p. 13, *l.* 15.

UNITED STATES DEPARTMENT OF JUSTICE
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Dated: June 11, 2024

Respectfully Submitted,

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ATTACHMENT A

has observed, the ordinary meaning of "coupon" encompasses "any type of award that is not cash or a product itself, but that class members can redeem to obtain products or services or to help make future purchases." *Hendricks v. Ference*, 754 F. App'x 510, 514 (9th Cir. 2018) (Friedland, J., concurring in part and dissenting in part); *see* 3 *Oxford English Dictionary* 1050–51 (2d ed. 1989) (defining "coupon" as "a form, ticket, part of a printed advertisement, etc., entitling the holder to a gift or discount"); *Webster's Third New International Dictionary* 522 (2002) (defining "coupon" as a "form, slip, or section of a paper resembling a bond coupon in that it may be surrendered in order to obtain some article, service, or accommodation" or a "form or check indicating a credit against future purchases or expenditures").

Under that definition, the vouchers in this case, which have no cash value but simply grant class members an amount ranging from $36.28 to $180.68 off Massage Envy products or services, are plainly coupons—so plainly that class representatives' counsel repeatedly (albeit unintentionally) referred to them as "coupons" during oral argument. It would be best if we could resolve this case by stating the obvious: A voucher is a coupon, so class counsel's attorney's fees must be calculated based on the value of any Massage Envy vouchers that are redeemed. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 636 (7th Cir. 2014) (concluding that the term "coupon" is "interchangeable with 'voucher' ").

Unfortunately, our precedent commands otherwise. In *In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934 (9th Cir. 2015), we prescribed a three-factor test for determining whether an award constitutes a coupon settlement: "(1) whether class members have 'to hand over more of their own money before they can take advantage of' a credit, (2) whether the credit is valid only 'for select products or services,' and (3) how much flexibility the credit provides, including whether it expires or is freely transferrable." *EasySaver*, 906 F.3d at 755 (quoting *Online DVD*, 779 F.3d at 951). That test has no basis in the statutory text. And as Judge Friedland has observed, it introduces "needless complication and confusion" to the evaluation of class-action settlements. *Hendricks*, 754 F. App'x at 516 (Friedland, J., concurring in part and dissenting in part).

This case is a good example. We hold that one of the three factors is "somewhat inconclusive" but "on balance" points one way; another "appear[s]" to point the same direction; and a third points to the opposite conclusion. Just how to balance the factors against each other is unclear because they are not readily commensurable. Here, we conclude that the vouchers are coupons. If one of the three factors were slightly different, would the conclusion be different? Further litigation will be required before anyone can know for sure.

None of this is a criticism of today's decision; the court does as well as anyone could in applying the *Online DVD* test. The problem is with the test itself. In an appropriate case, we should reconsider *Online DVD* en banc.

Faour Abdallah FRAIHAT; Marco Montoya Amaya; Raul Alcocer Chavez; Jose Segovia Benitez; Hamida Ali; Melvin Murillo Hernandez; Jimmy Sudney; Jose Baca Hernandez; Edilberto Garcia Guerrero; Martin Mu-

noz; Luis Manuel Rodriguez Delgadillo; Ruben Dario Mencias Soto; Alex Hernandez; Aristoteles Sanchez Martinez; Sergio Salazar Artaga; Inland Coalition for Immigrant Justice; Al Otro Lado, Plaintiffs-Appellees,

v.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; U.S. Department of Homeland Security; Alejandro Mayorkas; Tae D. Johnson; Steve K. Francis; Corey A. Price; Patrick J. Lechleitner; Stewart D. Smith; Jacki Becker Klopp; David P. Pekoske, Defendants-Appellants.

No. 20-55634

United States Court of Appeals, Ninth Circuit.

Argued and Submitted December 9, 2020 Seattle, Washington

Filed October 20, 2021

Background: Immigration detainees brought putative class action alleging that Immigration and Customs Enforcement (ICE) directives in response to COVID-19 pandemic reflected deliberate indifference to medical needs and reckless disregard of known health risks, in violation of Fifth Amendment and Rehabilitation Act. The United States District Court for the Central District of California, Jesus G. Bernal, J., 445 F.Supp.3d 709, certified two nationwide classes and issued preliminary injunction that applied to all immigration detention facilities in United States. United States appealed.

Holdings: The Court of Appeals, Bress, Circuit Judge, held that:

(1) detainees failed to make clear showing that ICE acted with deliberate indifference to medical needs or in reckless disregard of health risks;

(2) nationwide preliminary injunctive relief could not be justified;

(3) detainees failed to establish likelihood of success on merits of their claim that conditions of their detention reflected unconstitutional punishment; and

(4) detainees failed to establish likelihood of success on merits of their Rehabilitation Act claim.

Reversed and remanded.

Berzon, Circuit Judge, dissented and filed opinion.

1. Alternative Dispute Resolution ⚿441

Mediation is not sound use of court resources when court has already fully evaluated and reached decision on merits, and when there are obvious reasons to question whether circuit mediator could efficiently resolve dispute.

2. Federal Courts ⚿3616(2)

Court of Appeals reviews district court's decision to grant preliminary injunction for abuse of discretion, its legal conclusions de novo, and its factual findings for clear error.

3. Injunction ⚿1016

Overbroad injunction is abuse of discretion.

4. Injunction ⚿1075, 1572

Preliminary injunction is extraordinary and drastic remedy, one that should not be granted unless movant, by clear showing, carries burden of persuasion.

5. Injunction ⚿1092

To obtain preliminary injunction, plaintiff must establish that (1) he is likely to succeed on merits, (2) he is likely to suffer irreparable harm in absence of preliminary relief, (3) balance of equities tips in his favor, and (4) injunction is in public interest.

6. Injunction ⚿1096

Likelihood of success on merits is most important factor in determining whether to grant preliminary injunction.

7. Injunction ⚿1092

Serious questions going to merits and balance of hardships that tips sharply towards plaintiffs can support issuance of preliminary injunction, so long as plaintiffs also show that there is likelihood of irreparable injury and that injunction is in public interest.

8. Constitutional Law ⚿4545(2)

To demonstrate deliberate indifference to pretrial detainee's serious medical needs in violation of due process, plaintiffs must establish that: (1) defendant made intentional decision with respect to conditions under which plaintiff was confined; (2) those conditions put plaintiff at substantial risk of suffering serious harm; (3) defendant did not take reasonable available measures to abate that risk, even though reasonable official in circumstances would have appreciated high degree of risk involved—making consequences of defendant's conduct obvious; and (4) by not taking such measures, defendant caused plaintiff's injuries. U.S. Const. Amend. 5.

9. Constitutional Law ⚿4545(2)

To establish objective unreasonableness of defendant's conduct, pretrial detainee alleging due process claim based on deliberate indifference to medical needs must prove more than negligence but less than subjective intent, something akin to reckless disregard. U.S. Const. Amend. 5.

10. Constitutional Law ⚿4545(2)

Neither mere lack of due care, nor inadvertent failure to provide adequate medical care, nor even medical malpractice, without more, is sufficient to meet "reckless disregard" standard for pretrial detainee's due process claim for deliberate indifference to serious medical needs; instead, detainee must show that defendant disregarded excessive risk to detainee's health and safety by failing to take reasonable and available measures that could have eliminated that risk. U.S. Const. Amend. 5.

11. Aliens, Immigration, and Citizenship ⚿485

Immigration detainees failed to make clear showing that in responding to COVID-19 pandemic, Immigration and Customs Enforcement (ICE) acted with deliberate indifference to medical needs or in reckless disregard of health risks, and thus were not entitled to preliminary injunction in their action alleging that ICE violated their due process rights by failing to ensure minimum lawful conditions of confinement at immigration facilities, even if ICE could have moved more expeditiously; ICE made compliance with Centers for Disease Control and Prevention (CDC) interim guidance mandatory for all detention facilities, instituted system for reporting at-risk detainees or suspected or confirmed COVID-19 cases on expedited timeframe, and enabled discretionary release of at-risk detainees. U.S. Const. Amend. 5.

12. Constitutional Law ⚿2580

Any rule of constitutional law that would inhibit flexibility of political branches of government to respond to changing world conditions should be adopted only with greatest caution.

13. Constitutional Law ⚿4545(2)

Mere difference of medical opinion is insufficient, as matter of law, to establish deliberate indifference to pretrial detainee's serious medical needs in violation of due process. U.S. Const. Amend. 5.

14. Aliens, Immigration, and Citizenship ⚿485

While district court's power to grant injunctive relief in action alleging violation

of immigration detainees' due process rights includes authority to order reduction in population, if necessary to remedy constitutional violation, compelled release of detainees is remedy of last resort. U.S. Const. Amend. 5.

15. Constitutional Law ⚿2553

Judicial deference to Executive Branch is especially appropriate in immigration context.

16. Constitutional Law ⚿2507(4), 2545(3)

Operation of correctional facilities is peculiarly province of legislative and executive branches of government, not judicial.

17. Aliens, Immigration, and Citizenship ⚿485

Nationwide preliminary injunctive relief could not be justified in Immigration detainees' putative class action alleging that Immigration and Customs Enforcement's (ICE) response to COVID-19 pandemic reflected deliberate indifference to medical needs and reckless disregard of known health risks, even if there were some deficiencies at some individual detention facilities; there were material differences in conditions at individual facilities, and declarations upon which district court relied were dated prior to ICE's issuance of its pandemic response requirements.

18. Federal Civil Procedure ⚿2582

Federal court must tailor remedy commensurate with specific violations at issue in case, and it errs where it imposes systemwide remedy going beyond scope of those violations.

19. Aliens, Immigration, and Citizenship ⚿485

Immigration detainees failed to establish likelihood of success on merits of their claim that conditions of their detention during COVID-19 pandemic reflected unconstitutional punishment under Due Process Clause, and thus were not entitled to preliminary injunction, even if Immigration and Customs Enforcement (ICE) failed to take similar actions as jails and prisons to release at-risk individuals; ICE was holding detainees because they were suspected of having violated immigration laws or were otherwise removable from United States, ICE imposed mandatory obligations on all ICE detention facilities, including mandatory compliance with Centers for Disease Control and Prevention (CDC) guidelines, and there was no evidence comparing conditions at ICE and criminal detention facilities. U.S. Const. Amend. 5; Immigration and Nationality Act §§ 212, 235, 236, 237, 8 U.S.C.A. §§ 1182(a), 1225(b), 1226(a), 1226(c), 1227(a), 1231(a).

20. Constitutional Law ⚿4545(1)

Under Due Process Clause, pretrial detainee may not be punished prior to adjudication of guilt in accordance with due process of law. U.S. Const. Amend. 5.

21. Constitutional Law ⚿4041

Restriction on detainee's confinement is "punitive," for purposes of due process, where it is intended to punish, or where it is excessive in relation to its non-punitive purpose, or is employed to achieve objectives that could be accomplished in so many alternative and less harsh methods. U.S. Const. Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

22. Constitutional Law ⚿4545(1)

If particular condition or restriction of pretrial detention is reasonably related to legitimate governmental objective, it does not, without more, amount to "punishment" for due process purposes. U.S. Const. Amend. 5.

23. Constitutional Law ⚿1039, 4041

Presumption of punitive conditions in violation of Due Process Clause arises where civil detainee is detained under conditions identical to, similar to, or more restrictive than those under which pretrial criminal detainees are held. U.S. Const. Amend. 5.

24. Constitutional Law ⚿1022, 4041

If civil detainee establishes that presumption under Due Process Clause that conditions of confinement are punitive applies, burden shifts to defendant to show (1) legitimate, non-punitive interests justifying conditions of detainee's confinement, and (2) that restrictions imposed are not excessive in relation to these interests. U.S. Const. Amend. 5.

25. Civil Rights ⚿1457(7)

Immigration detainees failed to establish likelihood of success on merits of their claim that Immigration and Customs Enforcement (ICE) violated Rehabilitation Act by failing to accord detainees with disabilities ability to participate in removal process during COVID-19 pandemic, and thus could not obtain preliminary injunction requiring ICE to undertake extensive measures in response to COVID-19 pandemic, absent showing that they were deprived of ability to participate in their immigration proceedings, or that any such deprivation was solely by reason of their alleged disabilities. Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794.

26. Civil Rights ⚿1055

Plaintiff bringing Rehabilitation Act claim must show that (1) he is individual with disability; (2) he is otherwise qualified to receive benefit; (3) he was denied benefits of program solely by reason of his disability; and (4) program receives federal financial assistance. Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794.

Appeal from the United States District Court for the Central District of California, Jesus G. Bernal, District Judge, Presiding, D.C. No. 5:19-cv-01546-JGB-SHK

Scott G. Stewart (argued), Deputy Assistant Attorney General; Anna L. Dichter and Lindsay M. Vick, Attorneys; William K. Lane III, Counsel; Christopher A. Bates, Senior Counsel; Jeffrey S. Robins, Deputy Director; William C. Peachey, Director; Ethan P. Davis, Acting Assistant Attorney General; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; for Defendants-Appellants.

Brian P. Goldman (argued), William F. Alderman, Mark Mermelstein, and Jake Routhier, Orrick Herrington & Sutcliffe LLP, San Francisco, California; Matthew R. Shahabian and Melanie R. Hallums, Orrick Herrington & Sutcliffe LLP, New York, New York; Katherine M. Kopp, Orrick Herrington & Sutcliffe LLP, Washington, D.C.; Timothy P. Fox and Elizabeth Jordan, Civil Rights Education and Enforcement Center, Denver, Colorado; Jared Davidson, Southern Poverty Law Center, New Orleans, Louisiana; Stuart Seaborn, Melissa Riess, and Rosa Lee Bichell, Disability Rights Advocates, Berkeley, California; Maria del Pilar Gonzalez Morales, Civil Rights Education and Enforcement Center, Los Angeles, California; Shalini Goel Agarwal, Southern Poverty Law Center, Tallahassee, Florida; Christina Brandt-Young, Disability Rights Advocates, New York, New York; Michael W. Johnson, Dania Bardavid, Jessica Blanton, and Joseph Bretschneider, Willkie Farr & Gallagher LLP, New York, New York; Leigh Coutoumanos, Willkie Farr & Gallagher LLP, Washington, D.C.; Veronica Salama, Southern Poverty Law Center, Decatur, Georgia; for Plaintiffs-Appellees.

Stephen J. McIntyre, Marissa Roy, and Kevin Kraft, O'Melveny & Myers LLP, Los Angeles, California; Lisa B. Pensabene, O'Melveny & Myers LLP, New York, New York; for Amici Curiae Casa de Paz, Church World Service—Jersey City, Clergy & Laity United for Economic Justice, Detention Watch Network, El Refugio, and Freedom for Immigrants.

Clifford W. Berlow, Michele L. Slachetka, Jonathan A. Enfield, E.K. McWilliams, and Reanne Zheng, Jenner & Block LLP, Chicago, Illinois, for Amici Curiae Public Health Experts.

Before: MARSHA S. BERZON, ERIC D. MILLER, and DANIEL A. BRESS, Circuit Judges.

Dissent by Judge BERZON

OPINION

BRESS, Circuit Judge:

In March 2020, toward the beginning of the COVID-19 pandemic, the plaintiffs in this case sought a preliminary injunction that would effectively place this country's network of immigration detention facilities under the direction of a single federal district court. The named plaintiffs were five detainees housed at three detention centers. But plaintiffs made allegations and requested preliminary injunctive relief that far transcended their individual circumstances. They contended that as to all of the approximately 250 immigration detention facilities nationwide, U.S. Immigration and Customs Enforcement's (ICE) directives in response to the COVID-19 pandemic reflected "deliberate indifference" to medical needs and "reckless disregard" of known health risks, in violation of the Fifth Amendment.

The district court agreed with the plaintiffs. In April 2020, it certified two nationwide classes and issued a preliminary injunction that applied to all immigration detention facilities in the United States. The injunction imposed a broad range of obligations on the federal government, including ordering ICE to identify and track detainees with certain risk factors that the district court identified; requiring ICE to issue a comprehensive Performance Standard covering a myriad of COVID-19-related topics, such as social distancing and cleaning policies; and setting directives for releasing detainees from custody altogether. Several months later, the district court issued a further order imposing more detailed requirements, such as twice-daily temperature checks, as well as procedures expressly designed to result in the release of substantial numbers of detainees from ICE custody. The government has now appealed the preliminary injunction.

We hold that the preliminary injunction must be set aside because plaintiffs have not demonstrated a likelihood of success on the merits of their claims. Our holding is a function of the sweeping relief plaintiffs sought and the demanding legal standards that governed their request. Plaintiffs did not seek individualized injunctive relief. Nor did they seek relief specific to the conditions at the detention centers in which they were housed. They instead challenged ICE's nationwide COVID-19 directives, asking a district court mid-pandemic to assume control over the top-level policies governing ICE's efforts to combat the viral outbreak. To obtain the extraordinary relief they sought, plaintiffs needed to come forward with evidence of constitutional and statutory violations on a programmatic, nationwide level. Plaintiffs did not do so.

Like many aspects of government that were potentially unprepared for a highly contagious airborne virus, ICE's initial response to the COVID-19 pandemic may have been imperfect, even at times inade-

quate. But the slew of national guidance, directives, and mandatory requirements that the agency issued and then frequently updated in the spring of 2020 belies the notion that ICE acted with the "reckless disregard" necessary to support a finding of unconstitutional, system-wide deliberate indifference.

ICE's nationwide policies included instructions on sanitation, hygiene, and social distancing; treatment of detainees who may have been exposed to the virus; which programs and activities to suspend; and when to release detainees from custody because of their vulnerabilities to viral infection. Like all parts of our government, ICE took actions in the face of scientific uncertainty and a constantly developing understanding of COVID-19.

Whatever shortcomings could be discerned in ICE's mandates in the spring of 2020, plaintiffs have not shown that ICE acted with deliberate indifference in issuing extensive nationwide directives that sought to mitigate the very health risks that plaintiffs claim ICE recklessly disregarded. The district court therefore erred in entering a preliminary injunction and in assuming the authority to dictate, at both a macro and a granular level, ICE's national response to the COVID-19 pandemic.

We appreciate plaintiffs' and the district court's concerns about the public health consequences of COVID-19 and the importance of protecting immigration detainees from harmful viral exposure. We of course share those concerns. Plaintiffs have identified COVID-19 infections among immigration detainees and have raised potentially valid questions about conditions at individual detention facilities, which other cases have likewise identified. We thus do not minimize the dangers that COVID-19 presents and the unique risks it imposes for persons in custody. The government here does not deny those risks, nor does it seek to absolve itself of responsibility for ensuring the safety of those whom it detains.

But the question here is not whether COVID-19 poses health risks to detainees generally or even the individual plaintiffs in this case. While a preliminary injunction is always an extraordinary remedy, the relief sought here was extraordinary beyond measure. Based on claimed deficiencies in ICE's national directives, plaintiffs sought a sweeping injunction that would and did place the district court in charge of setting the COVID-19 policies that apply to every immigration detention facility in the United States—for which the Executive Branch bears primary authority. As ICE was in the middle of confronting an unprecedented and evolving public health problem, it found its nationwide policies almost immediately subject to judicial revision.

Neither the facts nor the law supported a judicial intervention of that magnitude. The standards that governed plaintiffs' request reflected not only the all-embracing relief they sought but the core principle, grounded in the separation of powers, that far-reaching intrusion into matters initially committed to a coordinate Branch requires a commensurately high showing sufficient to warrant such a significant exercise of judicial power. Plaintiffs here did not make the showing required to justify the extraordinary relief they requested.

For these reasons and those that we now explain, we reverse the preliminary injunction and direct that all orders premised on it be vacated.

I

A

ICE, an agency of the Department of Homeland Security (DHS), is tasked with

detaining certain non-citizens. Some of these persons were apprehended attempting to enter the United States without authorization. 8 U.S.C. § 1225(b)(1)(A)(i), (B)(iii)(IV); *see also id.* § 1182(a). Others are in detention pending proceedings in which the government seeks to remove them from the United States, *id.* § 1226(a), or following orders of removal, *id.* § 1231(a)(1)–(2). Still others are held are under mandatory detention because they committed crimes in the United States, or on terrorism-related grounds. *Id.* § 1226(c).[1] In Fiscal Year 2020 through April 4, 2020, ICE reportedly held an average daily population of 42,738 adult non-citizens across a nationwide network of over 250 detention facilities.

These facilities differ in various ways. ICE owns some of the detention facilities; others are operated under contract with state or local agencies or government contractors. Some of the centers are "dedicated" facilities, which hold only ICE detainees, whereas others are "non-dedicated" facilities, which also hold non-ICE detainees. Some facilities are in remote or rural areas, while others are located closer to cities. Facilities also house differing numbers of detainees and are configured differently.

Facilities also vary based on who provides medical care. Government employees, as part of the ICE Health Services Corps (IHSC), provide direct medical care at twenty facilities, which together hold about 13,500 detainees. The remaining facilities employ medical staff that the federal government does not directly employ. However, IHSC Field Medical Coordinators provide oversight of the medical care at those facilities.

B

In December 2019, the virus SARS-CoV-2 was identified in China as causing an outbreak of a new, communicable respiratory illness, now known as coronavirus disease 2019, or COVID-19. Following the spread of the virus to the United States, the Secretary of Health and Human Services on January 31, 2020 declared a nationwide public health emergency.

This case focuses on ICE's centralized actions in response to the COVID-19 outbreak. Because plaintiffs allege that ICE acted with deliberate indifference on a national level, it is necessary for us to review in some detail ICE's system-level COVID-19 guidance and requirements. We do so through the period leading up to the district court's preliminary injunction in April 2020.

1

We begin in January 2020. As an initial response to the virus, ICE implemented applicable parts of its pre-existing "pandemic workforce protection plan," which "provides specific guidance for biological threats such as COVID-19." That same month, DHS also issued "additional guidance to address assumed risks and interim workplace controls, including the use of

1. The parties dispute whether detention under 8 U.S.C. § 1226(c) is in fact mandatory in every circumstance. Plaintiffs filed declarations from a former Deputy Assistant Director for Custody Programs at ICE's Office of Enforcement and Removal Operations and from an immigration practitioner asserting that ICE had previously released individuals held under "mandatory" detention "pursuant to ICE's guidelines and policies, particularly where the nature of their illness could impose substantial health care costs or the humanitarian equities mitigating against detention were particularly compelling." We need not decide whether the government may release individuals detained under section 1226(c) for circumstances other than those in section 1226(c)(2).

masks, available respirators, and additional personal protective equipment."

By March 2020, ICE Enforcement and Removal Operations (ERO) had convened a group of experts, including "medical professionals, disease control specialists, detention experts, and field operators to identify additional enhanced steps to minimize the spread of the virus." As more information about the novel coronavirus became available, ICE responded by issuing multiple guidance documents specifically directed at reducing the risk of COVID-19 infections among its detainee population.

On March 6, 2020, IHSC promulgated "Version 6.0" of its "Interim Reference Sheet on 2019-Novel Coronavirus (COVID-19)." Although this version is the only one in the record, it is apparent that multiple previous versions existed. This document contained six pages of "recommendations" on managing COVID-19, including detailed procedures for screening, monitoring, assessing, isolating, and testing detainees.

The document first called for "intake medical screening" to determine a detainee's "exposure risk." This involved assessing whether detainees had traveled through countries with "widespread or sustained community transmission," as defined by the Centers for Disease Control and Prevention (CDC), or had "close contact" with a person confirmed to have had COVID-19. "Close contact" was defined as "being within approximately 6 feet (2 meters) of a COVID-19 case for a prolonged period of time" (such as "while caring for, living with, visiting, or sharing a healthcare waiting area or room with a COVID-19 case") or "having direct contact with infectious secretions of a COVID-19 case (e.g., being coughed on)." If a detainee had such defined "exposure risk," he or she was to be assessed for fever and respiratory symptoms.

The results of IHSC's recommended intake screening process were to inform the facility's subsequent actions. Detainees with exposure risk but who did not exhibit COVID-19 symptoms were to be monitored for fever or respiratory complications on a daily basis for 14 days. These detainees were to be housed "in a single cell room if available," or else "as a cohort." (According to the CDC, "[c]ohorting refers to the practice of isolating multiple laboratory-confirmed COVID-19 cases together as a group, or quarantining close contacts of a particular case together as a group.") In addition, ICE detention facilities were to document each at-risk detainee on a centralized tracking tool, request a medical alert, and (if the detainee was not being held at an IHSC-staffed facility) notify the Field Medical Coordinator in charge of that facility.

Detainees with no known exposure risk but who were symptomatic were to be considered for a possible COVID-19 test. (Although such tests have become more widely available, that was not the case at the beginning of the outbreak; the IHSC document indicates that at the time it was issued, testing through commercial laboratories had only recently become possible.) IHSC indicated that "[d]ecisions on which patients receive testing should be based on the epidemiology of COVID-19, as well as the clinical course of illness." Additionally, "[p]roviders [we]re strongly encouraged to test for other causes of respiratory illness, including infections such as influenza." The document included a link to instructions for collecting specimens to facilitate testing.

IHSC provided a different set of recommendations for symptomatic detainees with known exposure risk. These detainees were to be isolated following a detailed procedure. A "tight-fitting surgical mask" was to be placed on the detainee. A medi-

cal provider, "preferably the Clinical Director or designee," was to be "[p]romptly consult[ed]," and the detainee was to be documented on the centralized tracking tool. The detainee was to be placed "in a private medical housing room, ideally in an airborne infection isolation room if available"; if no such room was available, the detainee was to be housed "separately from the general detention population." When detainees left these isolation rooms, they "should wear a tight-fitting surgical mask."

IHSC also recommended a system of notifications related to this group of symptomatic detainees. For these detainees, the local or state health department was to be notified and consulted for guidance, and, if the detainee had "underlying illness" or was "acutely ill," or if symptoms did not resolve, the ICE Regional Clinical Director or Infectious Disease program was to be consulted. ICE healthcare staff were also to be notified through the Infection Prevention Officer, the Facility Healthcare Program Manager, the Infection Prevention Group, or (for non-IHSC facilities) the Field Medical Coordinator assigned to the facility. In turn, ICE officials were to "immediately" "notify the Regional Infection Prevention Supervisory Nurse."

In bold, oversized font, the Interim Reference Sheet also recommended implementing additional hygiene protocols for symptomatic detainees with exposure risk. Detention facilities should "**[i]mplement strict hand hygiene and standard, airborne and contact precautions, including use of eye protection**." They should also "**[i]ncrease hand hygiene and routine cleaning of surfaces**," with the guidance document noting that "**[a]ppropriate personal protective equipment includes gloves, gowns, N95 respirators, and goggles or face shields**." During the initial screenings and in later consultations, IHSC further recommended that facilities "[e]ducate all detainees to include the importance of hand washing and hand hygiene, covering coughs with the elbow instead of with hands, and requesting sick call if they feel ill." This recommendation is repeated throughout the document.

Finally, the Interim Reference Sheet contained a list of "[i]nfectious disease public health actions." Detainees with "[k]nown exposure to a person with confirmed COVID-19" were recommended to be cohorted "with restricted movement" for 14 days, during which time they would be monitored for symptoms daily. Detainees with "exposure to a person with fever or symptoms being evaluated or under investigation for COVID-19 but not confirmed to have COVID-19" were to be similarly cohorted and monitored for 14 days, unless the individual in question received a diagnosis that excluded COVID-19. All such cohorting was to be reported through IHSC's routine protocols, and all "asymptomatic and afebrile" detainees being cohorted were to be documented in the tracking tool.

ICE also issued separate guidance to reduce its detainee population where possible. On March 18, 2020, one week after the World Health Organization first characterized the COVID-19 outbreak as a "pandemic," ICE issued guidance that "directed" its Field Office Directors (FODs) and Deputy Field Office Directors (DFODs) "to review the cases of aliens detained in your area of responsibility who were over the age of 70 or pregnant to determine whether continued detention was appropriate" in light of the pandemic. The record indicates that FODs have considerable authority within ICE. One former FOD described his duties in that role as "provid[ing] operational and policy oversight for ERO's interior enforcement efforts within the local area of responsibility,

spanning 43,000 square miles, three district courts, a cadre of nearly 200 employees, and 1,400 detention beds."

2

On March 23, 2020, soon after States began issuing stay-at-home orders for the first time, the CDC published a document entitled "Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities." ICE soon thereafter would reference and incorporate the CDC's Interim Guidance in its own directives. But we discuss the CDC's guidance now as part of the chronological history.

The Interim Guidance document was dedicated to providing "recommended best practices specifically for correctional and detention facilities," based on "what is currently known about the transmission and severity of coronavirus disease 2019 (COVID-19)." The Guidance included among its "intended audience" those "law enforcement agencies that have custodial authority for detained populations (i.e., US Immigration and Customs Enforcement . . .)." But the CDC acknowledged (in bold) that its Guidance document did not "**differentiate[ ]**" between "**different facilities types . . . and sizes**" and that "**[a]dministrators and agencies should adapt [its] guiding principles to the specific needs of their facility**."

The CDC Interim Guidance provided approximately 20 pages of "detailed recommendations," including on the following topics: "Operational and communications preparations for COVID-19"; "Enhanced cleaning/disinfecting and hygiene practices"; "Social distancing strategies to increase space between individuals in the facility"; "How to limit transmission from visitors"; "Infection control, including recommended personal protective equipment (PPE) and potential alternatives during PPE shortages"; "Verbal screening and temperature check protocols for incoming incarcerated/detained individuals, staff, and visitors"; "Medical isolation of confirmed and suspected cases and quarantine of contacts, including considerations for cohorting when individual spaces are limited"; "Healthcare evaluation for suspected cases, including testing for COVID-19"; "Clinical care for confirmed and suspected cases"; and "Considerations for persons at higher risk of severe disease from COVID-19." The CDC provided extensive recommendations on each of these topics.

A few days later, on March 27, 2020, ICE issued a six-page memorandum containing an "Action Plan" for addressing COVID-19, for the stated purpose of "ensur[ing] a unified and preventative response." The memorandum, addressed to ICE "Detention Wardens and Superintendents," directly applied to dedicated or IHSC-staffed facilities. "For intergovernmental partners and non-dedicated facilities," the memorandum instead deferred to governmental public health authorities. But the Action Plan nevertheless "recommend[ed] [the] actions contained in this memorandum be considered as best practices" for all facilities. The document contained guidance from various ICE components, consisting of IHSC, ERO, Custody Management Division (which "provides policy and oversight for the administrative custody" of ICE detainees), and Field Operations.

ICE's Action Plan acknowledged that "[t]he combination of a dense and highly transient detained population presents unique challenges for ICE efforts to mitigate the risk of infection and transmission." Among other things, the Action Plan provided guidance on how to limit visits and gatherings within detention facilities to reduce the risk of coronavirus introduction and spread. Detainee visita-

tions, in-person staff training, volunteer visits, and non-oversight facility tours were suspended. But in recognition of the "considerable impact of suspending personal visitation" and the importance of detainees "maintain[ing] community ties," detention facilities were advised to "maximiz[e]" detainee use of telephone, videoconferencing, and email, "with extended hours where possible." Visits by contractors performing essential services, legal visits, and presentations by legal rights groups remained permitted, but the Action Plan provided guidance for minimizing exposure risk from those activities.

The Action Plan addressed a variety of other topics as well, including hygiene and social distancing practices. Facilities were to make alcohol-based hand sanitizer available to detainees and staff "to the maximum extent possible." Hand sanitizer "with at least 60 percent alcohol" was also to "be available in visitor entrances, exits, and waiting areas." In addition, facilities were directed to "implement modified operations to maximize social distancing," such as "staggered mealtimes and recreation times." The document also provided a procedure for ensuring the safety of detainees being released from custody.

Additionally, and while referring to previously disseminated guidance on how to screen detainees, the March 27, 2020 Action Plan also provided detailed instructions for "[e]nhanced health screening[s]" of ICE and facility staff to prevent staff from bringing the virus into the detention facility. This guidance applied to "ICE detention facilities in geographic areas with 'sustained community transmission,' " as defined by the CDC. Finally, the document explained that "[t]he CDC remains the authoritative source for information on how to protect individuals and reduce exposure to COVID-19," and it referred to multiple CDC documents, including the Interim Guidance document discussed above.

3

On April 4, 2020, ICE replaced its March 18, 2020 detention review guidance with new guidance, entitled "COVID-19 Detained Docket Review," that governed determinations whether to release detainees from custody because of the risk of COVID-19. The theory behind reducing the detainee population was not only to remove from detention facilities those noncitizens with particular vulnerabilities to disease, but to create additional social distancing opportunities for those who remained in custody. This new April 2020 guidance was again addressed to Field Office Directors and deputies, and it expanded the risk factors that would prompt a review of a detainee's continued detention.

The April 4, 2020 Docket Review guidance listed several categories of detainees "that should be reviewed to re-assess custody." This new list expanded on "a list of categories of individuals identified as potentially being at higher-risk for serious illness from COVID-19," which the CDC had previously developed. As of April 4, 2020, ICE now directed FODs and DFODs to "re-assess" the custody of detainees who were pregnant, who had delivered babies in the last two weeks, who were over 60 years old, or who had chronic, immunocompromising conditions. Conditions in this latter category included, but were not limited to, blood disorders, chronic kidney disease, illnesses or treatment that would result in compromised immune systems (such as radiation therapy or chemotherapy, transplants, or "high doses of corticosteroids or other immunosuppressant medications"), endocrine disorders, metabolic disorders, heart disease, lung disease, and neurological, neurologic, and neurodevelopment conditions.

The April 4, 2020 guidance instructed FODs and DFODs, "[a]s part of [the] ongoing application of the CDC's Interim Guidance," to "please identify all cases within your [area of responsibility] that meet any of the criteria above and validate that list with assistance from IHSC or your Field Medical Coordinator." Once a detainee was verified as meeting one of those criteria, the Docket Review guidance instructed officers to "review the case to determine whether continued detention remains appropriate in light of the COVID-19 pandemic." However, while "[t]he presence of one of the factors listed above should be considered a significant discretionary factor weighing in favor of release," the ultimate determination was to depend on the basis for the detainee's detention.

The April 4, 2020 guidance explained that aliens subject to mandatory detention under 8 U.S.C. § 1226(c) "may not be released in the exercise of discretion during the pendency of removal proceedings even if potentially higher-risk for serious illness from COVID-19." Additionally, the guidance observed that "pursuant to [8 U.S.C. § 1231(a)(2)], certain criminal and terrorist aliens subject to a final order of removal may not be released during the 90-day removal period even if potentially higher-risk for serious illness from COVID-19."

The document then turned to detainees being held under discretionary detention under 8 U.S.C. § 1226(a). It mandated that "[c]ases involving any arrests or convictions for any crimes that involve risk to the public . . . must be reviewed and approved by a Deputy Field Office Director . . . or higher before a determination is made to release." The document provided examples of such crimes: those that "involve[ ] any form of violence, driving while intoxicated, threatening behaviors, terroristic threats, stalking, domestic violence, harm to a child, or any form of assault or battery." But the guidance noted that "[t]his list is not intended to be comprehensive." "[T]he age of an arrest or a conviction" could be a mitigating or aggravating factor but would not "automatically outweigh public safety concerns." Furthermore, citing 8 C.F.R. § 236.1(c)(8), the Docket Review guidance reminded officers that even for non-citizens under discretionary detention, "release is prohibited, even if the alien is potentially higher-risk for serious illness from COVID-19, if such release would pose a danger to property or persons."

Finally, the Docket Review guidance addressed "arriving aliens and certain other aliens eligible for consideration of parole from custody." "[A]bsent significant adverse factors," that a detainee was "potentially higher-risk for serious illness from COVID-19" may justify his release under 8 C.F.R. § 212.5(b)(5), based on a determination that "continued detention is not in the public interest." Furthermore, "field offices remain[ed] responsible for articulating individualized custody determinations" for "other aliens for whom there is discretion to release," "taking into consideration the totality of the circumstances presented in the case." The April 4, 2020 guidance mandated that "[t]he fact that an alien is potentially higher-risk for serious illness from COVID-19 should be considered a factor weighing in favor of release."

The record contains evidence that ICE reduced its detainee population under the guidance described above. As of April 10, 2020, ICE reported that it had released 693 individuals from custody after evaluating their immigration histories and criminal records. Furthermore, in response to the virus, ICE sought to "limit[ ] the intake of new detainees being introduced into the ICE detention system." As a re-

sult, ICE reported a decrease in "bookins" of over 60 percent when comparing March 2020 to March 2019. ICE also "arrested 1,982 fewer individuals in [the] Criminal Alien Program and 3,390 fewer at-large individuals," "comparing the period of 22 days before and after March 18, 2020." All told, by "releas[ing] ... highly vulnerable detainees, reducing [ICE's] enforcement posture, and exercising discretion on certain lower risk arrests," ICE reduced its detainee population from 37,662 single adults on February 13, 2020, to 35,980 on March 13, 2020, to 31,709 on April 13, 2020.

4

On April 10, 2020, ICE ERO issued an 18-page document entitled "COVID-19 Pandemic Response Requirements." "[I]ntended for use across ICE's entire detention network," the Pandemic Response Requirements "appl[ied] to all facilities housing ICE detainees" and provided detailed instructions for managing the detainee population in the face of COVID-19. ICE ERO explained that these measures were "necessary" given the "seriousness and pervasiveness of COVID-19." Thus, ICE was "providing guidance on the minimum measures required for facilities housing ICE detainees to implement to ensure consistent practices throughout its detention operations and the provision of medical care across the full spectrum of detention facilities to mitigate the spread of COVID-19."

The Pandemic Response Requirements, which were also developed in consultation with the CDC, imposed mandatory requirements on all facilities holding ICE detainees.[2] As the Requirements stated under "Objectives," ICE's purpose in issuing them was to "establish consistency across ICE detention facilities by establishing mandatory requirements and best practices all detention facilities housing ICE detainees are expected to follow during the COVID-19 pandemic."

The Pandemic Response Requirements began by mandating that all facilities "*must* ... [c]omply with the CDC's [Interim Guidance]" document, which we described above. Furthermore, each facility "*must*" have its Health Services Administrator notify the Field Office Director and Field Medical Coordinator responsible for the facility "as soon as practicable, but in no case more than 12 hours after identifying any detainee who meets the CDC's identified populations potentially being at higher-risk for serious illness from COVID-19."

The Pandemic Response Requirements described those "higher-risk" populations as "including" "[p]eople aged 65 and older" and "[p]eople of all ages with underlying medical conditions, particularly if not well controlled." The specified medical conditions "includ[ed]" chronic lung disease, moderate to severe asthma, serious heart conditions, immunocompromising conditions, severe obesity (defined as "body mass index ... of 40 or higher"), diabetes, chronic kidney disease undergoing dialysis, and liver disease. Furthermore, each facility "*must*" "[r]eport all confirmed and sus-

2. The Pandemic Response Requirements imposed virtually identical requirements on both dedicated and non-dedicated ICE facilities. There were only two apparent distinctions. First, the Pandemic Response Requirements noted that the cross-referenced March 27, 2020 Action Plan was mandatory for dedicated facilities but not for non-dedicated facilities. And second, dedicated facilities were required to notify the local FOD and FMC by email within 12 hours of identifying a higher-risk detainee while non-dedicated facilities were authorized to make notifications within 12 hours either via email or some "[o]ther standardized means of communicati[on]."

pected COVID-19 cases to the local ERO Field Office Director (or designee), Field Medical Coordinator, and local health department immediately."

The Pandemic Response Requirements additionally "required" "all facilities housing ICE detainees" to establish a "COVID-19 mitigation plan" to protect detainees from the pandemic. The mitigation plan was "required" to "meet[ ] the following four objectives":

- To protect employees, contractors, detainees, visitors to the facility, and stakeholders from exposure to the virus;
- To maintain essential functions and services at the facility throughout the pendency of the pandemic;
- To reduce movement and limit interaction of detainees with others outside their assigned housing units, as well as staff and others, and to promote social distancing within housing units; and
- To establish means to monitor, cohort, quarantine, and isolate the sick from the well.

Consistent with these objectives, the Pandemic Response Requirements also imposed a wide range of additional operational requirements that "*all detention facilities housing ICE detainees must also comply with.*" These requirements were divided into three sections.

First, under the heading "Preparedness," the Pandemic Response Requirements provided detailed directives on information-sharing with partner agencies, staffing, supplies (such as soap and facemasks), hygiene, and cleaning and disinfecting practices. In particular, the Pandemic Response Requirements mandated that facilities follow CDC guidance on optimizing the supply of personal protective equipment, such as facemasks and N95 respirators. The Pandemic Response Requirements also specified that when PPE such as N95 masks were limited in supply, "[c]loth face coverings should be worn by detainees and staff . . . to help slow the spread of COVID-19."

"Preparedness" also included requirements for ensuring personal and facility-wide hygiene. Among other things, all detainees and staff were to be provided "no-cost, unlimited access to supplies for hand cleansing, including liquid soap, running water, hand drying machines or disposable paper towels, and no-touch trash receptacles." Facilities were also to "[p]rovide alcohol-based hand sanitizer with at least 60% alcohol where permissible based on security restrictions." To educate detainees and staff, facilities were required to post signage (such as that provided by the CDC) about hand hygiene and cough etiquette in English, Spanish, and "any other common languages for the detainee population at the facility."

ICE detention facilities were also required to "[a]dhere to CDC recommendations for cleaning and disinfection," and the Pandemic Response Requirements provided a link to the CDC guidance on the subject. The Pandemic Response Requirements contain a lengthy list of "Cleaning/Disinfecting Practices" and recommendations for cleaning "Hard (Non-porous) Surfaces," "Soft (Porous) Surfaces," "Electronics," and "Linens, Clothing, and Other Items That Go in the Laundry."

Second, under the heading "Prevention," the Pandemic Response Requirements provided directives for screening detainees and staff, visitation, and social distancing, emphasizing that "[b]oth good hygiene practices and social distancing are critical in preventing further transmission" of COVID-19. As to screening, for example, the Requirements detailed how facilities

should screen for COVID-19 symptoms and what facilities should do when they determined during the screening process that a detainee or staff member may have COVID-19 exposure. As to social distancing, the Pandemic Response Requirements discussed various measures for sleeping, dining, and recreation that could lead to greater physical distance between detainees during more hours of the day.

While the Pandemic Response Requirements recognized that "strict social distancing may not be possible in congregate settings such as detention facilities," it required facilities, "to the extent practicable," to reduce detainee populations and population movement as part of creating greater social distancing. Facilities specifically were advised to "reduce the population to approximately 75% of capacity." The Pandemic Response Requirements also required facilities, "**[w]here possible, [to] restrict transfers of detained non-ICE populations to and from other jurisdictions and facilities unless necessary for medical evaluation, isolation/quarantine, clinical care, or extenuating security concerns.**" Notwithstanding this new guidance, continued detention review, as specified in the April 4, 2020 "COVID-19 Detained Docket Review," remained ongoing.

Third, under the heading "Management," the Pandemic Response Requirements provided detailed instructions on managing suspected or confirmed COVID-19 cases. All such detainees were to be isolated "immediately" with their own individual "housing space[s] and bathroom[s] where possible," and were to "always wear[ ] a face mask (if it does not restrict breathing) when outside of the isolation space, and whenever another individual enters the isolation room." The Pandemic Response Requirements acknowledged cohorting as an option, but it "should only be practiced if there are no other available options." Furthermore, "[i]f the number of confirmed cases exceeds the number of individual isolation spaces available in the facility, then ICE must be promptly notified so that transfer to other facilities, transfer to hospitals, or release can be coordinated immediately."

The Pandemic Response Requirements also reproduced the CDC's list of medical isolation methods, ranging from the most preferred option ("[s]eparately, in single cells with solid walls (i.e., not bars) and solid doors that close fully") to the option of last resort ("[a]s a cohort, in multi-person cells without solid walls or solid doors (i.e., cells enclosed entirely with bars), preferably with an empty cell between occupied cells"). Isolation was to be maintained, the Pandemic Response Requirements mandated, "until all the CDC criteria" for ending isolation have been met.

With this important background in place, we now turn to the litigation at hand.

C

On August 19, 2019, several months before the COVID-19 outbreak began, a group of fifteen non-citizens in immigration detention and two non-profit organizations filed the underlying complaint in this case against DHS, ICE, and various DHS and ICE officials. Plaintiffs filed the case as a putative nationwide class action on behalf of "all people currently detained, or who in the future will be detained, in ICE custody who are now, or will in the future be, subjected to" certain detention conditions. The complaint broadly alleged that the government had failed to "provide constitutionally adequate medical and mental health care" at ICE detention facilities, had unconstitutionally housed detainees in near-solitary confinement, and had dis-

criminated against detainees with disabilities.

Months into the litigation, COVID-19 began to grip the United States. The focus of this case then became ICE's handling of the pandemic. On March 24 and 25, 2020, and before some of the ICE directives described above had been issued, plaintiffs filed emergency motions seeking a preliminary injunction and certification of two subclasses. Plaintiffs sought an injunction requiring ICE, *inter alia*, to identify all detainees at greater risk from COVID-19 because of certain medical conditions, and to release all such detainees "if medically necessary safeguards cannot be immediately (within 24 hours) provided to ensure [their] health and safety[ ] and absent an individualized finding of dangerousness to community."

On April 20, 2020, the district court entered a preliminary injunction and an accompanying provisional class certification order. *Fraihat v. ICE*, 445 F. Supp. 3d 709, 750–51 (C.D. Cal. 2020); *Fraihat v. ICE*, No. EDCV 19-1546 JGB (SHKx), 2020 WL 1932393, at *1 (C.D. Cal. Apr. 20, 2020). The district court certified two subclasses. 2020 WL 1932393, at *1. The first subclass consisted of "[a]ll people who are detained in ICE custody who have one or more of the Risk Factors placing them at heightened risk of severe illness and death upon contracting the COVID-19 virus." *Id.* "Risk Factors" meant "being over the age of 55; being pregnant; or having chronic health conditions." *Id.* The class certification order defined "chronic health conditions" as "including" the following list of conditions:

> cardiovascular disease (congestive heart failure, history of myocardial infarction, history of cardiac surgery); high blood pressure; chronic respiratory disease (asthma, chronic obstructive pulmonary disease including chronic bronchitis or emphysema, or other pulmonary diseases); diabetes; cancer; liver disease; kidney disease; autoimmune diseases (psoriasis, rheumatoid arthritis, systemic lupus erythematosus); severe psychiatric illness; history of transplantation; and HIV/AIDS.

Id. The second subclass consisted of "[a]ll people who are detained in ICE custody whose disabilities place them at heightened risk of severe illness and death upon contacting the COVID-19 virus." *Id.* The list of "Covered disabilities" was identical to the list of "chronic health conditions." *Id.*

The district court appointed five of the fifteen original individual plaintiffs as class representatives for the provisionally certified subclasses: Faour Abdallah Fraihat, Jimmy Sudney, Aristoteles Sanchez Martinez, Alex Hernandez, and Martín Muñoz. *Id.* At the time, Sanchez Martinez was detained at the Stewart Detention Center in Georgia, and Hernandez was detained at the Etowah County Detention Center in Alabama. Fraihat, Sudney, and Muñoz previously had been detained at the Adelanto ICE Processing Center in California, but all three had been released by the time the district court issued the injunction and appointed them as class representatives.

With the exception of Sanchez Martinez, the class representatives had lengthy criminal histories, including convictions for manufacturing methamphetamine, robbery, and felony hit-and-run causing death or injury. At least two had previously been denied bond by Immigration Judges for presenting a danger to the community, and at least one previously had been found to be a flight risk.

Simultaneously with its class certification order, the district court entered a preliminary injunction. 445 F. Supp. 3d at 750–51. The court found that Plaintiffs were likely to succeed on the merits of three claims. First, ICE had likely acted

with "medical indifference in violation of the Fifth Amendment" by failing to promulgate minimally adequate system-wide requirements in response to the pandemic. *Id.* at 742–46. The district court also noted deficiencies in hygiene, medical care, and social distancing at certain facilities. *Id.* at 728–734, 742–46.

Second, the court held that ICE's actions likely created "punitive conditions of confinement" in violation of the Fifth Amendment because the conditions in ICE detention facilities were worse than those in federal prisons. *Id.* at 746–47. Third, the district court found that ICE likely violated section 504 of the Rehabilitation Act by failing to accord detainees with disabilities a "benefit," which the court found was "best understood as participation in the removal process." *Id.* at 747–48.

Additionally, the district court found that plaintiffs showed a likelihood of irreparable harm based on an increase in COVID-19 cases among ICE detainees, a 15 percent mortality rate for "individuals vulnerable to COVID-19" and the possibility of "lasting consequences" for those who contract the virus and survive, and evidence that "detained populations tend to have worse health outcomes than the population as a whole." *Id.* at 749. The district court also found that the balance of the equities and public interest "sharply incline[d] in Plaintiffs' favor." *Id.*

The district court entered a preliminary injunction that ordered ICE to undertake extensive measures in response to COVID-19. *Id.* at 750–51. Because it is important to appreciate the scope of the district court's preliminary injunction, we quote its commands in full:

- Defendants shall provide ICE Field Office Directors with the Risk Factors identified in the Subclass definition;
- Defendants shall identify and track all ICE detainees with Risk Factors. Most should be identified within ten days of this Order or within five days of their detention, whichever is later;
- Defendants shall make timely custody determinations for detainees with Risk Factors, per the latest Docket Review Guidance. In making their determinations, Defendants should consider the willingness of detainees with Risk Factors to be released, and offer information on post-release planning, which Plaintiffs may assist in providing;
- Defendants shall provide necessary training to any staff tasked with identifying detainees with Risk Factors, or delegate that task to trained medical personnel;
- The above relief shall extend to detainees with Risk Factors regardless of whether they have submitted requests for bond or parole, have petitioned for habeas relief, have requested other relief, or have had such requests denied;
- Defendants shall promptly issue a performance standard or a supplement to their Pandemic Response Requirements ("Performance Standard") defining the minimum acceptable detention conditions for detainees with the Risk Factors, regardless of the statutory authority for their detention, to reduce their risk of COVID-19 infection pending individualized determinations or the end of the pandemic;
- Defendants shall monitor and enforce facility-wide compliance with the Pandemic Response Requirements and the Performance Standard.

Id. at 751. These measures, the district court ordered, were to "remain in place as

long as COVID-19 poses a substantial threat of harm to members of the Subclasses." *Id.* at 751.

D

On June 19, 2020, the government timely appealed the district court's injunction and class certification order but did not seek a stay pending appeal. Briefing in this appeal was completed in early September 2020. Several weeks later, on October 7, 2020, the district court issued a further order granting in part plaintiffs' motion to enforce the injunction. *Fraihat v. ICE*, No. EDCV 19-1546 JGB (SHKx), 2020 WL 6541994 (C.D. Cal. Oct. 7, 2020). In this order, the district court explained that there were "several areas" of the preliminary injunction "where clarification is warranted," based on the government's non-compliance with the original injunction. *Id.* at *3. Although the district court's October 2020 order is the subject of a separate appeal, we discuss the order here because it demonstrates the district court's understanding and interpretation of its earlier April 20, 2020 injunction.

In the October 7, 2020 order, the district court noted that the government had since revised its Pandemic Response Requirements, but the court concluded that those revisions were inadequate. While noting it was not "enlarging the preliminary injunction," the district court issued substantial clarification in three areas. *Id.* at *5–13.

First, explaining that "the nature of the violation is a failure to adopt sufficiently comprehensive protocols to protect Subclass members," the district court's October 7, 2020 order provided a detailed set of directives governing the manner in which ICE was to provide medical care. *Id.* at *8. We quote those in full:

- Defendants shall issue a comprehensive Performance Standard directed to the Subclasses within twenty days.
- Defendants shall mandate more widespread and regular testing of the Subclasses, consistent with CDC Guidelines and above the level provided by the [Bureau of Prisons] and state prisons.
- Defendants shall develop minimum care and hospitalization protocols for Subclass Members who test positive.
- Defendants shall mandate that medical isolation and quarantine are distinct from solitary, segregated, or punitive housing, that extended lockdowns as a means of COVID-19 prevention are not allowed, and that access to diversion (books, television, recreation) and to telephones must be maintained to the fullest extent possible.
- Defendants shall mandate that safe cleaning products be utilized in safe quantities and in the manner intended for those products. Defendants shall promptly investigate and redress reports of adverse reactions to harsh cleaning products or chemical sprays.
- Defendants shall provide more protective, and more concrete, transfer protocols to protect the Subclasses, including a suspension of transfers with a narrow and well-defined list of exceptions consistent with CDC Guidance.
- Defendants shall mandate twice daily screening of the Subclass members for symptoms and temperature, consistent with CDC recommendations and utilizing a structured screening tool.
- Defendants shall continue to update the Performance Standard, consistent with expert guidance and CDC Interim Guidance, with the goal of

exceeding [Bureau of Prisons] and state prison system response levels.

- Defendants shall ensure subsequent iterations of the [Pandemic Response Requirements] do not dilute or distort CDC Interim Guidance, and shall ensure that facility operators are promptly notified of changes in CDC Interim Guidance.

Id. (footnotes omitted).[3]

Second, citing the government's "weak monitoring of facility-wide compliance with the Performance Standard," the district court in its October 7, 2020 order issued clarifications and directives on the issue of "monitoring and enforcement." *Id.* at *6, *8–9. We quote those in full:

- The Facility Survey shall be immediately and continuously updated to reflect the most current Performance Standard, shall include a section on Subclass member numbers and present conditions, and shall be corrected to address flaws noted by Plaintiffs' expert.
- Defendants shall require [Detention Service Managers], [Detention Standards Compliance Officers] or other trained ICE compliance personnel to verify in person the facility self reports. These in-person checks should occur at least monthly.
- Defendants shall centrally track notices of non-compliance, action plans, corrective action plans, and notices of intent, and shall document their follow-up. These documents shall be included in the bi-weekly disclosures to Plaintiffs.

Id. at *9 (citations omitted).[4]

Third, and most significantly, the district court found that ICE had not conducted sufficiently "meaningful" custody determinations. *Id.* at *9. The court was "especially distressed that about 70% of the detained Subclass members are not subject to mandatory detention yet have not benefited from the Docket Review Guidance, which instructs that the presence of a risk factor should be a significant discretionary factor in favor of release." *Id.* at *6.

This, the district court explained, contravened its prior orders. The court characterized its initial injunction as "assum[ing]" that making the Docket Review guidance mandatory would, consistent with the court's orders, "result in meaningful reviews and the release of significant numbers of Subclass members." *Id.* at *10. This meant that under the injunction, "only in rare cases would Defendants fail to release a Subclass member not subject to mandatory detention." *Id.* But the court also indicated it had "expected that some individuals subject to mandatory detention would be released under the Docket Review Guidance and Preliminary Injunction." *Id.* at *11. The district court faulted the government for failing to release more detainees, finding that its "expect[ation]" of an "increase in releases" since the injunction had not been fulfilled. *Id.*

To remedy this issue, the district court issued further "clarifications" that it described as "necessary to achieve the origi-

3. According to the district court's preliminary injunction, the referenced "Performance Standard" was to be a supplemented and more comprehensive version of ICE's Pandemic Response Requirements that complied with the district court's orders. 445 F. Supp. 3d at 751.

4. The referenced Facility Surveys were questionnaires completed by individual detention facility administrators that, according to the district court, allowed "self-report[ing] [of] conditions of confinement and degree of COVID-19 preparedness." 2020 WL 6541994, at *4.

nal purposes" of the injunction. *Id.* at *12. The court first clarified that under the original injunction, ICE was required to follow a two-step process for custody determinations. *Id.* at *12. The district court provided this further direction, as follows:

- The Preliminary Injunction requires Defendants to identify and track detainees with risk factors within five days of their detention (step one) then to make a "timely" custody determination (step two).
  - At step one, Defendants must affirmatively identify and track detainees with Risk Factors. However, detainee medical files might be incomplete. To account for this likelihood, a detainee or their counsel may promptly obtain a copy of the medical file and may supplement medical records at any time. Defendants shall streamline and clarify procedures for such requests. Defendants' medical personnel shall review newly submitted records within five days and inform the detainee and his or her counsel of the result.
  - At step two, Defendants must complete a "timely" custody determination. Only in rare cases should the determination take longer than a week.
  - Defendants shall provide notice of the result of the custody determination to the Subclass member and his or her counsel. The notice shall mention the Risk Factor(s) identified, and in cases of non-release shall reference a basis for continued detention in the Docket Review Guidance.

Id. (citation omitted).

The district court then specified the manner in which ICE was to make custody determinations, as well as the frequency with which ICE was to release detainees. We quote the district court's clarifications in full:

- In order to increase compliance and reduce detainee and attorney confusion, Defendants shall advertise and implement consistent procedures across field offices, for both steps outlined above. Defendants shall ensure that the presence of a Risk Factor is given significant weight and that the custody reviews are meaningful.
  - Blanket or cursory denials do not comply with the Preliminary Injunction or with the Docket Review Guidance's instruction to make individualized determinations.
  - Only in rare cases should a Subclass member not subject to mandatory detention remain detained, and pursuant to the Docket Review Guidance, a justification is required.
  - Subclass members subject to mandatory detention shall also receive custody determinations. Defendants shall not apply the Docket Review Guidance rule against release of Section 1226(c) detainees so inflexibly that none of these Subclass members are released. Section 1226(c) Subclass members should only continue to be detained after individualized consideration of the risk of severe illness or death, with due regard to the public health emergency.
  - Defendants shall centrally track and report in their biweekly productions the results of the Risk Factor and custody determinations.

- To the extent *Fraihat* conflicts with another injunction regarding custody determination practices or procedures at particular field offices or facilities, the other court orders take precedence.
- The Risk Factor "Severe psychiatric illness" includes psychiatric illnesses that make it difficult for the individual to participate in their own care, that make it unlikely the individual will express symptoms, or that increase the risk of complications from the virus.

Id. (citation and footnote omitted).

The district court reiterated, however, that "[t]he Preliminary Injunction and subsequent orders address only Defendants' *systemwide* response to the pandemic." *Id.* at *13. As a result, the district court went on, "[t]he case does not opine on the lawfulness of conditions faced by any individual detainee, nor does it determine the lawfulness of conditions at any particular facility." *Id.*

The government then filed a separate notice of appeal from the district court's October 7, 2020 clarification order. After we heard oral argument in the original appeal of the preliminary injunction and class certification orders, we ordered that the second appeal be held in abeyance pending the resolution of the first appeal. In the meantime, the district court has issued a further order granting plaintiffs' motion to appoint a special master to "monitor and oversee" ICE's compliance with the injunction. The government has since filed a third notice of appeal of a further order of the district court accepting the special master's May 21, 2021 recommendations on additional oversight of ICE relating to the release and transfer of detainees and vaccinations.

In the meantime, and following the change in presidential administrations, the government reiterated its opposition to the district court's April 20, 2020 injunction. In a February 26, 2021 letter to this Court, the government maintained that "individual findings of likely deliberate indifference are not enough to show systemic harm or enough to warrant certification of sweeping nationwide classes or class-wide relief." Citing "ICE's extensive nationwide approach and response to COVID-19," the government renewed its position that "ICE's policies in response to COVID-19" did not "violate[ ] due process on a nationwide basis."

[1] On September 9, 2021, nine months after this case was argued and submitted and nearly fifteen months after the government had filed its notice of appeal, the parties asked us to refer this case to our Court's mediation program. This request comes much too late, and we deny it. This matter has long been poised for resolution on appeal. The parties were free to resolve their dispute at any time and remain free to reach any private agreement. But given the substantial judicial and court resources that the parties already required be expended on their behalf, we decline their request to now use further court resources in the form of the Court's mediation program—itself a not unlimited resource. *See* Ninth Circuit General Order 7.1 ("The goals of the [Circuit mediation] program are to facilitate the voluntary resolution of appeals in order to reduce the Court's workload and to offer parties an alternative to litigation to resolve their disputes."). Mediation is also not a sound use of court resources when the court has already fully evaluated and reached a decision on the merits, and when there are obvious reasons to question whether a circuit mediator could efficiently resolve this sprawling dispute, itself but one part of a

much larger litigation.[5]

II

The government argues on appeal that the district court erred both in issuing a preliminary injunction and in granting provisional class certification. Although we have jurisdiction to reach the latter issue, *see Paige v. State of California*, 102 F.3d 1035, 1039 (9th Cir. 1996), we need not do so here. The district court's class certification ruling depended on, and was in service of, its preliminary injunction. If the preliminary injunction is infirm, the class certification order necessarily falls as well, regardless of whether class certification was otherwise proper under Federal Rule of Civil Procedure 23.

[2, 3] We thus turn our attention to the district court's preliminary injunction. We have jurisdiction under 28 U.S.C. § 1292(a)(1) to "review for an abuse of discretion the district court's decision to grant a preliminary injunction." *Ramos v. Wolf*, 975 F.3d 872, 888 (9th Cir. 2020). "Within this inquiry, we review the district court's legal conclusions de novo and its factual findings for clear error." *Id.* In addition, "[a]n overbroad injunction is an abuse of discretion." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009) (quotations and alteration omitted); *see also McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992).

[4] A preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (per curiam)); *accord Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); *California ex rel. Becerra v. Azar*, 950 F.3d 1067, 1105 (9th Cir. 2020) (en banc); *City & County of San Francisco v. USCIS*, 944 F.3d 773, 789 (9th Cir. 2019)).

[5–7] To obtain this relief, a plaintiff "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *USCIS*, 944 F.3d at 788–89 (quoting *Winter*, 555 U.S. at 20, 129 S.Ct. 365) (alterations in original). "Likelihood of success on the merits is the most important factor." *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (quotations omitted). In this Circuit, we also "employ[ ] an alternative 'serious questions' standard, also known as the 'sliding scale' variant of the *Winter* standard." *Ramos*, 975 F.3d at 887 (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011)). Under that formulation, " 'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff[s] can support issuance of a preliminary injunction, so long as the plaintiff[s] also show[ ] that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies*, 632 F.3d at 1135.

The district court found that plaintiffs had established a likelihood of success on three claims: (1) deliberate indifference to the medical needs of detainees, in violation of the Fifth Amendment; (2) punitive con-

5. The parties' request to refer this case to the Court's mediation program is thus denied. For the reasons set forth in Judge Berzon's dissenting opinion, Judge Berzon would grant the mediation request.

ditions of confinement, also in violation of the Fifth Amendment; and (3) a violation of section 504 of the Rehabilitation Act, 29 U.S.C. § 794. 445 F. Supp. 3d at 741–48. We hold, however, that plaintiffs failed to demonstrate a likelihood of success or serious questions on the merits of any of these claims. We address each in turn.

III

We begin with plaintiffs' primary claim that ICE "failed to promulgate and implement medically necessary protocols and practices to protect medically vulnerable people" from COVID-19, and that this failure amounted to deliberate indifference in violation of the Fifth Amendment. We conclude that plaintiffs have not shown a likelihood of success or serious questions on the merits of this claim, and that the district court's determination otherwise turned on a misapprehension of the governing legal standards.

A

[8] Demonstrating deliberate indifference requires a substantial showing. Plaintiffs must establish the following:

> (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries.

Gordon v. County of Orange, 888 F.3d 1118, 1125 (9th Cir. 2018).

[9] In substance, the government focuses on the third element, which requires plaintiffs to show that defendants' conduct was "objectively unreasonable." *Id.* To establish objective unreasonableness, a plaintiff must "prove more than negligence but less than subjective intent—something akin to reckless disregard." *Id.* (quoting *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc)); *see also, e.g.*, *Roman v. Wolf*, 977 F.3d 935, 943 (9th Cir. 2020) (per curiam).

[10] The "reckless disregard" standard is a formidable one. *See, e.g.*, *Roman*, 977 F.3d at 947 (Miller, J., concurring in part and concurring in the judgment) (describing "reckless disregard" as a "high standard"). Neither "mere lack of due care," nor "an inadvertent failure to provide adequate medical care," nor even "[m]edical malpractice," without more, is sufficient to meet this standard. *Estelle v. Gamble*, 429 U.S. 97, 105–06, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Gordon*, 888 F.3d at 1125; *Castro*, 833 F.3d at 1071; *see also Roman*, 977 F.3d at 947 (Miller, J., concurring in part and concurring in the judgment) ("Although the word 'reasonable' might be taken to suggest something akin to the duty of reasonable care applied in negligence cases, the standard is more demanding than that . . . ."). Instead, a plaintiff must show that the defendant "disregard[ed] an excessive risk" to the plaintiff's health and safety by failing to take "reasonable and available measures" that could have eliminated that risk. *Castro*, 833 F.3d at 1070–71 (quoting *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1050 (9th Cir. 2002)).

The scope of the plaintiffs' allegations and the nature of their requested relief also necessarily inform our analysis. *See Gordon*, 888 F.3d at 1125 (explaining that whether the government's conduct was "objectively unreasonable" "will necessari-

ly turn on the facts and circumstances of each particular case" (quotations omitted and alteration accepted)). In many cases alleging unconstitutional deliberate indifference to medical needs, the plaintiff seeks relief as to himself, based on his own medical circumstances. *See, e.g.*, *Gamble*, 429 U.S. at 99–106, 97 S.Ct. 285; *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1243–46 (9th Cir. 2016); *Long v. County of Los Angeles*, 442 F.3d 1178, 1181–86 (9th Cir. 2006); *Toguchi v. Chung*, 391 F.3d 1051, 1055–56 (9th Cir. 2004). In some cases, the plaintiffs seek relief on behalf of a larger group, but one nonetheless bounded by a more narrowly drawn common experience, such as conditions at a particular facility. *See, e.g.*, *Roman*, 977 F.3d at 939 (conditions at the Adelanto ICE Processing Center); *Disability Rights Mont., Inc. v. Batista*, 930 F.3d 1090, 1093–96 (9th Cir. 2019) (conditions at the Montana State Prison).

More unusually here, in contrast, the basis for plaintiffs' request and the district court's injunction was not the individual circumstances of any detainee or the conditions at any ICE facility. Given the inevitable differences in the medical vulnerabilities of individual detainees and the material differences across the approximately 250 detention facilities nationwide, plaintiffs' premising their requested injunctive relief on these grounds would have created understandable problems in justifying a nationwide injunction and nationwide classes.

Instead, and in an effort to match the broad relief they sought, plaintiffs focused on the asserted unconstitutionality of ICE's nationwide directives, issued through the policy documents we chronicled above at length. *See Brown v. Plata*, 563 U.S. 493, 499–506, 505 n.3, 131 S.Ct. 1910, 179 L.Ed.2d 969 (2011) (exposure of prisoners to substantial risk of serious harm through statewide policies and practices); *Parsons v. Ryan*, 754 F.3d 657, 662–68, 676–78 (9th Cir. 2014) (same). The district court's order granting a preliminary injunction thus focused on these same ICE policy documents, as well as "several additional global failures" that also were premised on the documents. 445 F. Supp. 3d at 743–45. As the district court thus made clear in its October 2020 order enforcing the injunction, "the nature of the violation is a failure to adopt sufficiently comprehensive protocols to protect Subclass members." 2020 WL 6541994, at *8. In this sense, plaintiffs' constitutional challenge is necessarily more abstract, yet more far-reaching, than a challenge to individual or facility-specific conditions of confinement.

[11] Based on our careful review of ICE's March and April 2020 directives, we conclude that plaintiffs have not made "a clear showing" that in responding to the evolving and unprecedented COVID-19 pandemic, ICE acted with "deliberate indifference" to medical needs or in "reckless disregard" of health risks. *California v. Azar*, 911 F.3d at 575; *Gordon*, 888 F.3d at 1125. We chronicled the various ICE mandates and guidance documents at some length above because they show why plaintiffs cannot establish a likelihood of success on the merits.

Those documents demonstrate that far from recklessly disregarding the threat of COVID-19, ICE in the spring of 2020 (and earlier) took steps to address COVID-19. In particular, the March 6, 2020 IHSC Interim Reference Sheet, March 27, 2020 ICE Action Plan, April 4, 2020 Docket Review guidance, and April 10, 2020 ICE ERO Pandemic Response Requirements collectively provided a detailed set of directives on a host of topics relevant to mitigating the risks of COVID-19. These topics included: screening of detainees and staff for COVID-19 symptoms and expo-

sure risk; monitoring, tracking, and reporting of detainees who had possible viral exposure; housing, cohorting, quarantining, and testing of detainees who may have developed COVID-19; hygiene practices, such as mask-wearing and sanitization; social distancing policies for sleeping, mealtimes, recreation periods, and otherwise; health education of detainees and staff; adherence to additional CDC Interim Guidance; release of detainees, with priority for those who had greater susceptibility to COVID-19 infection; limits on outside visits to detention facilities; development of facility-specific mitigation plans; and so on.

The April 10, 2020 ICE ERO Pandemic Response Requirements—which was ICE's most recent directive prior to the district court's injunction and which ICE issued after plaintiffs had already sought preliminary injunctive relief—bears particular mention. The Pandemic Response *Requirements* made compliance with the CDC Interim Guidance mandatory for all ICE detention facilities and instituted a system for reporting at-risk detainees or suspected or confirmed COVID-19 cases on an expedited timeframe. It also contained mandatory, detailed requirements for provision of hygiene supplies, PPE, and signage; procedures for cleaning various surfaces and common items; screening detainees and staff; and detainee housing protocols, including social distancing, cohorting, and medical isolation methods. It further required each facility to establish a mitigation plan dedicated to protecting detainees.

[12] The Supreme Court long ago reminded us that "[a]ny rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution." *Mathews v. Diaz*, 426 U.S. 67, 81, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976). Particularly in the face of scientific uncertainty about COVID-19—and with due consideration for the Executive Branch's preeminent role in managing immigration detention facilities and its greater institutional competence in this area, *see Bell v. Wolfish*, 441 U.S. 520, 548, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Roman*, 977 F.3d at 947 (Miller, J., concurring in part and concurring in the judgment)—we cannot conclude that ICE's directives are the stuff of deliberate indifference. Updated over time to account for improved understandings of an unprecedented global pandemic, ICE's documents reflect a mobilized effort to address what ICE acknowledged was the "seriousness and pervasiveness of COVID-19."

As a result, whether one would characterize ICE's spring 2020 policy response to COVID-19 as strong, fair, needing improvement, or something else, it simply cannot be described in the way that matters here: as a reckless disregard of the very health risks it forthrightly identified and directly sought to mitigate. The district court's determination that ICE's national directives reflected a "callous indifference to the safety and wellbeing of the Subclass members," 445 F. Supp. 3d at 745, is therefore not supported.[6]

B

Plaintiffs' contrary arguments, which the district court accepted, do not demonstrate otherwise. To the extent plaintiffs have come forward with evidence suggesting that ICE might have approached the pandemic more effectively in the spring of

6. Our fine dissenting colleague maintains we have applied a subjective intent standard. That is not correct. The standard, as we have indicated, is an objective one, and we have considered ICE's policies through that lens.

2020, plaintiffs have not shown that ICE's national policies reflected deliberate indifference or reckless disregard of COVID-19.

First, plaintiffs argued, and the district court agreed, that ICE had unreasonably delayed in issuing nationwide directives to detention facilities. 445 F. Supp. 3d at 744–45. For example, the district court faulted the government for "promulgat[ing] only non-binding guidance for the first month of the pandemic" and for "unreasonably delay[ing] taking steps that would allow higher levels of social distancing in detention." *Id.* at 743–44. But this does not demonstrate deliberate indifference.

It may be that ICE could have moved more expeditiously in engaging the threat that COVID-19 posed. But ICE began addressing that issue in January 2020, and was addressing it in earnest by March 2020, when it issued the IHSC Interim Reference Sheet and ICE Action Plan. COVID-19 presented a public health crisis unlike any that we have encountered in our time. *See, e.g.*, *Hope v. Warden York Cnty. Prison*, 972 F.3d 310, 330 (3d Cir. 2020) ("COVID-19 presents highly unusual and unique circumstances that have radically transformed our everyday lives in ways previously inconceivable and have altered our world with lightning speed and unprecedented results." (quotations and citations omitted and alterations accepted)). Plaintiffs have not demonstrated that ICE's response to the pandemic in the spring of 2020 materially trailed that of the many other areas of government that were confronting this challenging new problem at the same time.

Regardless, ICE's earlier delays in addressing COVID-19 did not demonstrate deliberate indifference on an ongoing basis. "[T]o establish eligibility for an injunction, [plaintiffs] must demonstrate the continuance of [defendants'] disregard during the remainder of the litigation and into the future." *Farmer v. Brennan*, 511 U.S. 825, 846, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). If ICE's prior delays had led to harm, that injury might be redressable in court. But the relief sought here is injunctive in nature. And plaintiffs have not explained how ICE's allegedly being slow out of the gate could justify preliminary injunctive relief if ICE's national policies at the time of the injunction did not reflect deliberate indifference. *See id.* at 846 n.9, 114 S.Ct. 1970 (observing that defendants "could prevent issuance of an injunction by proving, during the litigation, that they were no longer unreasonably disregarding an objectively intolerable risk of harm and that they would not revert to their obduracy upon cessation of the litigation").

Second, the district court found special fault with ICE's March 6, 2020 IHSC Interim Reference Sheet. 445 F. Supp. 3d at 743, 745. The district court explained that "Plaintiffs raise serious questions about the reasonableness of the IHSC guidance at the time it was promulgated and updated" because, among other things, "[t]he IHSC guidance omits aspects of the CDC recommendations" and "did not more strongly recommend social distancing." *Id.* at 745. These observations, however, did not support a finding of deliberate indifference.

We discussed the IHSC Interim Reference Sheet in detail above. That document provided extensive recommended protocols for intake medical screening, monitoring of detainees with exposure risk (both those with symptoms and those who presently lacked them), quarantining, and cohorting of detainees. Once again, whatever limitations might be detected in this "interim" set of policies does not demonstrate a reckless disregard of COVID-19. The Interim Reference Sheet instead reflects an effort, ongoing in nature, to address viral

exposure through recommended implementation of concrete procedures.

Several weeks later, moreover, ICE would issue the April 10, 2020 ICE ERO Pandemic Response Requirements, which directed that all ICE facilities "*must*" comply with the CDC's Interim Guidance on COVID-19 and which contained a section detailing "Additional Measures to Facilitate Social Distancing." While the district court questioned "whether the issuance of non-binding recommendations is an objectively 'reasonable' response to a pandemic," it acknowledged that the Pandemic Response Requirements "set forth 'mandatory requirements' for all facilities housing ICE detainees." *Id.* at 724, 744. That ICE was updating its policies during the preliminary injunction proceedings and mid-pandemic also underscores the difficulty plaintiffs face in showing that ICE's policies reflected deliberate indifference on a nationwide level. The reckless disregard standard did not permit the district court to scrutinize ICE's national policies at the level that it did. *See Wolfish*, 441 U.S. at 539, 547–48, 99 S.Ct. 1861.[7]

Third, the district court agreed with plaintiffs that ICE had "fail[ed] to take measures within ICE's power to increase the distance between detainees." *Id.* at 745. But plaintiffs did not thereby demonstrate ICE's deliberate indifference to the risks of COVID-19.

There are understandable constraints in imposing social distancing measures in a detention facility consistent with other necessary governmental objectives, such as security and the need to place certain persons in custody. *See, e.g.*, *Wolfish*, 441 U.S. at 540, 99 S.Ct. 1861 ("The Government ... has legitimate interests that stem from its need to manage the facility in which the individual is detained."). Even so, as detailed in the various ICE directives from March and April 2020, ICE recommended and ordered extensive social distancing measures, which included releasing some persons from detention altogether.

Most notably, the April 10, 2020 Pandemic Response Requirements mandated that ICE facilities "*must*" adopt the CDC Guidelines, which included the requirement to "**[i]mplement social distancing strategies to increase the physical space between incarcerated/detained persons**." Moreover, the Pandemic Response Requirements directed that "all facilities housing ICE detainees should implement ... to the extent practicable" a detailed list of "Additional Measures to Facilitate Social Distancing." These measures, which reiterated many of the CDC's recommended social distancing strategies, consisted of the following required actions, which we quote in full:

- Efforts should be made to reduce the population to approximately 75% of capacity.
- Where detainee populations are such that such cells are available, to the extent possible, house detainees in individual rooms.
- Recommend that detainees sharing sleeping quarters sleep "head-to-foot."
- Extend recreation, law library, and meal hours and stagger detainee access to the same in order to limit the

7. Like the district court, the dissent flyspecks ICE's policies to the point of criticizing its use of particular words or phrases, like "'please,'" "'ideally,'" and "'efforts should be made,'" while chastising ICE for acknowledging the realistic difficulties associated with achieving complete social distancing in custodial settings. These critiques are inconsistent with the reckless disregard standard and the deference owed to the government in its operation of immigration detention centers mid-pandemic.

number of interactions between detainees from other housing units.

- Staff and detainees should be directed to avoid congregating in groups of 10 or more, employing social distancing strategies at all times.
- Whenever possible, all staff and detainees should maintain a distance of six feet from one another.
- If practicable, beds in housing units should be rearranged to allow for sufficient separation during sleeping hours.

Taken together, ICE's national policies in the spring of 2020, including adoption of CDC Guidelines, did not reflect reckless disregard of the very social distancing approaches they sought to implement.[8] While we do not suggest these policies are impervious to criticism, they did not demonstrate deliberate indifference to medical needs.

Fourth, the district court found plaintiffs had met their burden because "Defendants have not provided even nonbinding guidance to detention facilities specifically regarding medically vulnerable detainees, pending individualized determinations of release or denial of release." 445 F. Supp. 3d at 744. This finding appears to have been the root of that portion of the district court's injunction requiring ICE to undertake various actions as to those detainees with certain "Risk Factors" that the district court specified. *Id.* at 750–51.

We conclude, however, that plaintiffs did not meet their burden of demonstrating deliberate indifference on this front either because the district court's determination otherwise was premised on legal error and a misapprehension of ICE's policies. As an initial matter, and contrary to suggestions in the district court's decision, ICE's mandatory Pandemic Response Requirements did consider whether certain detainees were at higher risk of developing serious illness from COVID-19 based on certain identified factors, such as age and preexisting health conditions. ICE made this the focus of its determinations whether to release certain detainees from custody, as well as various internal reporting requirements. ICE also directed, for example, that if facilities lacked adequate capacity to house confirmed COVID-19 cases individually, "the facility must be especially mindful of cases that are at higher risk of severe illness from COVID-19" to "prevent transmission" to the "higher-risk individual."

To the extent the district court believed it was necessary for ICE to develop hygiene and other practices specific to persons with greater vulnerability to COVID-19, the government responds that the guidance ICE issued applied to *all* detainees, which included those at greater risk from COVID-19. The government's chosen approach does not reflect deliberate indifference.

[13] ICE developed its policies based on its knowledge of how immigration detention facilities functioned and in consultation with the CDC. It may be that plaintiffs, their experts, and the district court

8. The dissent claims that in *Roman*, we held that the CDC Guidelines "do not provide a workable standard." 977 F.3d at 946. But the dissent leaves out the rest of the quoted sentence in that case, which states that the CDC Guidelines "do not provide a workable standard *for a preliminary injunction*." *Id.* (emphasis added). In *Roman*, we *vacated* a district court's COVID-19–related preliminary injunction that applied to just a single immigration detention facility. *Id.* at 945. And in the course of doing so, we advised the district court not to base any renewed injunction for that particular facility on the CDC Guidelines. *Id.* We certainly did not say in *Roman* that the CDC Guidelines were unworkable as national policy, which is how ICE is using them here.

have identified an alternative strategy that ICE could have pursued and that would have been more effective. But "a mere difference of medical opinion is insufficient, as a matter of law, to establish deliberate indifference." *Toguchi*, 391 F.3d at 1058 (quotations omitted and alterations accepted). Nor can the constitutional line be drawn based on "a court's idea of how best to operate a detention facility." *Wolfish*, 441 U.S. at 539, 99 S.Ct. 1861. The deliberate indifference standard recognizes that the Executive must have some discretion in addressing a complex problem like the one before us; plaintiffs' and the district court's approach do not account for that. *Cf. Swain v. Junior*, 961 F.3d 1276, 1289 (11th Cir. 2020) ("We simply cannot conclude that, when faced with a perfect storm of a contagious virus and the space constraints inherent in a correctional facility, the defendants here acted unreasonably . . . .").[9]

Finally, and for similar reasons, the district court erred in determining that ICE's policies for releasing detainees were "objectively unreasonable," and in finding that ICE acted with deliberate indifference in not adhering to procedures that would result in the release of more detainees. 445 F. Supp. 3d at 745. The district court concluded that ICE's Docket Review guidance improperly failed to contain "a strong presumption of release." *Id.* In its later October 7, 2020 order, the district court elaborated that its initial injunction was intended to "result in meaningful reviews *and the release of significant numbers of Subclass members*," so that "*only in rare cases* would Defendants fail to release a Subclass member not subject to mandatory detention." 2020 WL 6541994, at *10 (emphasis added). The district court further clarified that it had "expected that some individuals subject to mandatory detention would be released." *Id.* at *11.

[14] Plaintiffs have not demonstrated a likelihood of success in obtaining such extraordinary relief on a system-wide basis. While "the district court's power to grant injunctive relief included the authority to order a reduction in population, if necessary to remedy a constitutional violation," *Roman*, 977 F.3d at 942, compelled release of detainees is surely a remedy of last resort, *see, e.g.*, *Hope*, 972 F.3d at 333 (characterizing release of immigration detainees as "the most extreme" remedy); *see also Plata*, 563 U.S. at 500–01, 131 S.Ct. 1910. The same is true of a judicial decree ordering the government to adhere to procedures with the expectation and understanding that they will result in

9. The dissent attempts to suggest that the district court's injunction was "limited" because it only applied to "medically vulnerable detainees." But the certified classes comprised persons with the Risk Factors that the district court identified, which consisted of anyone over age 55 or who had a wide range of different health issues, including conditions such as high blood pressure and asthma. The district court itself explained that "general knowledge and common sense indicate that the class is large." *Fraihat*, 445 F. Supp. 3d at 736 (quotations and brackets omitted). And by the district court's determination, the classes consist of persons "at immigration detention facilities across the country," so that any injunction would operate "across all facilities." *Id.* at 719, 738. These statements belie the dissent's effort to minimize the import of the district court's injunction, while confirming that in ordering ICE to follow certain directives for those detainees with "Risk Factors," the district court's disagreement with ICE's approach to the pandemic was not somehow a limited one.

The dissent similarly maintains that "[t]he district court's injunction did not create a nationwide policy," but "mandated only that *ICE* change its *own* nationwide policies." But that is a distinction without a difference. It is obvious that the preliminary injunction imposed on ICE extensive directives that the district court devised, subject to the district court's continuing oversight.

greater release of detainees. And, in all events, the availability of any of this relief necessarily turns on "the antecedent question whether the government has acted with 'reckless disregard.'" *Roman*, 977 F.3d at 947 (Miller, J., concurring in part and concurring in the judgment).

In this case, plaintiffs did not demonstrate that the mere fact of their detention amounted to deliberate indifference. It is undisputed that the government has the authority to detain those in the plaintiff class. *See* 8 U.S.C. §§ 1225(b), 1226(a), (c), 1231(a). Nor did the conditions of confinement, as reflected in ICE's nationwide policy directives, provide a basis for the district court effectively to order the release of substantial numbers of immigration detainees.

The same was true of the district court's directives requiring ICE to adhere to more stringent custody review determinations that reflected a "strong presumption of release." *Fraihat*, 445 F. Supp. 3d at 745. Cross-referencing the April 4, 2020 Docket Review guidance, the mandatory Pandemic Response Requirements stated that ICE ERO "will review" detainees at higher risk of illness "to determine whether continued detention is appropriate." That the plaintiffs and district court may have desired more detainees be released, and on a potentially quicker basis, does not mean that the government's approach—which involved early release determinations—reflected reckless disregard on a national basis.

[15, 16] The Supreme Court has recognized that "judicial deference to the Executive Branch is especially appropriate in the immigration context." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999). And "the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." *Wolfish*, 441 U.S. at 548, 99 S.Ct. 1861; *see also Mirmehdi v. United States*, 689 F.3d 975, 984 (9th Cir. 2012) ("[T]he decision to detain an alien pending resolution of immigration proceedings is explicitly committed to the discretion of the Attorney General . . . ."), *as amended* (June 7, 2012). When combined with the exigencies of a global pandemic, these core principles, grounded in the Constitution's separation of powers, must in this context necessarily inform the deliberate indifference standard and the scope of appropriate injunctive relief.

For the reasons we have explained, plaintiffs have not demonstrated a likelihood of success or serious questions going to the antecedent constitutional violation that would justify any of the relief they were seeking, much less a judicial decree effectively directing the United States to release persons whom it was lawfully detaining. That is especially the case in view of ICE policies that already enabled the discretionary release of detainees with greater susceptibility to COVID-19—policies which, at the time of the injunction, had already led to the release of many detainees. On this record, there is no basis to conclude that to avoid acting with deliberate indifference, the Executive Branch was required to release large numbers of detainees held under proper authority.

The dissent for its part attempts to save the district court's nationwide injunction by downplaying its significance, calling the injunction "limited, modest, and deferential." Suffice it to say, that is not an apt description of the injunction before us, which imposed far-ranging court-ordered directives on the Executive Branch during a pandemic. That is why the district court itself (accurately) viewed plaintiffs as "claim[ing] entitlement to a comprehensive response to the pandemic," and why the district court viewed the issue in this case

as whether ICE's "global response" to the pandemic was "adequate." *Fraihat*, 445 F. Supp. 3d at 738–39; *see also id.* at 742 n.25 (district court "reject[ing] the implication that it lacks authority to enter class-wide relief to require a constitutionally adequate response to COVID-19 from ICE").

Nor can the import of the district court's injunction be minimized on the theory that the injunction operated on ICE's policies and not the detention centers themselves. The policies govern the detention centers. There is no dispute that plaintiffs "claim Defendants have failed to ensure minimum lawful conditions of confinement at immigration detention facilities across the country," and that the district court's injunction therefore operates "across all facilities." *Fraihat*, 445 F. Supp. 3d at 719, 738. To say that the injunction bears upon the policies in the first instance is only to underscore the magnitude of both the relief plaintiffs sought and the district court's error in concluding that plaintiffs had shown that ICE acted with reckless disregard to COVID-19 on a national level.

C

Perhaps recognizing that the district court's injunction cannot be maintained based on ICE's policy directives, plaintiffs devote extensive effort to detailing the conditions at certain ICE facilities. In this regard, plaintiffs have pointed to potential shortcomings in the on-the-ground COVID-19 response at individual detention facilities in spring 2020.

Whether those shortcomings would rise to the level of a constitutional violation, however, is a different question. *See Gordon*, 888 F.3d at 1125. And whether those conditions persist today, over a year after plaintiffs first sought injunctive relief, is yet another question, underscoring the difficulties with issuing injunctive relief about detention conditions in the midst of a fast-moving pandemic, where improved scientific knowledge leads to updated approaches over time. *See Roman*, 977 F.3d at 945–46 (vacating provisions of a preliminary injunction ordering specific COVID-19 measures at Adelanto where "circumstances have changed dramatically" since the time of the injunction). In this case, moreover, most of the named plaintiffs who sought the injunction are no longer in custody at all and were not detained at least as of July 2020.[10]

The more fundamental point, however, is that conditions at individual detention facilities cannot support the injunction that plaintiffs sought. While the district court discussed conditions at certain ICE facilities, as described by detainees and other visitors to detention facilities, 445 F. Supp. 3d at 728–34, the district court did not base its injunction on this evidence, some of which it characterized as "anecdotal," *id.* at 728. Instead, the district court was clear that it was the claimed deficiencies in ICE's nationwide directives that justified a nationwide injunction and nationwide classes.

"[T]he common question driving this case," the district court explained, is the adequacy of "Defendants' systemwide response" to the pandemic. *Id.* at 737. Accordingly, the district court's analysis focused on ICE's "decision to promulgate . . . guidance" and its purported "systemwide inaction." *Id.* at 743. In its later order enforcing the injunction, the district court

10. Although we do not reach the question of irreparable harm, we note that the dissent's perception of that issue turns on its unsupported determination that ICE's national policies reflected reckless disregard, and that the district court's solution to the situation was more likely to ameliorate harm than ICE's own policies. The dissent also questions the accuracy of the central statistic on which it relies.

reiterated that "[t]he Preliminary Injunction and subsequent orders address only Defendants' *systemwide* response to the pandemic." 2020 WL 6541994, at *13. The district court thus was clear that its preliminary injunction order "does not opine on the lawfulness of conditions faced by any individual detainee, nor does it determine the lawfulness of conditions at any particular facility." *Id.*

The district court's disclaimer was understandable because the circumstances at individual detention facilities could not justify the broad, nationwide relief that plaintiffs pursued. By seeking an injunction based on ICE's allegedly unconstitutional "systemwide" response, plaintiffs necessarily attacked ICE's detention policies at every one of its more than 250 facilities across the country. Yet the five class representatives had been detained at only three facilities.

[17] The government persuasively argues that given the material differences across ICE facilities—including their size, layout, health care capabilities, whether they also housed non-ICE detainees, and so on—the nature of the injunctive relief plaintiffs sought could not be justified based on evidence about conditions at individual facilities. On this record, that position is well-taken.

[18] A federal court must "tailor[ ] a remedy commensurate with the . . . specific violations" at issue in a case, and it errs where it "impose[s] a systemwide remedy going beyond [the] scope" of those violations. *Lewis v. Casey*, 518 U.S. 343, 359, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (quoting *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977)); *accord California v. Azar*, 911 F.3d at 584 ("The scope of an injunction . . . must [be] tailor[ed] . . . 'to meet the exigencies of the particular case.' " (quoting *Trump v. Int'l Refugee Assistance Project*, —— U.S. ——, 137 S. Ct. 2080, 2087, 198 L.Ed.2d 643 (2017) (per curiam))). "[O]nly if there has been a systemwide impact may there be a systemwide remedy." *Flores v. Huppenthal*, 789 F.3d 994, 1005–06 (9th Cir. 2015) (alteration in original) (quoting *Casey*, 518 U.S. at 359–60, 116 S.Ct. 2174).

Plaintiffs have not demonstrated that the conditions at their individual facilities support a showing that ICE has acted with deliberate indifference or reckless disregard as to the approximately 250 immigration detention facilities nationwide. In this case, moreover, the declarations upon which the district court relied to support the preliminary injunction all were dated in March 2020, which was prior to the April 10, 2020 Pandemic Response Requirements, ICE's most significant operative guidance at the time the district court entered its injunction. *See* 445 F. Supp. 3d at 728–34. And while plaintiffs attempted to submit additional declarations in a filing that the district court denied as moot, those facility-specific declarations—which were prepared only several days after the mandatory Pandemic Response Requirements were issued and included discussion of events prior to that time—do not show deliberate indifference on a system-wide basis either. Indeed, the CDC's own guidance acknowledged differences in "facility types . . . and sizes" and specified that "[a]dministrators and agencies should adapt these guiding principles to the specific needs of their facility."

For these reasons, plaintiffs' reliance on our decisions in *Roman v. Wolf*, 977 F.3d 935 (9th Cir. 2020) (per curiam), and *Zepeda Rivas v. Jennings*, 845 F. App'x 530 (9th Cir. 2021), is misplaced. In *Roman*, plaintiffs challenged only the conditions of confinement at one immigration detention facility, Adelanto, and they sought an injunction only with respect to that facility's

handling of COVID-19. 977 F.3d at 939. The district court there had before it detailed information about the conditions at Adelanto, such as the population levels, screening procedures, cleaning routines, and physical layout of the facility, down to the precise distance between bunk beds in feet and inches. *Roman v. Wolf*, 2020 WL 1952656, at *1–9 (C.D. Cal. Apr. 23, 2020), *aff'd in part and vacated in part by* 977 F.3d at 946–47. Even then, we "vacate[d] the provisions of the preliminary injunction that ordered specific measures to be implemented at Adelanto," including reductions of the detainee population. 977 F.3d at 939, 945. And we cautioned that "the district court should, to the extent possible, avoid imposing provisions that micromanage the Government's administration of conditions at Adelanto." *Id.* at 946.

Similarly, in *Zepeda Rivas*, plaintiffs challenged the conditions at two detention facilities. As in *Roman*, in entering a preliminary injunction the district court considered detailed evidence about those facilities' approach to COVID-19. *Zepeda Rivas v. Jennings*, 465 F. Supp. 3d 1028, 1034 (N.D. Cal. 2020), *aff'd in part*, 845 F. App'x at 534. There were also notable similarities between the two facilities: they were both located in California's Central Valley, were operated under the same ICE field office, and received detainees convicted of similar crimes transferred from the same county jail. *See Zepeda Rivas v. Jennings*, 445 F. Supp. 3d 36, 38–40, 39 n.4 (N.D. Cal. 2020).

Roman and *Zepeda Rivas* are of no assistance to plaintiffs here and put in perspective the immensity of the relief sought in this case. In contrast to the comparatively focused, facility-specific relief in those two prior cases, plaintiffs here challenged conditions of confinement at every ICE detention facility nationwide. The relief they seek is far greater than what was at issue in *Roman* and *Zepeda Rivas*. Plaintiffs' request demanded proof that would meet it. And given the nature of their challenge, that proof was not to be found in the form of particular conditions at individual detention facilities.

Plaintiffs also argue that the injunction could be justified by the district court's reference to "ICE's apparent failure to enforce compliance with its policy documents." 445 F. Supp. 3d at 743. But the district court here was referring to the fact that "from March 11, 2020 to April 10, 2020," ICE's policies "seem[ ] to have been voluntary." *Id.* As the district court acknowledged, and as we have explained, the April 10, 2020 Pandemic Response Requirements were mandatory. *See id.* at 724 (district court quoting the Pandemic Response Requirements and stating that "[t]he Pandemic Response Requirements set forth 'mandatory requirements' for all facilities housing ICE detainees as well as best practices"). The district court still faulted those Requirements for lacking "enforcement mechanisms." *Id.* But the district court did not here elaborate on the "enforcement mechanisms" that were supposedly lacking. And plaintiffs have cited no authority requiring such additional mechanisms as a matter of constitutional law in the face of mandatory policies that were to be implemented through a chain of command.

To the extent plaintiffs instead argue that ICE has failed adequately to implement its policies at individual facilities, this encounters the same problem we have discussed above about the difficulties of invoking facility-specific conditions to justify a "clear showing" of nationwide deliberate indifference. Noncompliance at individual facilities could provide evidence of a lack of adequate oversight at those specific facilities. *See, e.g.*, *Roman*, 977 F.3d at 939–940.

But on this record, that evidence is insufficient to support a finding as to ICE's allegedly deliberately indifferent "system-wide response." 445 F. Supp. 3d at 737. There is considerable distance between imperfect implementation of a policy, or even knowledge of the imperfect implementation of a policy, and deliberate indifference in the constitutional sense. *See, e.g.*, *Mortimer v. Baca*, 594 F.3d 714, 722–23 (9th Cir. 2010); *see also, e.g.*, *Gamble*, 429 U.S. at 105–06, 97 S.Ct. 285; *Gordon*, 888 F.3d at 1125; *Castro*, 833 F.3d at 1071.

We therefore hold that plaintiffs failed to make a "clear showing" of entitlement to relief commensurate with the scope of their request. *USCIS*, 944 F.3d at 789 (quoting *Winter*, 555 U.S. at 22, 129 S.Ct. 365). Plaintiffs have not established a likelihood of success or serious questions on the merits of their claim that ICE's nationwide approach to COVID-19 in spring 2020 reflected deliberate indifference or reckless disregard of health risks. The district court's injunction therefore cannot stand on this basis.

IV

[19] Given our holding on plaintiffs' deliberate indifference claim, it all but follows that plaintiffs have not demonstrated a likelihood of success on their closely related theory that ICE's COVID-19 policies reflected unconstitutional "punishment" under the Fifth Amendment.

[20–22] "[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Wolfish*, 441 U.S. at 535, 99 S.Ct. 1861. We have thus held that "a civil detainee awaiting adjudication is entitled to conditions of confinement that are not punitive." *Jones v. Blanas*, 393 F.3d 918, 933 (9th Cir. 2004). "[A] restriction is 'punitive' where it is intended to punish, or where it is 'excessive in relation to its non-punitive purpose,' or is 'employed to achieve objectives that could be accomplished in so many alternative and less harsh methods.' " *Id.* at 933–34 (alteration accepted) (first quoting *Demery v. Arpaio*, 378 F.3d 1020, 1028 (9th Cir. 2004); and then quoting *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1484 (9th Cir. 1993)). But "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' " *Wolfish*, 441 U.S. at 539, 99 S.Ct. 1861.

In this case, we easily conclude that there is a "legitimate governmental objective" in detaining plaintiffs. *Id.* ICE is holding them because they are suspected of having violated the immigration laws or are otherwise removable from the United States. *See* 8 U.S.C. §§ 1182(a), 1225(b), 1226(a), (c), 1227(a), 1231(a). The government has an understandable interest in detaining such persons to ensure attendance at immigration proceedings, improve public safety, and promote compliance with the immigration laws. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 521, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003); *see also Jennings v. Rodriguez*, —— U.S. ——, 138 S. Ct. 830, 836, 200 L.Ed.2d 122 (2018) (explaining that "Congress has authorized immigration officials to detain some classes of aliens during the course of certain immigration proceedings" to allow "immigration officials time to determine an alien's status without running the risk of the alien's either absconding or engaging in criminal activity before a final decision can be made").

The district court concluded that "[d]uring a pandemic such as this, it is likely punitive for a civil detention administrator to fail to mandate compliance with widely accepted hygiene, protective equipment, and distancing measures until the peak of

the pandemic." 445 F. Supp. 3d at 746. But regardless of ICE's earlier actions, by April 10, 2020, the Pandemic Response Requirements imposed a host of mandatory obligations on all ICE detention facilities, including mandatory compliance with the CDC Guidelines. Just as ICE's national directives as of that time did not reflect deliberate indifference to COVID-19, they did not create excessive conditions of "punishment" either.

[23, 24] The district court concluded otherwise in part on the ground that ICE had "fail[ed] to take similar systemwide actions as jails and prisons." *Id.* at 746–47. But plaintiffs cannot demonstrate a likelihood of success on that theory either. Under case law that the district court referenced, "a presumption of punitive conditions arises where the individual is detained under conditions identical to, similar to, or more restrictive than those under which pretrial criminal detainees are held." *Jones*, 393 F.3d at 934. If a plaintiff establishes that this presumption applies, "the burden shifts to the defendant to show (1) 'legitimate, non-punitive interests justifying the conditions of the detainee's confinement' and (2) 'that the restrictions imposed are not "excessive" in relation to these interests.' " *King v. County of Los Angeles*, 885 F.3d 548, 557 (9th Cir. 2018) (alterations accepted) (quoting *Jones*, 393 F.3d at 935).

Jones announced the foregoing comparative presumption in the context of a California state prisoner who was civilly detained and awaiting proceedings under California's Sexually Violent Predator Act. *See* 393 F.3d at 922–23. *King* involved a plaintiff in substantially the same situation. *See* 885 F.3d at 552–53. Plaintiffs have not identified authority from this Court extending *Jones*'s presumption to the context of federal immigration detainees. But assuming without deciding that it would be appropriate to invoke that presumption in the immigration context—in which different government interests are at stake—the presumption provides no aid to plaintiffs here.

As an initial matter, to the extent plaintiffs seek application of this presumption to their confinement itself, as opposed to their "*conditions* of confinement," *Jones*, 393 F.3d at 934 (emphasis added), we have not previously invoked the presumption in that manner. Nor do we see how we could do so in this context, when the Supreme Court "has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523, 123 S.Ct. 1708. Insofar as plaintiffs argue that they should be released in greater numbers because more criminal detainees have been released due to concerns about COVID-19 at their prisons, we are aware of no authority requiring such parity as a matter of federal constitutional law.

To the extent plaintiffs' intended comparison is instead between the conditions at different facilities—ICE facilities versus those housing criminal detainees—plaintiffs have not demonstrated a likelihood of success on that theory. In *Jones*, where we invoked the presumption plaintiffs seek, we were considering a suit for damages by a single state detainee who was civilly committed pending a trial to determine whether he qualified as a sexual predator under California law. *Jones*, 393 F.3d at 922–23. We compared that detainee's conditions of confinement to those of the general jail population at the same facility in which the plaintiff was housed. *Id.* at 934–35.

Here, in sharp contrast, plaintiffs' argument in favor of a presumption of "punitive" conditions depends on a far more monumental comparison: all ICE detention facilities against (presumably) all prisons

housing criminal detainees. Once again, the scope of plaintiffs' desired relief demands a commensurately high showing, which plaintiffs have not made here.

The record lacks evidence from which to draw any relevant comparisons between the overall conditions of confinement of ICE detainees as compared to those in criminal custody. The only basis for comparison that the district court identified related to a Department of Justice memorandum from the Attorney General to the Federal Bureau of Prisons (BOP) concerning the release of criminal detainees due to COVID-19 concerns. 445 F. Supp. 3d at 747.

That comparison is unavailing. There is, as we have already explained, no support in our cases for applying *Jones*'s presumption about comparative "conditions" of confinement to the government's continued *ability* to confine persons pursuant to lawful authority, as here. But even setting that threshold issue aside, plaintiffs have not demonstrated that any "presumption" about punitive conditions should arise from the BOP memorandum.

When we have applied the presumption announced in *Jones*, we have done so after comparing the relevant conditions of confinement as a whole. Thus in *Jones*, for example, we compared the plaintiff's overall conditions of confinement—including recreational activities, phone calls, time out of cell, and so on—with those of persons in the jail's general population. *See* 393 F.3d at 934–35; *see also King*, 885 F.3d at 557 (similar). Even assuming release determinations qualify as "conditions" of confinement (they do not), plaintiffs have not explained how we can evaluate this one "condition" in isolation, without comparing the various other "conditions" at ICE and criminal detention facilities that also bear on COVID-19 mitigation efforts. And on that point, and beyond custody release determinations, plaintiffs have not identified how the relevant "conditions" generally differ across the two types of facilities. Under these circumstances, we do not think the *Jones* presumption could apply, or that it could apply with any meaningful force, when plaintiffs' focus is limited to one "condition" of confinement among many.

Regardless, plaintiffs have not demonstrated there is any material difference between the BOP's approach to COVID-19-based custody release determinations and that which ICE set forth in its Docket Review guidance. The April 10, 2020 Pandemic Response Requirements provides that all detention facilities housing ICE detainees "*must*" "[n]otify both the local ERO Field Office Director (or designee) and the Field Medical Coordinator as soon as practicable, but in no case more than 12 hours after identifying any detainee who meets the CDC's identified populations potentially being at higher-risk for serious illness from COVID-19." The Pandemic Response Requirements then instruct that "[u]pon being informed of" such a detainee, "ERO will review the case to determine whether continued detention is appropriate."

At this point, the Pandemic Response Requirements cross-reference the April 4, 2020 Docket Review guidance, which provides detailed instructions for higher-risk "cases that should be reviewed to re-assess custody." After setting forth an "[e]xpand[ed]" list of health conditions that would warrant this review, the Docket Review guidance instructs relevant personnel to "review the case to determine whether continued detention remains appropriate in light of the COVID-19 pandemic." The Guidance further makes clear that "[t]he fact that an alien is potentially higher-risk for serious illness from COVID-19 should

be considered a factor weighing in favor of release."

Notwithstanding this, the district court concluded that the BOP memorandum reflected "a more decisive and urgent call to action," whereas ICE's Docket Review guidance "arguably fails to communicate the same sense of urgency or concern." 445 F. Supp. 3d at 747. When considering the Docket Review guidance in conjunction with the later Pandemic Response Requirements, we do not think they promote a materially discrepant message from that of the BOP memorandum. But even if there were a difference in emphasis, any such perceived tonal difference does not demonstrate a sufficiently material divide between ICE's approach and that of the BOP. That perceived disparity thus could not be the basis for any "presumption" of punitiveness. Nor, as we have explained, have plaintiffs otherwise shown a likelihood of success on this Fifth Amendment "punishment" claim.

V

[25] We turn lastly to plaintiffs' statutory claim under the Rehabilitation Act. That Act prohibits a program receiving federal financial assistance from discriminating based on disability. 29 U.S.C. § 794; *see generally Fleming v. Yuma Reg'l Med. Ctr.*, 587 F.3d 938, 940 (9th Cir. 2009). We hold that plaintiffs have not met their burden of establishing a likelihood of success on the merits of this claim.

[26] Section 504 of the Rehabilitation Act states in relevant part that "[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). A plaintiff bringing a section 504 claim thus "must show that '(1) he is an individual with a disability; (2) he is otherwise qualified to receive the benefit; (3) he was denied the benefits of the program solely by reason of his disability; and (4) the program receives federal financial assistance.' " *Updike v. Multnomah County*, 870 F.3d 939, 949 (9th Cir. 2017) (quoting *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001)).

Plaintiffs have at the very least not established a likelihood of success on the third element. Plaintiffs have not identified any "benefit" that they have been denied. The district court held otherwise after concluding that the "programmatic 'benefit' in this context ... is best understood as participation in the removal process." 445 F. Supp. 3d at 748. But even assuming "participation in the removal process" could fit within the statutory term "benefit," plaintiffs have not shown they were deprived of the ability to participate in their immigration proceedings. Plaintiffs in their answering brief respond only that "a person cannot participate in challenging her removal from this country—by communicating with counsel, witnesses, or the immigration judge—if she is on a ventilator." But this bare allegation is insufficient.

In addition, plaintiffs did not establish a further requirement of section 504's third element, which is that the denial of benefits be "solely by reason" of plaintiffs' alleged disabilities. 29 U.S.C. § 794(a). Plaintiffs at most demonstrated that they were subjected to inadequate national policies that they claimed reflected deliberate indifference to COVID-19; they did not show they were treated differently from other detainees "solely by reason" of their disabilities. *See K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1099 (9th Cir. 2013).

We have no occasion to reach the Rehabilitation Act's other elements because we conclude that plaintiffs have not shown a likelihood of success that they were denied a benefit solely by reason of their claimed disabilities. Their statutory claim, like their constitutional claims, thus cannot support preliminary injunctive relief. And because plaintiffs have not demonstrated a likelihood of success on any claim, we need not address the other preliminary injunction factors that plaintiffs also would have needed to establish. *See California ex rel. Becerra*, 950 F.3d at 1083 ("If a movant fails to establish likelihood of success on the merits, we need not consider the other factors.").

* * *

COVID-19 presents inherent challenges in institutional settings, and it has without question imposed greater risks on persons in custody. But plaintiffs had to demonstrate considerably more than that to warrant the extraordinary, system-wide relief that they sought. The demanding legal standards that govern plaintiffs' request reflect the separation of powers implications underlying any effort to place presumptively Executive responsibilities in judicial hands. That COVID-19 is an unprecedented public health issue could not thereby sustain a preliminary injunction that, without sufficient basis, effectively placed a federal court at the center of the Executive's nationwide effort safely to manage immigration detention facilities in the middle of an evolving pandemic.

We therefore reverse the preliminary injunction and direct that all orders premised on it be vacated.

REVERSED AND REMANDED WITH INSTRUCTIONS.

BERZON, Circuit Judge, dissenting:

I dissent from both the majority's opinion vacating the district court's preliminary injunction and its order denying the parties' joint request for mediation.

Today, the majority vacates the district court's April 2020 preliminary injunction. To arrive at its holding, the majority applies incorrect standards three times: The majority recites but does not engage with our sliding scale approach for reviewing a preliminary injunction. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011); Opinion at 635. It correctly identifies but then flouts our mandate to review the grant of a preliminary injunction for abuse of discretion, not de novo. *See, e.g.*, *id.* at 641–42 (reaching its own "conclu[sion]" as to whether the plaintiffs met their factual burden). And, functionally, it evaluates Plaintiffs' Fifth Amendment reckless disregard claim under a subjective, instead of the proper, objective, standard. *Id.* at 636–39. The majority also repeatedly characterizes as "sweeping," "far-reaching" and of great "magnitude," *id.* at 618, 619–20, an injunction that is actually limited, modest, and deferential to the government's primary role in crafting policy and administering the detention facilities that house immigration detainees. Beyond these analytical errors, the majority does precisely what it chastises the district court for: by declining the parties' joint request for mediation, the majority imposes its own will on the parties.

I.

This appeal is more easily summarized than the majority's lengthy opinion suggests. The federal government is authorized, and sometimes required, by statute to hold people in civil detention pending federal immigration proceedings. *See generally Jennings v. Rodriguez*, —— U.S. ——, 138 S. Ct. 830, 836–38, 200 L.Ed.2d 122 (2018). But "[t]he Fifth Amendment re-

quires the government to provide conditions of reasonable health and safety to people in its custody." *Roman v. Wolf*, 977 F.3d 935, 943 (9th Cir. 2020) (citing *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989)).[1] People in custody can demonstrate unconstitutional conditions by pointing to systemwide policies insufficient for protecting their health and safety. *See generally Brown v. Plata*, 563 U.S. 493, 505 n.3, 131 S.Ct. 1910, 179 L.Ed.2d 969 (2011); *Parsons v. Ryan*, 754 F.3d 657, 676–79 (9th Cir. 2014).

In March 2020, a group of people in federal immigration detention sought, in an already pending case, emergency subclass certification for, and a preliminary injunction on behalf of, all detainees who for medical reasons were "at heightened risk of severe illness and death upon contracting the COVID-19 virus." *Fraihat v. U.S. Immigr. & Customs Enf't*, 445 F. Supp. 3d 709, 726, 736–41 (C.D. Cal. 2020) (*Preliminary Injunction*). The district court provisionally certified both subclasses, using a set of medical risk factors substantially similar to those put forth by U.S. Immigration and Customs Enforcement (ICE), based on guidance from the Centers for Disease Control and Prevention (CDC). *Id.*; *see also Fraihat v. U.S. Immigr. & Customs Enf't*, No. 19-1546, 2020 WL 1932393 (C.D. Cal. Apr. 20, 2020) (*Class Certification Order*). So—and this point is critical, although the majority opinion repeatedly loses track of it—this case concerns ICE COVID-19 policy *only* as it relates to medically vulnerable detainees.

The majority opinion, disregarding that this case focuses on the lack of specific provisions in ICE's policy statements regarding *vulnerable detainees*, recites at length the provisions in ICE documents governing the treatment of all detainees during the early days of the pandemic. That ICE produced a fair amount of paper addressing the COVID-19 problem in its facilities should not obscure the critical facts as found by the district court and here relevant:

During the period of time the district court considered when issuing the injunction under review, ICE had issued a national policy guidance, known as the "Detained Docket Review Guidance," advising its agents to reassess the continued custody of some medically vulnerable detainees. But, the district court found, the policy was discretionary, as it did not "mandate action" and lacked "any requirement" that ICE field agents conduct such custody reviews. *Preliminary Injunction*, 445 F. Supp. 3d at 743, 750. The district court recounted that the guidance only "*ask[ed]* Field Office Directors to '*please*' make individualized determinations of the necessity of ongoing detention, and only as to some detainees." *Preliminary Injunction*, 445 F. Supp. 3d at 743 (emphasis added) (quoting Detained Docket Review Guidance). Moreover, the district court found, ICE did not have a centralized tracking mechanism enabling affirmative and quick identification of such detainees, nor did ICE "enforce compliance." *Id.* at 726–28, 745, 747, 743. "To the extent COVID-19 risk was addressed by individual facilities from March 11, 2020 to April 10, 2020," the district court concluded, "it seems to have been voluntary." *Id.* at 743. And, the dis-

1. People in custody may also argue that conditions are unconstitutionally punitive under a related Fifth Amendment due process theory. *See Roman v. Wolf*, 977 F.3d 935, 943 n.4 (citing *Bell v. Wolfish*, 441 U.S. 520, 535–37, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)). I agree with the majority that the Plaintiffs have not raised serious questions on the merits of their punitive conditions claim or their Rehabilitation Act claim.

trict court further found, ICE had no specific policy mandating minimum acceptable detention conditions for medically vulnerable subclass members in particular, directed at reducing their chance of contracting COVID-19 while they remained detained. *Id.* at 744.

ICE's April 10, 2020, COVID-19 policy, known as the "Pandemic Response Requirements," or "PRR," did not cure these defects. It sought implementation of the measures it laid out to prevent the spread of COVID-19 only "to the extent practicable," specified that "*[e]fforts* should be made to reduce the population to approximately 75% of capacity," and recognized that "strict social distancing *may not be possible* in congregate settings such as detention facilities." Finally, the PRR included "no mention of enforcement mechanisms." *Preliminary Injunction*, 445 F. Supp. 3d at 743. For all its verbosity, the majority opinion does not identify as clear error—and therefore as an abuse of discretion—any of the district court's findings about ICE's inadequate focus on the particular needs of medically vulnerable detainees or ICE's failure to mandate and assure compliance with directives to protect such detainees.

Because ICE's initial policy guidance was discretionary and its updated guidances required only "[e]fforts" that the guidance itself recognized as perhaps futile, high-risk detainees faced dangerous, deteriorating conditions at the time the injunction under review issued. Plaintiff subclass members detained in ICE facilities reported "little change in protocols or procedures in place in light of COVID-19." One man, detained at the Etowah County Detention Center in Alabama, detailed his living conditions thus: he had received no formal education about COVID-19; he ate three meals a day in a crowded setting, side-by-side with approximately seventy other people; he spent four hours every day in a group area where "there [wa]s no room for social distancing" and the maximum distance between people was approximately two feet; he shared a cell with another person in which social distancing was not possible; he was given soap once every one-to-two weeks; he was given one facemask to reuse; and there was no hand sanitizer available. Another man, detained at the Stewart Detention Center in Georgia, declared, "[s]ince the COVID-19 crisis started, ICE has not made any changes to the cleaning schedule for our dorm. Nor have we been provided with additional cleaning supplies to keep our dorm disinfected and sufficiently clean."

An employee at a faith-based organization that works with people in ICE detention facilities reported that people in detention "ha[d] not experienced any material changes that protect them from the virus. To the contrary, I have daily conversations with our detained community members and with each passing day the conditions get worse." The testimony of another man, detained at the Adelanto Detention Center in California, highlighted the ways in which conditions were deteriorating. Hand sanitizer in a dispenser in a common area had been empty for more than two weeks. More than that, the man worked as a janitor in the facility, earning one dollar per day, and although "[t]here [we]re bottles of disinfectant in the janitor's closet that [they] [we]re supposed to add to the bucket," the bottles were "empty." "We are," he told the district court, "just cleaning with water."

The district court's findings reflected this disturbing evidence and that of medical experts. After a hearing, the district court found that 15% of subclass members would die if they contracted COVID-19, which was considerably more likely while

they remained detained. *Preliminary Injunction*, 445 F. Supp. 3d at 722, 744. Subclass members who contract COVID-19 and survive would be likely to experience "life-altering complications" such as "permanent loss of respiratory capacity, heart conditions, [and] kidney damage." *Id.* The district court also found that "a surge in preventable cases would further strain local hospital and healthcare resources." Based on the record before it and its findings, the district court issued a preliminary injunction in April 2020 to protect the medically vulnerable detainee subclass members from COVID-19.

According to the majority, the "sweeping injunction" "was extraordinary beyond measure" and "effectively place[d] this country's network of immigration detention facilities under the direction of a single federal district court." Opinion at 618, 619–20. That characterization, to put it mildly, is not accurate.

The Plaintiffs did not contend, as the majority suggests, that "all of the approximately 250 immigration detention facilities nationwide" were violating the Fifth Amendment. *Id.* at 618. Instead, Plaintiffs claimed *ICE's nationwide policies*, or lack thereof, for protecting high-risk detainees from COVID-19 exposed them to an unconstitutional risk of harm given their medical vulnerabilities. So it was not the preliminary injunction that put the hundreds of immigration facilities under the control of the district court. Instead each of those facilities is part of the federal government's immigration detention system and must comply with ICE's national policies. For that reason, systemic changes in the policies will affect individual facilities, but the injunction is directed at the promulgation of the policies, not at evaluating the conditions at individual facilities. And, as the district court noted, "[D]efendants do not dispute that they have the authority to mandate compliance [with national policies]." *Preliminary Injunction*, 445 F. Supp. 3d at 746.

Although one would not know this from reading the majority's hyperbolic language about the separation of powers and appropriate judicial reticence, the April 2020 injunction ultimately required ICE to devise appropriate policies; the injunction did not dictate those policies or usurp the agencies' role in running the detention facilities. It left the definition of specific policies to the defendants, and appropriately so. *Cf. Brown v. Plata*, 563 U.S. 493, 500, 131 S.Ct. 1910, 179 L.Ed.2d 969 (2011) (upholding a district court's order that le[ft] the choice of means to reduce overcrowding to the discretion of ... officials"). Injunctions regarding conditions in detention facilities are suitable when they lay out "general areas ... that [the agency] need[s] to address," and "direct the [agency] to develop specific policies and procedures for complying with" federal law. *Armstrong v. Davis*, 275 F.3d 849, 883 (9th Cir. 2001) (Berzon, J., concurring). That is precisely what the district court's original injunction did.

Specifically, the preliminary injunction mandated, at a high level of generality, the following:

- Defendants shall provide ICE Field Office Directors with the Risk Factors identified in the Subclass definition;
- Defendants shall identify and track all ICE detainees with Risk Factors. Most should be identified within ten days of this Order or within five days of their detention, whichever is later;
- Defendants shall make timely custody determinations for detainees with Risk Factors, per the latest Docket Review Guidance. In making their determinations, Defendants should consider the willingness of detainees

with Risk Factors to be released, and offer information on post-release planning, which Plaintiffs may assist in providing;

- Defendants shall provide necessary training to any staff tasked with identifying detainees with Risk Factors, or delegate that task to trained medical personnel;
- The above relief shall extend to detainees with Risk Factors regardless of whether they have submitted requests for bond or parole, have petitioned for habeas relief, have requested other relief, or have had such requests denied;
- Defendants shall promptly issue a performance standard or a supplement to their Pandemic Response Requirements ('Performance Standard') defining the minimum acceptable detention conditions for detainees with the Risk Factors, regardless of the statutory authority for their detention, to reduce their risk of COVID-19 infection pending individualized determinations or the end of the pandemic;
- Defendants shall monitor and enforce facility-wide compliance with the Pandemic Response Requirements and the Performance Standard.

Preliminary Injunction, 445 F. Supp. 3d at 750–51. The injunction, then, specified areas that needed to be addressed, leaving to ICE the development of specific policies and procedures. Pursuant to the injunction, ICE, not the court, was to decide how to identify and track detainees, the standards governing custody determinations, the "minimal acceptable detention conditions," and the way in which compliance would be monitored and enforced.

The government never moved to stay the injunction, modify it, or vacate it, despite the district court's invitation to do so, *see id.* at 750, and waited two months to file an appeal.

According to the district court, after the injunction issued, custody reviews of subclass members remained "a disorganized patchwork of non-responses or perfunctory denials." *Fraihat v. U.S. Immigr. & Customs Enf't*, No. EDCV191546JGBSHKX, 2020 WL 6541994, at *6, *10 (C.D. Cal. Oct. 7, 2020) (*Supervisory Order*). There was still no minimum detention standard "to address the substantial risk of death to subclass members during the pandemic." *Id.* at *6. And "monitoring efforts rel[ied] on a meager survey that allow[ed] facilities to self-report their level of compliance." *Id.* To address these gaps, the district court issued a further order in October 2020, from which defendants also appealed. *See generally id.*; Notice of Appeal, *Fraihat v. U.S. Immigr. & Customs Enf't*, No. 5:19-cv-01546-JGB-SHK (C.D. Cal. Dec. 7, 2020), ECF No. 250. Most recently, a special master appointed by the district court reported that immigration detention facilities "are in the midst of an unprecedented surge in cases." Report and Recommendation of Special Master, *Fraihat v. U.S. Immigr. & Customs Enf't*, No. 5:19-cv-01546-JGB-SHK (C.D. Cal. May 21, 2021), ECF No. 304; *see also* Opinion at 633–34 (referencing the special master). The majority opinion devotes considerable attention to the details of the October 2020 order, even though it is the subject of a separate appeal.

II.

It is true that this case has an artificial quality, as the development of the coronavirus crisis has taken many twists and turns, both terrifying and at times heartening, and both inside and outside detention institutions, since April 2020. As a result of both changes in the pandemic's

course and concerns about ICE's implementation of the bare-bones provisions of the April injunction, the district court has acted within its power in considering new facts on the ground and revisiting the terms of the order it originally issued. *See* Fed. R. Civ. P. 62(d) ("While an appeal is pending from an interlocutory order ... that grants ... an injunction, the court may ... modify ... [the] injunction."). But the majority's approach to this fluid situation—relying on the district court's October order to demonstrate that the April order was too intrusive, while refusing to recount or consider any of the facts underlying it—cannot be justified. *See, e.g.*, Opinion at 642–43.

Either we consider—as did this court in *Roman v. Wolf*, 977 F.3d 935 (9th Cir. 2020), and *Zepeda Rivas v. Jennings*, 845 Fed.Appx. 530 (9th Cir. 2021)—what actually *happened* after the April 2020 injunction issued, or we do not. Were we to consider it, we might note that what happened, according to the district court, was that ICE did little to carry out the broad, deferential directives issued in April, and the coronavirus spread exponentially among the medically vulnerable members of the Plaintiff subclasses. It might well have made more sense to consolidate this appeal with the appeal of the October order and the appeal of the district court's June 23, 2021, order that adopted the special master's report and recommendation regarding compliance with the April 2020 injunction—but we did not do that.

What we cannot do is what the majority does: treat the April injunction here under review as if it included all the terms of the October order while refusing to consider the factual and legal circumstances that led to that second order.[2]

In the end, we have to deal with the appeal before us, from the April injunction, not with the appeals *not* before us, from the October 2020 and June 2021 orders. I therefore focus this dissent on the April record and the April injunction.

III.

As to the question actually before us—the propriety of the April, 2020, preliminary injunction—the majority begins by applying a misleading standard when considering whether the issuance of the injunction was proper. The majority first lays out the familiar preliminary injunction test in *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008), under which "[a] plaintiff ... must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20, 129 S.Ct. 365. The majority then acknowledges in passing that in this court we apply *Winter* through a sliding scale approach, adjusting the level of likelihood of success on the merits to the degree and imminence of irreparable harm demonstrated. Opinion at 635; *All. for the Wild Rockies*, 632 F.3d at 1131–32. But its recitation of the standard from *Alliance for the Wild Rockies* is the beginning and end of its consideration and appreciation of the sliding scale standard.

I would actually apply the sliding scale analysis under *Alliance for the Wild Rockies* with regard to Plaintiffs' reckless disregard due process claim, rather than recit-

2. It is critical in this regard that we are reviewing a *preliminary* injunction. The case remains pending, so the majority's rejection of a preliminary injunction based on the April 2020 record with regard to the deliberate indifference issue does not preclude the Plaintiffs from moving for, nor the district court from considering, a renewed motion for a preliminary injunction or permanent relief.

ing and then ignoring it. Doing so, I would affirm the district court's preliminary injunction.[3]

A.

Contrary to the majority's suggestion, our standard of review is not whether "*[w]e* conclude" "that plaintiffs did not meet their burden of demonstrating deliberate indifference." Opinion at 641 (emphasis added); *see also id.* at 642–43. Rather, "[a]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001) (internal quotation marks omitted). "A preliminary injunction should be set aside only if the district court 'abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.' " *Doe v. Kelly*, 878 F.3d 710, 719 (9th Cir. 2017) (internal quotation marks omitted). The majority opinion is bereft of any recognition of our limited role in reviewing a district court's issuance of a preliminary injunction.

B.

Again, under *Alliance for the Wild Rockies*, the proper preliminary injunction inquiry takes into account whether the balance of hardship tips sharply in Plaintiffs' favor, and, if so, whether they have raised serious questions going to the merits of their Fifth Amendment reckless disregard claim. "That is, 'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff[s] can support issuance of a preliminary injunction, so long as the plaintiff[s] also show[ ] that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* at 1135. Here, in my view, the equity balance does strongly favor the Plaintiffs. And there are, at a minimum, serious questions as to whether ICE's supervision of detention facilities recklessly disregarded the medical needs of the high risk detainees who make up the Plaintiff subclasses. The district court did not abuse its discretion in so concluding.

(i) First, the balance of equities does tip sharply in Plaintiffs' favor.

When the government is a party, the balance of equities factor merges with the public interest consideration. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). On the balance of equities/public interest point, *Roman* is instructive. *Roman* held that "[t]he district court rightly concluded that the equities and public interest tipped in [the] [p]laintiffs' favor," because the "[p]laintiffs were likely to suffer irreparable harm absent relief given COVID-19's high mortality rate," and the government's interests were unlikely to be harmed by the issuance of an injunction: many of the plaintiffs did not have criminal records and there was little risk the plaintiffs would "abscond if they were released" especially given the availability of electronic monitoring tools." 977 F.3d at 944.

The same is true here. As the district court explained, defendants "do not dis-

3. Alternatively, I would leave the injunction in place and suspend consideration of this case while the parties mediate towards a solution, as they have requested. On June 1, 2021, the parties informed us that they were considering requesting a referral to the court's mediators, and on September 9, 2021, they jointly did so. The majority today refuses to grant the parties' joint request. I note that this court has an excellent in-house mediation service, and during my time on the court, a panel has denied a joint request for referral to that service rarely if ever.

pute that 15% of [subclass members] who ultimately contract COVID-19 will die, or that those who survive are likely to suffer life-altering complications," such as "permanent loss of respiratory capacity, heart conditions, [and] kidney damage." *Preliminary Injunction*, 445 F. Supp. 3d at 744, 722. Death and life-altering medical conditions are surely irreparable injuries. In fact, a comparison with *Roman* suggests that the balance of hardships tips *more* "sharply towards the plaintiff[s]," *All. for the Wild Rockies*, 632 F.3d at 1135, than in *Roman*, because, as to the irreparable harm to the class, *Fraihat* subclass members are particularly vulnerable to COVID-19, while the *Roman* class included all detainees.

Also as in *Roman*, the government's interests here were not likely to be injured. The latest statistics available suggest that 70% of detained subclass members were not mandatorily detained, *Supervisory Order*, 2020 WL 6541994, at *5, and thus not "inadmissible or deportable because of [their] criminal history," 8 U.S.C. § 1226(c). There is no reason to think that *Fraihat* subclass members are more likely to have criminal records than *Roman* class members. And there is no presumption that *Fraihat* subclass members with criminal records would be routinely released under the April order, which specified that ICE should apply its own Detained Docket Review Guidance, not one provided by the court.[4]

The heightened risk of a COVID-19 outbreak in detention centers was apparent in April 2020.[5] A "remedy for unsafe conditions need not await a tragic event." *Helling v. McKinney*, 509 U.S. 25, 33–34, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993). Also, the district court's preliminary injunction opinion explained that "[a]n immigration facility outbreak would also menace the non-detained: a surge in preventable cases would further strain local hospital and healthcare resources." *Preliminary Injunction*, 445 F. Supp. 3d at 722.

"Faced with . . . preventable human suffering," as we are here, "we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor." *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017); *see Preliminary Injunction*, 445 F. Supp. 3d at 749 (quoting *Hernandez*). Because the district court appropriately concluded that an injunction was needed to safeguard the health of both detainees *and* the communities surrounding detention centers, its issuance of a preliminary injunction was in the public interest. The district court so found and did not abuse its discretion in doing so.

(ii) Next, Plaintiffs have raised serious questions going to the merits of their reckless disregard claim. The district court "identified the correct legal rule" govern-

4. I note that in the October enforcement order, the district court retained the Detained Docket Review Guidance as providing the governing standards and specified only that, ''Defendants shall not apply the Docket Review Guidance rule against release of Section 1226(c) detainees so inflexibly that *none* of these subclass members are released.'' *Supervisory Order*, 2020 WL 6541994, at *12 (emphasis added).

5. It is no surprise that the pandemic's eventual course bore this prediction out. In a July 2020 filing, an expert relayed to the district court that ''detention centers are closed environments that increase the risk of COVID-19 outbreaks and are institutional amplifiers of the virus, not unlike factories or nursing homes.'' *Supervisory Order*, 2020 WL 6541994, at *3. And in October 2020 the district court observed, ''[d]etention centers with lax social distancing or other COVID-19 prevention measures continue to pose a grave threat of harm to individuals residing and working in them, *as well as to the community as a whole*.'' *Id.* (emphasis added).

ing this claim. *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). Under *Gordon v. County of Orange*, 888 F.3d 1118 (9th Cir. 2018), Plaintiffs must show

> "(i) the defendant[s] made an intentional decision with respect to the conditions under which ... plaintiff[s] w[ere] confined; (ii) those conditions put the plaintiff[s] at substantial risk of suffering serious harm; (iii) the defendant[s] did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant[s'] conduct obvious; and (iv) by not taking such measures, the defendant[s] caused the plaintiff[s'] injuries."

Id. at 1125. The majority focuses only on the third element, as there is no dispute that the others are met.[6] *See* Opinion at 636–39.

Critically, "[w]ith respect to the third element, the defendant[s'] conduct must be *objectively* unreasonable." *Gordon*, 888 F.3d at 1125 (quoting *Castro v. Cnty. of L.A.*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc) (emphasis added)). "[T]he plaintiff[s] must 'prove more than negligence but less than subjective intent—something akin to reckless disregard.' " *Id.* (quoting *Castro*, 833 F.3d at 1071) (footnote omitted). The majority recognizes this point but then repeatedly elides it.

Even though the proper standard "is one of *objective* indifference, not *subjective* indifference," *id.* at 1120 (emphasis added), the majority substantiates its analysis with cases that additionally require subjective indifference. It does so primarily by relying on cases that predate *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S.Ct. 2466, 192 L.Ed.2d 416 (2015). Opinion at 636–37, 641–42. *Kingsley* held the proper standard for evaluating a detainee's excessive force claim is purely objective. 576 U.S. at 395–97, 135 S.Ct. 2466. Applying *Kingsley*, *Gordon* "conclude[d] that the proper standard of review" for "right to adequate medical care" claims "is one of objective indifference, not subjective indifference." 888 F.3d at 1120.

The majority relies, for example, on *Toguchi v. Chung*, 391 F.3d 1051, 1058 (2004) for the proposition that "a mere difference of medical opinion is insufficient, as a matter of law, to establish deliberate indifference." But *Toguchi*, decided before *Gordon*, applied "both the objective and subjective" test. *Id.* at 1057 (quoting *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002). Similarly, the majority quotes *Swain v. Junior*, 961 F.3d 1276, 1289 (11th Cir. 2020), as support for its conclusion that the government did not act with deliberate indifference. Opinion at 641–42. But, as *Swain*

6. Defendants do not dispute that they made a series of intentional decisions with respect to COVID-19—in fact, the premise of their defense, and the majority's reversal, is that ICE "forthrightly identified and directly sought to mitigate," Opinion at 638. the threat of COVID-19. There is also no dispute that Plaintiffs were at "substantial risk of suffering serious harm," *Gordon*, 888 F.3d at 1125, in the midst of a global pandemic. As the district court explained, "[i]t is undisputed that COVID-19 finds its way into almost every ... communal setting." *Preliminary Injunction*, 445 F. Supp. 3d at 744. Further, defendants "do not dispute that 15% of [subclass members] who ultimately contract COVID-19 will die, or that those who survive are likely to suffer life-altering complications." *Id.* Similarly, there is no dispute that the causation element is met too, as, to prove causation, "a plaintiff need only prove a 'sufficiently imminent danger,' because a 'remedy for unsafe conditions need not await a tragic event.' " *Roman*, 977 F.3d at 943–44 (quoting *Helling*, 509 U.S. at 33–34, 113 S.Ct. 2475 (cleaned up).

explicitly noted, the Eleventh Circuit "require[s] detainees to prove *subjective* deliberate indifference." 961 F.3d at 1285 n.4 (emphasis added); *see Dang ex rel. Dang v. Sheriff, Seminole Cnty. Fla.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (holding *Kingsley* did not abrogate Eleventh Circuit precedent of using a subjective standard for claims of inadequate medical treatment). Thus, *Swain* held the government had not "acted with a deliberately indifferent mental state" because its mental state was not "equivalent to '*subjective* recklessness.' " 961 F.3d at 1289. Our court applies a different standard, so *Swain*'s reasoning offers little guidance.

The majority's importation of subjective elements into its analysis is not simply a matter of erroneously citing cases applying a subjective standard. The majority's analysis of whether ICE's policies regarding the protection of medically vulnerable detainees from serious illness and possible death is replete with consideration of subjective factors.

To the majority, ICE's April 2020 policy response was reasonable because it "reflect[ed] a mobilized *effort*" which "*forthrightly* identified and directly *sought* to mitigate" the health risks posed by COVID-19. Opinion at 638–39 (emphasis added); *see also id.* at 618–19. Indeed—and thankfully—some federal immigration officials did recognize the threat of COVID-19 in detention facilities. For example, ICE's March 2020 "Action Plan" recognized "[t]he combination of a dense and highly transient detained population presents unique challenges for ICE efforts to mitigate the risk of infection and transmission."

But the *Kingsley/Gordon* reckless disregard standard is not satisfied by simply recognizing a risk to health and safety, expressing concern, and taking *some* measures to decrease the risk. Instead, the officials responsible for the conditions must take "reasonable available measures to abate that risk"; the degree of risk presented necessarily informs which "reasonable available measures" are needed "to abate" them. *Gordon*, 888 F.3d at 1125. Plaintiffs have presented evidence which, viewed through an objective standard, strongly suggesting the government did not prescribe such measures, whether it meant to do so or not.

Distracted, I submit, by its evaluation of whether ICE was acting in good faith, the majority holds that ICE's policy about detention conditions is not "objectively unreasonable," Opinion at 636–39; *Gordon*, 888 F.3d at 1125 (quoting *Castro*, 833 F.3d at 1071). I disagree. Given the degree of irreparable harm to which the Plaintiff subclasses of medically vulnerable detainees were exposed, *Roman* makes clear that the district court did not abuse its discretion in concluding that the Plaintiffs at least demonstrated a serious legal question on the merits of their claim, sufficient to support the grant of a preliminary injunction.

The majority holds, for example, that "[P]laintiffs did not demonstrate that the mere fact of their detention amounted to deliberate indifference,"[7] Opinion at 643,

7. The post-*Kingsley* case law continues to use the term ''deliberate indifference,'' *see, e.g., Gordon*, 888 F.3d 1118, 1124–25 (9th Cir. 2018); *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1069–70 (9th Cir. 2016), despite its origination in the Eighth Amendment subjective standard cases, *e.g., Whitley v. Albers*, 475 U.S. 312, 320, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986); *Hudson v. McMillian*, 503 U.S. 1, 6, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992), and even though the term seems to incorporate the subjective component (that the ''indifference'' was ''deliberate''). I use ''reckless disregard'' here and suggest that we stop using the

such that the government's custody review policy at the time could be considered unconstitutional reckless disregard of potential medical injury. But the district court did not hold that continued detention itself demonstrated reckless disregard of the safety of medically vulnerable detainees during the pandemic. Instead, the district court's findings—and order—focused on the failure to articulate a mandatory individual review requirement for each member of the limited, medically vulnerable Plaintiff subclasses to determine *whether* temporary release was appropriate under ICE's own release standards.

With regard to the underlying finding regarding the level of risk—again, an essential aspect of determining whether any failure to cabin that risk was "reckless"—the district court found that 15% of subclass members would die if they contracted COVID-19, *Preliminary Injunction*, 445 F. Supp. 3d at 722, 744, which was significantly more likely while they remained detained.[8]

Notably, the government does not contend that the district court's factfinding as to the level of risk to which medically vulnerable detainees are exposed was clearly erroneous. Given that level of risk, the government was required to take "reasonable available measures to abate th[e] risk," *Gordon*, 888 F.3d at 1125, which stemmed directly from the congregate nature of detention. Issuing an advisory policy for field agents with regard to reviewing the continued detention of medically vulnerable people, *see* pp. 662–64, *infra*, does amount to reckless disregard for subclass members' health and safety—or at least the district court did not abuse its discretion in so concluding.

The majority's dismissal of *Roman* as not pertinent here notwithstanding, Opinion at 645–47, *Roman* strongly supports this conclusion. In *Roman*, we agreed with the district court, *see* 977 F.3d at 943, that detaining people in a too-crowded detention facility without proper sanitation exposed them to a "substantial risk of suffering serious harm" from COVID-19, *Gordon*, 888 F.3d at 1125. For support, *Roman* pointed to *Helling*, 509 U.S. at 35, 113 S.Ct. 2475, which it described as "holding that the health risk posed by a prison inmate's involuntary exposure to second-hand smoke could form the basis of a claim that the government was violating his right to reasonable safety." *Roman*, 977 F.3d at 943–44. And again the *Fraihat* subclass members—compared to the *Roman* plaintiffs—faced a heightened risk of harm because the *Fraihat* subclass included *only* those who were already medically vulnerable to COVID-19—not, as in *Roman*, all detainees.[9]

In addition to holding that the risk of harm to *all* detainees from COVID-19 exposure during immigration detention was serious, *Roman* held it was not an abuse of discretion for the district court in that case to conclude that ICE's conduct at the time the injunction issued was "objectively unreasonable," *Gordon*, 888 F.3d at 1125 (quoting *Castro*, 833 F.3d at 1071), such

misleading "deliberate indifference" rubric in cases involving pretrial or civil detention Fifth or Fourteenth Amendment challenges.

8. It is possible that *since* April 2020, developments such as a more sophisticated understanding of COVID-19 and the availability of a vaccine mean that this estimated fatality rate is no longer accurate. The shifting nature of the pandemic is precisely why I strongly disagree with the majority's insistence on deciding a case that the parties would now prefer to mediate. *See* note 4, *supra*.

9. One of Plaintiffs' experts declared that a person aged 50–59 years without underlying medical conditions had a 1% "case fatality rate."

that ICE "violated detainees' due process right to reasonable safety," *Roman*, 977 F.3d at 943. The majority holds that because "the guidance ICE issued [concerning detention conditions] applied to *all* detainees, which included those at greater risk from COVID-19," "[t]he government's chosen approach does not reflect deliberate indifference." Opinion at 641. But the undisputed record shows subclass members are not similarly situated to all other persons detained. In fact, subclass members are uniquely vulnerable to COVID-19, and the government must take "reasonable available measures to abate *that* risk." *Gordon*, 888 F.3d at 1125 (emphasis added).

* * *

In sum, the rubric that is the appropriate one here, is whether the "balance of hardships ... tips sharply towards the plaintiff[s]." *All. for the Wild Rockies*, 632 F.3d at 1135. The district court did not abuse its discretion in concluding that it does. As in *Roman*, the district court appropriately concluded that the Plaintiffs "were likely to suffer irreparable harm absent relief given COVID-19's high mortality rate," 977 F.3d at 944. And, for the reasons I have explained, the issuance of an injunction accorded with the public interest, and there were at least "serious questions" going to the merits of the plaintiff's reckless disregard Fifth Amendment claim.

IV.

So the district court did not err in concluding it could properly issue *some* preliminary injunction. The question that remains is whether the district court abused its discretion by ordering the specific terms of the April 2020 injunction. I am convinced that it did not.

The majority maintains that the district court abused its discretion in issuing a preliminary injunction in April 2020 because, according to the majority, even if ICE was "slow out of the gate" in addressing COVID-19, "ICE's national policies at the time of the injunction did not reflect deliberate indifference." Opinion at 639. More specifically, the majority suggests that, by April 2020, ICE had already "take[n] reasonable available measures to abate th[e] risk" of COVID-19 to subclass members, *Gordon*, 888 F.3d at 1125, pointing out that, by then, "ICE policies ... had already led to the release of many detainees." Opinion at 643.

What the district court actually found was that ICE had released 693 individuals since March 2020 based on medical vulnerabilities. *Preliminary Injunction*, 445 F. Supp. 3d at 727. At the time, ICE had more than thirty thousand people in custody. *Id.* at 725. That 693 individuals were released is no measure of whether ICE's release review policy had reached and was going to reach all endangered members of the Plaintiff subclasses. The district court's order that ICE affirmatively require prompt detention reviews of the particularly vulnerable subset of detainees in the Plaintiff subclasses, and that it enforce the requirement, was designed to assure that the number of medically vulnerable individuals released reflected the application of ICE's own standards for release to the high risk presented, not local intransigence or foot-dragging.[10]

10. As it turned out, six months later the district court found "a pattern of noncompliance or exceedingly slow compliance," *Supervisory Order*, 2020 WL 6541994, at *13, vindicating the district court's earlier apprehension about "Defendants' halting start to pandemic response" and its conclusion that "Defendants have not ... shown that delays or non-enforcement of ICE facility-wide policies will

The majority considers that the district court's injunction might have been justified if the Pandemic Response Requirements had not been mandatory. Opinion at 646–47. But it rejects this justification because, in its view, "the April 10, 2020 Pandemic Response Requirements *were* mandatory." *Id.* (emphasis added). The majority inaccurately asserts that "the district court acknowledged" that the PRRs were mandatory. *Id.* But the majority points to the district court's statement, in quotation marks, that the April 10, 2020 Pandemic Response Requirements *purported* to "set forth 'mandatory requirements' for all facilities housing ICE detainees." 445 F. Supp. 3d at 724 (quoting PRR). In fact, the PRR's concrete terms regarding custody reviews, and the specific language it uses to convey those terms to ICE facilities, belie the majority's suggestion that the terms were likely to be understood as mandatory.

The processes the PRR laid out regarding custody reviews afforded ICE broad discretion. The PRR does not impose a time limit by which custody reviews of medically vulnerable detainees must take place. It advises facilities to notify Enforcement and Removal Operations ("ERO") "in no case more than 12 hours after identifying any detainee" who is "potentially . . . at higher-risk for serious illness from COVID-19." But there is no requirement that the review itself take place expeditiously; it specifies no time period at all. Upon notification, the PRR specifies, "ERO will review the case to determine whether continued detention is appropriate." That description is followed by a citation to the April 4, 2020 Detained Docket Review Guidance. The custody review the PRR specifies is thus the same as the review laid out in the previous guidance, the Detained Docket Review Guidance.

That guidance is replete with advisory language no one contends is mandatory. And in fact, the language the Detained Docket Review Guidance uses to describe the custody review process is unlikely to be understood by readers as conveying an imperative; the language amounts, at most, to exhortations that ICE facilities take specified action. In the section regarding custody reviews, for example, the Detained Docket Review Guidance uses encouraging, advisory language such as "should," not directive terms such as "must" and "shall."

Elsewhere, with regard to other conditions both guidance documents refer to what "must," be done, what facilities are "directed" to do, and what branch offices are "required" to do—regarding. *See, e.g.*, Pandemic Response Requirements at 8, 12 (staff member obligations), 9 (signage requirements), 15 (notifying ICE of case rates), 16 (food safety hygiene requirements), 9 (hand hygiene requirements). The contrast is evident. Where guidance does not state " 'must' or 'shall' . . . but merely that [an actor] 'should' " take some action, such language affords discretion. *United States v. Navarro-Vargas*, 408 F.3d 1184, 1205, (9th Cir. 2005) (en banc). Just so here.

Given the language used regarding custody review and the internal contrasting language, the district court did not abuse its discretion in concluding the Pandemic Response Requirements would not be understood as mandatory with regard to reviewing custody, and in issuing an injunction to compel ICE to issue actual directives requiring timely custody reviews of members of the Plaintiff subclass, and to enforce them.

cease." *Preliminary Injunction,* 445 F. Supp. 3d at 750.

The majority similarly explains that it vacates the preliminary injunction's requirement to articulate minimum detention standards for subclass members in part because "ICE was updating its policies during the [April 2020] preliminary injunction proceedings and mid-pandemic," including the April 10th "Pandemic Response Requirements." Opinion at 640.[11] But the result of this "updating," at the time the injunction issued, was a moving target of enunciated policies strewn about with precatory language. Those documents advised: detention facilities should implement measures to facilitate social distancing "to the extent practicable"; detention "facilities *should consider* cohorting daily intakes"; "*[e]fforts* should be made" to reduce capacity of people detained; people should be detained in individual rooms "to the extent possible"; "strict social distancing *may not be possible* in congregate settings such as detention facilities"; and "*[i]deally*, ill detainees should not be cohorted with other infected individuals." The injunction did not override or disregard ICE's efforts or impose the district court's own pandemic detention protections. Instead, it afforded discretion and control to ICE, requiring that ICE "supplement" its existing guidance with a carefully considered set of standards that could be clearly communicated to each detention center and enforced by ICE. *Preliminary Injunction*, 445 F. Supp. 3d at 751.

Additionally, the majority makes much of the fact that the PRR mandated ICE facilities adopt the CDC guidelines for detention facilities, deeming that overlap "[m]ost notabl[e]." Opinion at 640. But *Roman* subsequently held the CDC guidelines "do not provide a workable standard" because of a "lack of specificity" and "key" "vague[ ]" "caveats, such as that its recommendations 'may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions.' " 977 F.3d at 946. Given these features, *Roman* remarked, "it is no surprise that the parties . . . disagree about what the CDC guidance means." *Id.* The majority strains to minimize *Roman*'s conclusion, reminding us that *Roman* concluded only that the CDC Guidelines were unworkable for a preliminary injunction, not "unworkable as national policy, which is how ICE is using them here." Opinion at 641 n.8. True. But this observation does not impede my own conclusion, which naturally follows. The reasons the CDC Guidelines were "a poor guidepost for mandatory injunctive relief" are precisely the same reasons the guidelines cannot save the PRR: the guidelines were vague and nonmandatory, admitting of "adapt[ation] based on individual facilities' " needs. *Roman*, 977 F.3d at 946. Finally, the majority harps on what it characterizes as the "sweeping" "nationwide relief" the district court ordered that "effectively place[d] this country's network of immigration detention facilities under the direction of a single federal district court." Opinion at 619–20, 645, 618. COVID-19 was and is a nationwide problem. ICE's control of detention centers is nationwide. ICE's policies thus apply nationwide. Plaintiffs could not have challenged an ICE policy specific to the detention centers that housed them because ICE's policies are not detention-center specific. The district court's injunction did not create a nationwide policy; it mandated only

11. Despite the preliminary injunction, it was still the case six months later that "[u]nder each PRR iteration, a 70-year-old with multiple Risk Factors w[ould] be held in essentially the same conditions as a 20-year-old, 'ideally' with further accommodations once they bec[a]me infected or [had] been in close contact with COVID-19." *Supervisory Order*, 2020 WL 6541994, at *7.

that *ICE* change its *own* nationwide policies. The injunction did not specify any particular standards for any particular facilities—or, indeed, any standards at all, as it only required ICE to have and enforce its own standards.

One measure of the reasonableness of the injunction the district court issued in April is a comparison with the advice provided in *Roman* regarding ordering detainees released. The district court in *Roman* had "imposed a moratorium on [the] receipt of new detainees . . . [and] ordered the facility's detainee population to be reduced to a level that would enable social distancing," among other things. 977 F.3d at 939. *Roman* explained,

> If the district court determines, based on current facts, that particular measures are necessary to ensure that conditions . . . do not put detainees at unreasonable risk of serious illness and death, it may require such measures. The district court may, for example, require . . . a reduction in the population to a level that would allow for six-foot social distancing, if it concludes th[at] action[ ] [is] necessary to bring the conditions to a constitutionally adequate level.

Id. at 945–46.

Here, the district court did *not* order the mass release of the particularly vulnerable subclass members in April 2020. Although the majority characterizes the district court as "compell[ing] release of detainees," Opinion at 642, in fact the April injunction required only that ICE assure the review of subclass members' continued custody according to its own standards for release; there was no compelled release here. Instead, the district court ordered a prompt, comprehensive, enforceable *review* of whether each subclass member should remain in custody, based on ICE's own standards for release (its Detained Docket Review Guidance). *Preliminary Injunction*, 445 F. Supp. 3d at 751. So the majority is just wrong when it says that the relief provided in this case was "far greater" than the relief approved in *Roman*; in fact, it was considerably narrower. Opinion at 646. The district court did not abuse its discretion with regard to requiring individualized custody reviews.

At oral argument, the government pointed to the requirement that it adopt detention and release standards specifically for subclass members—that is, the medically vulnerable detainees—as a particular burden. It is hard to see why it is more burdensome to review a subgroup of detainees for release than to review all of them, or more burdensome to promulgate isolation and quarantine provisions for a subgroup of detainees than for all detainees. It may, for example, prove difficult to prescribe individual rooms, not cohorting, for isolating or quarantining *all* detainees, but practical to do so for medically vulnerable individuals. Moreover, the specific release and detention condition standards were left to Defendants. The district court provided the government the very flexibility the majority emphasizes is important, and limited even the flexible requirements to the Plaintiff subclasses, not all detainees. *See* Opinion at 638, 642–43. It was up to the government to determine which preventative measures were most appropriate for medically vulnerable detainees.

V.

The majority nonetheless "reverse[s] the preliminary injunction." Opinion at 651. It also "direct[s] that all orders premised on it be vacated." *Id.*

As to this latter edict, according to the majority, "[t]he district court's class certification ruling depended on, and was in service of, its preliminary injunction." *Id.* at 635. Thus, "the class certification order

necessarily falls . . . regardless of whether class certification was otherwise proper."[12] *Id.*

I do not see why that is so. Although it is true that, under *Paige v. California*, 102 F.3d 1035 (9th Cir. 1996), "we could not *uphold* [the preliminary injunction] without also upholding the certification of the class," *id.* at 1039 (emphasis added), and thus, *if* the class certification order was infirm, *then* the preliminary injunction might be as well, the majority does not uphold the preliminary injunction. Further, *Roman* vacated provisions of a preliminary injunction related to COVID-19 in federal immigration detention, just as the majority does here, while *upholding* the district court's provisional class certification order. 977 F.3d at 944–45.

Whether the *Fraihat* subclass certification is proper depends on Federal Rule of Civil Procedure 23. *Roman* provides strong evidence that such certification was proper. *See id.* at 944. As the majority does not provide a contrary Rule 23 analysis, there is no reason the district court must repeat its own, and the majority opinion should not be read to suggest otherwise.

VI.

I am convinced that the district court did not err in determining that circumstances were potentially life-threatening for subclass members; that issuing an injunction would be in the public interest; and that Plaintiffs raised serious questions on the merits of their reckless disregard claim in light of these facts. The majority is nonetheless alarmed by the modest, deferential, preliminary injunction. Contrary to the majority's suggestion, the district court's remedy does not place all federal detention facilities under its control nor purport to set policy. The injunction directs *ICE* to craft, implement, and enforce *its own policies*, adequate to meet the needs of the medically vulnerable members of the Plaintiff subclasses. As neither issuance of a preliminary injunction to address a developing dire situation nor the terms of the deferential injunction issued were an abuse of the district court's discretion, I respectfully, but vigorously, dissent.

12. I agree with the majority that "we have jurisdiction" to review the district court's provisional class certification order, Opinion at 634–35, even though the government did not seek permission to appeal that under Federal Rule of Civil Procedure 23(f), because the class certification order "is inextricably bound up with the grant of the interim injunction," *Paige v. California*, 102 F.3d 1035, 1039 (9th Cir. 1996).

Leroy MCGILL, Petitioner-Appellant,

v.

David SHINN, Director, Arizona Department of Corrections; Walter Hensley, Warden, Arizona Department of Corrections - Eyman Complex, Respondents-Appellees.

No. 19-99002

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 20, 2021 Pasadena, California

Filed October 21, 2021

Background: Following affirmance of his convictions for first-degree premeditated murder, attempted first-degree murder, arson, and endangerment and his death

ATTACHMENT B

Joseph R. BIDEN, Jr., President of the United States, et al., Petitioners

v.

TEXAS, et al.
No. 21-954

Supreme Court of the United States.

Argued April 26, 2022

Decided June 30, 2022

Background: States of Texas and Missouri brought action for declaratory and injunctive relief and vacatur against Secretary of Department of Homeland Security (DHS) and others, alleging that Department's termination of its Migrant Protection Protocols (MPP), which provided for return to Mexico of non-Mexican noncitizens who had been detained when attempting to enter the United States by land illegally from Mexico, violated Administrative Procedure Act (APA) and Immigration and Nationality Act (INA). Following bench trial, the United States District Court for the Northern District of Texas, Matthew J. Kacsmaryk, J., 554 F.Supp.3d 818, vacated the termination decision, granted nationwide permanent injunction requiring DHS to implement the Protocols in good faith until such time as it was lawfully rescinded in compliance with APA or Government had sufficient detention resources, and remanded. DHS appealed. The United States Court of Appeals for the Fifth Circuit, 10 F.4th 538, denied motion by DHS for emergency stay pending appeal. The District Court, Kacsmaryk, J., 2021 WL 5399844, granted in part States' motion to enforce permanent injunction and for expedited discovery. DHS appealed. The Court of Appeals, Oldham, Circuit Judge, 20 F.4th 928, affirmed. Certiorari was granted, and additional briefing was ordered after oral argument.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

(1) INA provision generally prohibiting lower courts from entering injunctions with respect to specified INA provisions does not deprive Supreme Court of jurisdiction to reach merits of an appeal if a lower court entered a form of relief barred by that provision;

(2) INA does not require Secretary to return a noncitizen, who is arriving on land, to a contiguous foreign territory pending a removal proceeding, as cure for any noncompliance with Government's obligation under INA to detain a noncitizen seeking admission who is not clearly and beyond a doubt entitled to be admitted; and

(3) Secretary's memorandum, issued after district court vacated the earlier memorandum, was final agency action, as basis for review under APA.

Reversed and remanded.

Justice Kavanaugh filed a concurring opinion.

Justice Alito filed a dissenting opinion, in which Justices Thomas and Gorsuch joined.

Justice Barrett filed a dissenting opinion, in which Justices Thomas, Alito, and Gorsuch joined as to all but the first sentence.

1. Aliens, Immigration, and Citizenship ⚷414, 485

INA provision generally prohibiting lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out specified provisions of INA addressing inspection, apprehension, examination, exclusion, and removal, does not deprive Supreme Court of jurisdiction to reach merits of an appeal if a lower court entered a form of relief barred by that provision. Immigration and Nationality Act § 242, 8 U.S.C.A. § 1252(f)(1).

2. Aliens, Immigration, and Citizenship ⚿413, 485

INA provision entitled "Limit on injunctive relief," stating that lower courts generally lack "jurisdiction or authority" to enter injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out specified provisions of INA addressing inspection, apprehension, examination, exclusion, and removal, merely withdraws a district court's power to issue a specific category of remedies, and it does not deprive the lower courts of all subject matter jurisdiction over non-individual claims brought under the specified INA provisions. Immigration and Nationality Act § 242, 8 U.S.C.A. § 1252(f)(1).

3. Federal Courts ⚿2028

A limitation on subject matter jurisdiction restricts a court's power to adjudicate a case.

4. Statutes ⚿1151

Courts give effect, if possible, to every clause and word of a statute.

5. Federal Courts ⚿2028

The question whether a court has jurisdiction to grant a particular remedy is different from the question whether it has subject matter jurisdiction over a particular class of claims.

6. Aliens, Immigration, and Citizenship ⚿465

INA provision under which, in the case of a noncitizen who is arriving on land from a foreign territory contiguous to the United States, the Secretary of Department of Homeland Security (DHS) "may" return the noncitizen to that territory pending a removal proceeding, clearly confers a discretionary authority. Immigration and Nationality Act § 235, 8 U.S.C.A. § 1225(b)(2)(C).

7. Statutes ⚿1407

The word "may" in a statute clearly connotes discretion.

8. Aliens, Immigration, and Citizenship ⚿465

INA provision under which, in the case of a noncitizen who is arriving on land from a foreign territory contiguous to the United States, the Secretary of Department of Homeland Security (DHS) "may" return the noncitizen to that territory pending a removal proceeding does not operate as a mandatory cure of any noncompliance with Government's obligation under INA to detain, for a removal proceeding, a noncitizen seeking admission who is not clearly and beyond a doubt entitled to be admitted. Immigration and Nationality Act § 235, 8 U.S.C.A. § 1225(b)(2)(A, C).

9. Constitutional Law ⚿2512, 2551

Because the Constitution authorizes the Executive to engage in direct diplomacy with foreign heads of state and their ministers, the Supreme Court, when interpreting federal statutes, takes care to avoid the danger of unwarranted judicial interference in the conduct of foreign policy, and declines to run interference in the delicate field of international relations without the affirmative intention of Congress clearly expressed. U.S. Const. art. 2.

10. Aliens, Immigration, and Citizenship ⚿102
Constitutional Law ⚿2553

Because the Constitution authorizes the Executive to engage in direct diplomacy with foreign heads of state and their ministers, the Supreme Court, when interpreting federal immigration statutes, takes care to avoid the danger of unwarranted judicial interference in the conduct of foreign policy, in recognition that the dynamic nature of relations with other countries

requires the Executive to ensure that immigration enforcement policies are consistent with the Nation's foreign policy. U.S. Const. art. 2.

11. Administrative Law and Procedure ⚿1106, 1115

Under the Administrative Procedure Act (APA), an agency's exercise of discretion within a statutory framework must be reasonable and reasonably explained. 5 U.S.C.A. § 701 et seq.

12. Aliens, Immigration, and Citizenship ⚿485

"Final agency action," as basis for judicial review under Administrative Procedure Act (APA), arose from attempt by Secretary of Department of Homeland Security (DHS), through issuance of memorandum, to terminate Department's Migrant Protection Protocols (MPP), which provided for return to Mexico of non-Mexican noncitizens who had been detained when attempting to enter the United States by land illegally from Mexico; memorandum bound DHS staff by forbidding them to continue the program in any way from that moment on. Immigration and Nationality Act § 235, 8 U.S.C.A. § 1225(b)(2)(C); 5 U.S.C.A. § 704.

See publication Words and Phrases for other judicial constructions and definitions.

13. Administrative Law and Procedure ⚿2025, 2026(1), 2031

Upon finding, on judicial review under the Administrative Procedure Act (APA), that the grounds for agency action are inadequate, a court may remand for the agency to do one of two things: first, the agency can offer a fuller explanation of the agency's reasoning at the time of the agency action, and if it chooses this route, the agency may elaborate on its initial reasons for taking the action but may not provide new ones, and alternatively, the agency can deal with the problem afresh by taking new agency action, and an agency taking this route is not limited to its prior reasons. 5 U.S.C.A. § 701 et seq.

14. Aliens, Immigration, and Citizenship ⚿485

"Final agency action," as basis for judicial review under Administrative Procedure Act (APA), arose from issuance by Secretary of Department of Homeland Security (DHS) of memorandum to terminate Department's Migrant Protection Protocols (MPP), which provided for return to Mexico of non-Mexican noncitizens who had been detained when attempting to enter the United States by land illegally from Mexico, which issuance occurred after a district court had vacated Secretary's earlier memorandum that attempted to terminate the Protocols; Secretary chose to deal with the problem afresh by taking new agency action, which bound DHS staff by forbidding them to continue the program in any way from that moment on. Immigration and Nationality Act § 235, 8 U.S.C.A. § 1225(b)(2)(C); 5 U.S.C.A. § 704.

See publication Words and Phrases for other judicial constructions and definitions.

15. Administrative Law and Procedure ⚿1935

In reviewing agency action under the Administrative Procedure Act (APA), a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record, but a narrow exception applies where the challengers to the agency's action make a strong showing of bad faith or improper behavior on the part of the agency. 5 U.S.C.A. § 701 et seq.

16. Administrative Law and Procedure ⚿2031

An agency that takes superseding action on remand from the court, with re-

spect to agency action challenged under the Administrative Procedure Act (APA), is entitled to reexamine the problem, recast its rationale, and reach the same result. 5 U.S.C.A. § 701 et seq.

17. Administrative Law and Procedure ⚿1715

Nothing prevents an agency from undertaking new agency action while simultaneously appealing an adverse judgment against its original action, which was challenged under the Administrative Procedure Act (APA). 5 U.S.C.A. § 701 et seq.

Syllabus *

In January 2019, the Department of Homeland Security began to implement the Migrant Protection Protocols (MPP). Under MPP, certain non-Mexican nationals arriving by land from Mexico were returned to Mexico to await the results of their removal proceedings under section 1229a of the Immigration and Nationality Act (INA). MPP was implemented pursuant to a provision of the INA that applies to aliens "arriving on land ... from a foreign territory contiguous to the United States" and provides that the Secretary of Homeland Security "may return the alien to that territory pending a proceeding under section 1229a." 8 U.S.C. § 1225(b)(2)(C). Following a change in Presidential administrations, the Biden administration announced that it would suspend the program, and on June 1, 2021, the Secretary of Homeland Security issued a memorandum officially terminating it.

The States of Texas and Missouri (respondents) brought suit in the Northern District of Texas against the Secretary and others, asserting that the June 1 Memorandum violated the INA and the Administrative Procedure Act (APA). The District Court entered judgment for respondents. The court first concluded that terminating MPP would violate the INA, reasoning that section 1225 of the INA "provides the government two options" with respect to illegal entrants: mandatory detention pursuant to section 1225(b)(2)(A) or contiguous-territory return pursuant to section 1225(b)(2)(C). 554 F.Supp.3d 818, 852. Because the Government was unable to meet its mandatory detention obligations under section 1225(b)(2)(A) due to resource constraints, the court reasoned, terminating MPP would necessarily lead to the systemic violation of section 1225 as illegal entrants were released into the United States. Second, the District Court concluded that the June 1 Memorandum was arbitrary and capricious in violation of the APA. The District Court vacated the June 1 Memorandum and remanded to DHS. It also imposed a nationwide injunction ordering the Government to "enforce and implement MPP *in good faith* until such a time as it has been lawfully rescinded in compliance with the APA **and** until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under [section 1225] without releasing any aliens *because of* a lack of detention resources." *Id.*, at 857 (emphasis in original).

While the Government's appeal was pending, the Secretary released the October 29 Memoranda, which again announced the termination of MPP and explained anew his reasons for doing so. The Government then moved to vacate the injunction on the ground that the October 29 Memoranda had superseded the June 1 Memorandum. But the Court of Appeals denied the motion and instead affirmed the District Court's judgment in full. With respect

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

to the INA question, the Court of Appeals agreed with the District Court's analysis that terminating the program would violate the INA, concluding that the return policy was mandatory so long as illegal entrants were being released into the United States. The Court of Appeals also held that "[t]he October 29 Memoranda did not constitute a new and separately reviewable 'final agency action.' " 20 F.4th 928, 951.

Held: The Government's rescission of MPP did not violate section 1225 of the INA, and the October 29 Memoranda constituted final agency action. Pp. 2538 – 2548.

(a) Beginning with jurisdiction, the injunction that the District Court entered in this case violated 8 U.S.C. § 1252(f)(1). See *Garland* v. *Aleman Gonzalez*, 596 U. S. ——, ——, 142 S.Ct. 2057, 213 L.Ed.2d 102. But section 1252(f)(1) does not deprive *this* Court of jurisdiction to reach the merits of an appeal even where a lower court enters a form of relief barred by that provision. Section 1252(f)(1) withdraws a district court's "jurisdiction or authority" to grant a particular form of relief. It does not deprive lower courts of all subject matter jurisdiction over claims brought under sections 1221 through 1232 of the INA.

The text of the provision makes that clear. Section 1252(f)(1) deprives courts of the power to issue a specific category of remedies: those that "enjoin or restrain the operation of " the relevant sections of the statute. And Congress included that language in a provision whose title—"Limit on injunctive relief "—makes clear the narrowness of its scope. Moreover, the provision contains a parenthetical that explicitly preserves this Court's power to enter injunctive relief. If section 1252(f)(1) deprived lower courts of subject matter jurisdiction to adjudicate any non-individual claims under sections 1221 through 1232, no such claims could ever arrive at this Court, rendering the specific carveout for Supreme Court injunctive relief nugatory.

Statutory structure likewise confirms this conclusion. Elsewhere in section 1252, where Congress intended to deny subject matter jurisdiction over a particular class of claims, it did so unambiguously. See, *e.g.,* § 1252(a)(2) (entitled "Matters not subject to judicial review"). Finally, this Court previously encountered a virtually identical situation in *Nielsen* v. *Preap*, 586 U. S. ——, 139 S.Ct. 954, 203 L.Ed.2d 333, and proceeded to reach the merits of the suit notwithstanding the District Court's apparent violation of section 1252(f)(1). Pp. 2538 – 2541.

(b) Turning to the merits, section 1225(b)(2)(C) provides: "In the case of an alien . . . who is arriving on land . . . from a foreign territory contiguous to the United States, the [Secretary] may return the alien to that territory pending a proceeding under section 1229a." Section 1225(b)(2)(C) plainly confers a *discretionary* authority to return aliens to Mexico. This Court has "repeatedly observed" that "the word 'may' *clearly* connotes discretion." *Opati* v. *Republic of Sudan*, 590 U. S. ——, ——, 140 S.Ct. 1601, 206 L.Ed.2d 904.

Respondents and the Court of Appeals concede that point, but urge an inference from the statutory structure: because section 1225(b)(2)(A) makes detention mandatory, they argue, the otherwise-discretionary return authority in section 1225(b)(2)(C) becomes mandatory when the Secretary violates that mandate. The problem is that the statute does not say anything like that. The statute says "may." If Congress had intended section 1225(b)(2)(C) to operate as a mandatory cure of any noncompliance with the Government's detention obligations, it would

not have conveyed that intention through an unspoken inference in conflict with the unambiguous, express term "may." The contiguous-territory return authority in section 1225(b)(2)(C) is discretionary—and remains discretionary notwithstanding any violation of section 1225(b)(2)(A).

The historical context in which section 1225(b)(2)(C) was adopted confirms the plain import of its text. Section 1225(b)(2)(C) was added to the statute more than 90 years after the "shall be detained" language that appears in section 1225(b)(2)(A). And the provision was enacted in response to a BIA decision that had questioned the legality of the contiguous-territory return practice. Moreover, since its enactment, every Presidential administration has interpreted section 1225(b)(2)(C) as purely discretionary, notwithstanding the consistent shortfall of funds to comply with section 1225(b)(2)(A).

The foreign affairs consequences of mandating the exercise of contiguous-territory return likewise confirm that the Court of Appeals erred. Interpreting section 1225(b)(2)(C) as a mandate imposes a significant burden upon the Executive's ability to conduct diplomatic relations with Mexico, one that Congress likely did not intend section 1225(b)(2)(C) to impose. And finally, the availability of parole as an alternative means of processing applicants for admission, see 8 U.S.C. § 1182(d)(5)(A), additionally makes clear that the Court of Appeals erred in holding that the INA required the Government to continue implementing MPP. Pp. 2541 – 2544.

(c) The Court of Appeals also erred in holding that "[t]he October 29 Memoranda did not constitute a new and separately reviewable 'final agency action.' " 20 F.4th, at 951. Once the District Court vacated the June 1 Memorandum and remanded to DHS for further consideration, DHS had two options: elaborate on its original reasons for taking action or " 'deal with the problem afresh' by taking *new* agency action." *Department of Homeland Security* v. *Regents of Univ. of Cal.*, 591 U. S. ——, ——, 140 S.Ct. 1891, 207 L.Ed.2d 353. The Secretary selected the second option from *Regents*: He accepted the District Court's vacatur and dealt with the problem afresh. The October 29 Memoranda were therefore final agency action for the same reasons that the June 1 Memorandum was final agency action: Both "mark[ed] the 'consummation' of the agency's decision-making process" and resulted in "rights and obligations [being] determined." *Bennett v. Spear*, 520 U.S. 154, 178, 117 S.Ct. 1154, 137 L.Ed.2d 281.

The various rationales offered by respondents and the Court of Appeals in support of the contrary conclusion lack merit. First, the Court of Appeals erred to the extent it understood itself to be reviewing an abstract decision apart from the specific agency actions contained in the June 1 Memorandum and October 29 Memoranda. Second, and relatedly, the October 29 Memoranda were not a mere *post hoc* rationalization of the June 1 Memorandum. The prohibition on *post hoc* rationalization applies only when the agency proceeds by the first option from *Regents*. Here, the Secretary chose the second option from *Regents* and "issue[d] a new rescission bolstered by new reasons absent from the [June 1] Memorandum." 591 U. S., at ——, 140 S.Ct., at 1908. Having returned to the drawing table, the Secretary was not subject to the charge of *post hoc* rationalization.

Third, respondents invoke *Department of Commerce* v. *New York*, 588 U. S. ——, 139 S.Ct. 2551, 204 L.Ed.2d 978. But nothing in this record suggests a "significant mismatch between the decision the Secretary made and the rationale he pro-

vided." *Id.*, at ——, 139 S.Ct., at 2575. Relatedly, the Court of Appeals charged that the Secretary failed to proceed with a sufficiently open mind. But this Court has previously rejected criticisms of agency closemindedness based on an identity between proposed and final agency action. See *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 591 U. S. ——, ——, 140 S.Ct. 2367, 207 L.Ed.2d 819. Finally, the Court of Appeals erred to the extent it viewed the Government's decision to appeal the District Court's injunction as relevant to the question of the October 29 Memoranda's status as final agency action. Nothing prevents an agency from undertaking new agency action while simultaneously appealing an adverse judgment against its original action. Pp. 2543 – 2548.

20 F.4th 928, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which BREYER, SOTOMAYOR, KAGAN, and KAVANAUGH, JJ., joined. KAVANAUGH, J., filed a concurring opinion. ALITO, J., filed a dissenting opinion, in which THOMAS and GORSUCH, JJ., joined. BARRETT, J., filed a dissenting opinion, in which THOMAS, ALITO, and GORSUCH, JJ., joined as to all but the first sentence.

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For U.S. Supreme Court briefs, see:

2022 WL 1180109 (Reply.Brief)

2022 WL 1097049 (Resp.Brief)

2022 WL 815341 (Pet.Brief)

Chief Justice ROBERTS delivered the opinion of the Court.

In January 2019, the Department of Homeland Security—under the administration of President Trump—established the Migrant Protection Protocols. That program provided for the return to Mexico of non-Mexican aliens who had been detained attempting to enter the United States illegally from Mexico. On Inauguration Day 2021, the new administration of President Biden announced that the program would be suspended the next day, and later that year sought to terminate it. The District Court and the Court of Appeals, however, held that doing so would violate the Immigration and Nationality Act, concluding that the return policy was mandatory so long as illegal entrants were being released into the United States. The District Court also held that the attempted rescission of the program was inadequately explained in violation of the Administrative Procedure Act. While its appeal was pending, the Government took new action

to terminate the policy with a more detailed explanation. But the Court of Appeals held that this new action was not separately reviewable final agency action under the Administrative Procedure Act.

The questions presented are whether the Government's rescission of the Migrant Protection Protocols violated the Immigration and Nationality Act and whether the Government's second termination of the policy was a valid final agency action.

I

A

On December 20, 2018, then-Secretary of Homeland Security Kirstjen Nielsen announced a new program called Remain in Mexico, also known as the Migrant Protection Protocols (MPP). MPP was created in response to an immigration surge at the country's southern border, and a resulting "humanitarian and border security crisis" in which federal immigration officials were encountering approximately 2,000 inadmissible aliens each day. 554 F.Supp.3d 818, 831 (ND Tex. 2021). MPP provided that certain non-Mexican nationals arriving by land from Mexico would be returned to Mexico to await the results of their removal proceedings under 8 U.S.C. § 1229a. On the same day that Secretary Nielsen announced the program, the Government of Mexico agreed that it would cooperate in administering it, on a temporary basis.

MPP was implemented pursuant to express congressional authorization in the Immigration and Nationality Act (INA), which provides that "[i]n the case of an alien . . . who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title." 66 Stat. 163, as added and amended, 8 U.S.C. § 1225(b)(2)(C).[1] Prior to the initiation of MPP, the Department of Homeland Security (DHS) and its predecessor agency had "primarily used [§ 1225(b)(2)(C)] on an ad-hoc basis to return certain Mexican and Canadian nationals" arriving at ports of entry. App. to Pet. for Cert. 273a, n. 12.

A separate provision of the same section of the INA states that if "an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title." § 1225(b)(2)(A). Due to consistent and significant funding shortfalls, however, DHS has never had "sufficient detention capacity to maintain in custody every single person described in section 1225." *Id.*, at 323a. In light of that fact, the Trump administration chose to implement MPP in part so that "[c]ertain 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 before an immigration judge can determine the merits of any claim." 554 F.Supp.3d, at 832.

In January 2019, DHS began implementing MPP, initially in San Diego, California, then in El Paso, Texas, and Calexico, California, and then nationwide. By December 31, 2020, DHS had enrolled 68,039 aliens in the program.

Following the change in Presidential administrations, however, the Biden administration sought to terminate the program. On January 20, 2021, the Acting Secretary

1. The provision refers to the Attorney General, but the authority it confers has been transferred to the Secretary of Homeland Security. See *Department of Homeland Security* v. *Thuraissigiam*, 591 U. S. ——, ——, n. 3, 140 S.Ct. 1959, 1965 n.3, 207 L.Ed.2d 427 (2020).

of Homeland Security wrote that "[e]ffective January 21, 2021, the Department will suspend new enrollments in [MPP] pending further review of the program. Aliens who are not already enrolled in MPP should be processed under other existing legal authorities." *Id.*, at 836. President Biden also issued Executive Order No. 14010, which directed the new Secretary of Homeland Security, Alejandro N. Mayorkas, to "promptly review and determine whether to terminate or modify the [MPP] program." 86 Fed. Reg. 8269 (2021).

On June 1, 2021, Secretary Mayorkas issued a memorandum officially terminating MPP (the June 1 Memorandum). In that memorandum, the Secretary noted his determination "that MPP [d]oes not adequately or sustainably enhance border management in such a way as to justify the program's extensive operational burdens and other shortfalls." App. to Pet. for Cert. 351a. He also emphasized that, since its inception, MPP had "played an outsized role in [DHS's] engagement with the Government of Mexico," given the "significant attention that it draws away from other elements that necessarily must be more central to the bilateral relationship." *Id.*, at 357a. For those and other reasons, the Secretary announced that he was "by this memorandum terminating the MPP program," and "direct[ed] DHS personnel to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives or policy guidance issued to implement the program." *Id.*, at 348a–349a.

B

On April 13, 2021, the States of Texas and Missouri (respondents) initiated this lawsuit in the Northern District of Texas against Secretary Mayorkas and others. Respondents' initial complaint challenged the Acting Secretary's January 20 suspension of new enrollments in MPP, but following the June 1 Memorandum, they amended their complaint to challenge the Secretary's June 1 rescission of the entire program. The amended complaint asserted that the June 1 Memorandum violated the INA and the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, and sought preliminary and permanent injunctive relief, declaratory relief, and vacatur of the rescission pursuant to the APA.

The District Court conducted a one-day bench trial and entered judgment for respondents. The court first concluded that terminating MPP would violate the INA. It reasoned that section 1225 of the INA "provides the government two options": mandatory detention pursuant to section 1225(b)(2)(A) or contiguous-territory return pursuant to section 1225(b)(2)(C). 554 F.Supp.3d, at 852. Because the Government was unable to meet its detention obligations under section 1225(b)(2)(A) due to resource constraints, the court concluded, "terminating MPP necessarily leads to the systemic violation of Section 1225 as aliens are released into the United States." *Ibid.* Second, the District Court found that the agency failed to engage in reasoned decisionmaking and therefore acted arbitrarily and capriciously in violation of the APA. *Id.*, at 847–851.

Based on these conclusions, the District Court "vacated [the June 1 Memorandum] in its entirety and remanded to DHS for further consideration." *Id.*, at 857 (boldface and capitalization omitted). And it imposed a nationwide injunction ordering the Government to "enforce and implement MPP *in good faith* until such a time as it has been lawfully rescinded in compliance with the APA **and** until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under [section 1225]

without releasing any aliens *because of* a lack of detention resources." *Ibid.* (emphasis in original).

The Government appealed and sought a stay of the injunction, which the District Court and the Court of Appeals each denied. The Government then applied to this Court for a stay. The Court denied the application, finding that the Government "had failed to show a likelihood of success on the claim that the [June 1 Memorandum] was not arbitrary and capricious." 594 U. S. ——, 142 S.Ct. 926, 210 L.Ed.2d 1014 (2021). The Court did not address the District Court's interpretation of the INA.

The parties proceeded to briefing in the Court of Appeals. While the Government's appeal was pending, however, Secretary Mayorkas "considered anew whether to maintain, terminate, or modify MPP in various ways." App. to Pet. for Cert. 286a. On September 29, 2021, the Secretary publicly announced his "inten[tion] to issue in the coming weeks a new memorandum terminating [MPP]." 20 F.4th 928, 954 (CA5 2021). The Government then moved to hold the appeal in abeyance pending the Secretary's formal decision, but the Court of Appeals denied the motion.

On October 29, the Secretary released a four-page memorandum that again announced the termination of MPP, along with a 39-page addendum explaining his reasons for doing so (the October 29 Memoranda). As the Secretary explained, this new assessment of MPP "examined considerations that the District Court determined were insufficiently addressed in the June 1 memo, including claims that MPP discouraged unlawful border crossings, decreased the filing of non-meritorious asylum claims, and facilitated more timely relief for asylum seekers, as well as predictions that termination of MPP would lead to a border surge, cause [DHS] to fail to comply with alleged detention obligations under the [INA], impose undue costs on states, and put a strain on U. S.-Mexico relations." App. to Pet. for Cert. 259a–260a.

The Secretary acknowledged what he called "the strongest argument in favor of retaining MPP: namely, the significant decrease in border encounters following the determination to implement MPP across the southern border." *Id.*, at 261a. But he nonetheless concluded that the program's "benefits do not justify the costs, particularly given the way in which MPP detracts from other regional and domestic goals, foreign-policy objectives, and domestic policy initiatives that better align with this Administration's values." *Ibid.* Finally, the Secretary once again noted that "[e]fforts to implement MPP have played a particularly outsized role in diplomatic engagements with Mexico, diverting attention from more productive efforts to fight transnational criminal and smuggling networks and address the root causes of migration." *Id.*, at 262a.

In light of those conclusions, the Secretary announced that he was once again "hereby terminating MPP." *Id.*, at 263a. He explained that DHS would "continue complying with the [District Court's] injunction requiring good-faith implementation and enforcement of MPP." *Id.*, at 264a. But he noted that "the termination of MPP" would be "implemented as soon as practicable after a final judicial decision to vacate" that injunction. *Ibid.* The Government then moved to vacate the injunction on the ground that the October 29 Memoranda had superseded the June 1 Memorandum, but the Court of Appeals denied the motion.

The Court of Appeals instead affirmed the District Court's judgment in full. With respect to the INA question, the Court of Appeals agreed with the District Court's analysis of the relevant provisions. That is,

the court explained, section 1225(b)(2)(A) "sets forth a general, plainly obligatory rule: detention for aliens seeking admission," while section 1225(b)(2)(C) "authorizes contiguous-territory return as an alternative." 20 F.4th, at 996. Accordingly, the Court of Appeals reasoned, "DHS is violating (A)'s mandate, refusing to avail itself of (C)'s authorized alternative, and then complaining that it doesn't like its options." *Ibid.*, n. 18.

The Court of Appeals also held that "[t]he October 29 Memoranda did not constitute a new and separately reviewable 'final agency action.' " *Id.*, at 951. The Court of Appeals distinguished "DHS's June 1 decision to terminate MPP," which it claimed "had legal effect," from the June 1 Memorandum, the October 29 Memoranda, and "any other subsequent memos," which it held "simply *explained* DHS's decision." *Ibid.* The Court of Appeals then criticized the Government for proceeding "without a hint of an intention to put the Termination Decision back on the chopping block and rethink things," and for ultimately "just further defend[ing] what it had previously decided." *Id.*, at 955. And the Court of Appeals drew a dichotomy between taking new agency action and appealing an adverse decision, asserting that "DHS chose not to take a new agency action" but "instead chose to notice an appeal and defend its Termination Decision in our court." *Id.*, at 941.

We granted certiorari, 595 U. S. ——, 142 S.Ct. 1098, 212 L.Ed.2d 1 (2022), and expedited consideration of this appeal at the Government's request.

II

We begin with jurisdiction. The Government contends that the injunction the District Court entered was barred by 8 U.S.C. § 1252(f)(1). That provision reads as follows:

> "Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [8 U.S.C. §§ 1221–1232], other than with respect to the application of such provisions to an individual alien against whom proceedings under [those provisions] have been initiated."

[1] As we recently held in *Garland* v. *Aleman Gonzalez*, 596 U. S. ——, 142 S.Ct. 2057, 213 L.Ed.2d 102 (2022), section 1252(f)(1) "generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." *Id.*, at ——, 142 S.Ct., at 2065. The District Court's injunction in this case violated that provision. But that fact simply presents us with the following question: whether section 1252(f)(1) deprives *this* Court of jurisdiction to reach the merits of an appeal, where the lower court entered a form of relief barred by that provision. See *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("Every federal appellate court has an obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it." (internal quotation marks and alterations omitted)).

[2] Absent section 1252(f)(1), the District Court clearly had federal question jurisdiction over respondents' suit, which asserted claims arising under two federal statutes, the INA and the APA. See 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). The question, then, is whether section 1252(f)(1)

strips the lower courts of subject matter jurisdiction over these claims. The parties agree that the answer to that question is no, and so do we. That is because section 1252(f)(1) withdraws a district court's "jurisdiction or authority" to grant a particular form of relief. It does not deprive the lower courts of all subject matter jurisdiction over claims brought under sections 1221 through 1232 of the INA.

[3] The text of the provision makes that clear. Section 1252(f)(1) deprives courts of the power to issue a specific category of remedies: those that "enjoin or restrain the operation of " the relevant sections of the statute. A limitation on subject matter jurisdiction, by contrast, restricts a court's "power to adjudicate a case." *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). Section 1252(f)(1) bears no indication that lower courts lack power to hear any claim brought under sections 1221 through 1232. If Congress had wanted the provision to have that effect, it could have said so in words far simpler than those that it wrote. But Congress instead provided that lower courts would lack jurisdiction to "enjoin or restrain the operation of " the relevant provisions, and it included that language in a provision whose title—"Limit on injunctive relief "—makes clear the narrowness of its scope.

[4] A second feature of the text of section 1252(f)(1) leaves no doubt that this Court has jurisdiction: the parenthetical explicitly preserving this Court's power to enter injunctive relief. See § 1252(f)(1) ("[N]o court (other than the Supreme Court) shall have jurisdiction or authority . . ."). If section 1252(f)(1) deprived lower courts of subject matter jurisdiction to adjudicate any non-individual claims under sections 1221 through 1232, no such claims could ever arrive at this Court, rendering the provision's specific carveout for Supreme Court injunctive relief nugatory. Indeed, that carveout seems directed at precisely the question before us here: whether section 1252(f)(1)'s "[l]imit on injunctive relief " has any consequence for the jurisdiction of this Court. Congress took pains to answer that question in the negative. Interpreting section 1252(f)(1) to deprive this Court of jurisdiction under these circumstances would therefore fail to "give effect, if possible, to every clause and word of [the] statute." *Williams v. Taylor*, 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).[2]

Statutory structure confirms our conclusion. Elsewhere in section 1252, where Congress intended to deny subject matter jurisdiction over a particular class of claims, it did so unambiguously. Section 1252(a)(2), for instance, is entitled "Matters not subject to judicial review" and provides that "*no court shall have jurisdiction to review*" several categories of decisions, such as "any final order of removal against an alien who is removable by reason of having committed a criminal offense . . . ." (Emphasis added.) Congress could easily have added one more item to this list: any action taken pursuant to sections 1221 through 1232. Or it could have worded section 1252(f)(1) similarly to the immediately adjacent section 1252(g), which provides that "*no court shall have*

2. Justice BARRETT raises a host of additional questions regarding the "Supreme Court" parenthetical, *post,* at 2561 – 2562 (dissenting opinion), and she faults us for relying on this aspect of the provision without comprehensively "explain[ing] how it would work," *post,* at 2562. But we see no need to explore every aspect or consequence of the parenthetical in order to answer the narrow question of our jurisdiction over this case. In declining to resolve these additional complexities, we merely heed Justice BARRETT's admonition to "tread . . . carefully." *Post,* at 2562 – 2563.

jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against [the alien]." (Emphasis added.) But Congress did neither. Instead, it constructed a carefully worded provision depriving the lower courts of power to "enjoin or restrain the operation of " certain sections of the statute, and it entitled that provision a "[l]imit on injunctive relief."

Our prior cases have already embraced this straightforward conclusion. Most relevantly, the Court previously encountered a virtually identical situation in *Nielsen* v. *Preap*, 586 U. S. ——, 139 S.Ct. 954, 203 L.Ed.2d 333 (2019). There, as here, the plaintiffs sought declaratory as well as injunctive relief in their complaint, and there, as here, the District Court awarded only the latter. Yet this Court proceeded to reach the merits of the suit, notwithstanding the District Court's apparent violation of section 1252(f)(1), by reasoning that "[w]hether the [District] [C]ourt had jurisdiction to enter such an injunction is irrelevant because the District Court had jurisdiction to entertain the plaintiffs' request for declaratory relief." *Id.*, at ——–——, 139 S.Ct., at 962 (ALITO, J., joined by ROBERTS, C. J., and KAVANAUGH, J.); see also *Jennings* v. *Rodriguez*, 583 U. S. ——, ——, 138 S.Ct. 830, 875, 200 L.Ed.2d 122 (2018) (BREYER, J., joined by Ginsburg and SOTOMAYOR, JJ., dissenting) (concluding that "a court could order declaratory relief " notwithstanding section 1252(f)(1)). Our disposition in *Preap* is inconsistent with an interpretation of the limitation in section 1252(f)(1) that strips the lower courts of subject matter jurisdiction.[3] And previous statements from this Court regarding section 1252(f)(1) are in accord. See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) ("By its plain terms, and even by its title, [section 1252(f)(1)] is nothing more or less than a limit on injunctive relief.").

[5] In short, we see no basis for the conclusion that section 1252(f)(1) concerns subject matter jurisdiction. It is true that section 1252(f)(1) uses the phrase "jurisdiction or authority," rather than simply the word "authority." But "[j]urisdiction . . . is a word of many, too many meanings." *Steel Co.*, 523 U.S., at 90, 118 S.Ct. 1003. And the question whether a court has jurisdiction to grant a particular remedy is different from the question whether it has subject matter jurisdiction over a particular class of claims. See *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 163–164, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010) (concluding that "[t]he word 'jurisdiction' . . . says nothing about whether a federal court has subject-matter jurisdiction to adjudicate claims"). Section 1252(f)(1) no doubt deprives the lower courts of "jurisdiction" to grant classwide injunctive relief. See *Aleman Gonzalez*, 596 U. S., at ——, 142 S.Ct., at 2068. But that limitation poses no obstacle to jurisdiction in this Court.[4]

3. Justice BARRETT notes that *Preap* involved consolidated cases, and that in one of the two cases the District Court granted declaratory as well as injunctive relief. *Post,* at 2562, n. (dissenting opinion). That misses the point. The *Preap* District Court granted only injunctive relief, presenting the exact circumstances we confront here, yet this Court exercised jurisdiction over that lawsuit and resolved it on the merits.

4. At our request, the parties briefed several additional questions regarding the operation of section 1252(f)(1), namely, whether its limitation on ''jurisdiction or authority'' is subject to forfeiture and whether that limitation extends to other specific remedies, such as declaratory relief and relief under section 706 of the APA. We express no view on those questions.

III

[6, 7] We now turn to the merits. Section 1225(b)(2)(C) provides: "In the case of an alien ... who is arriving on land ... from a foreign territory contiguous to the United States, the [Secretary] may return the alien to that territory pending a proceeding under section 1229a." Section 1225(b)(2)(C) plainly confers a *discretionary* authority to return aliens to Mexico during the pendency of their immigration proceedings. This Court has "repeatedly observed" that "the word 'may' *clearly* connotes discretion." *Opati* v. *Republic of Sudan*, 590 U. S. ——, ——, 140 S.Ct. 1601, 1609, 206 L.Ed.2d 904 (2020) (emphasis in original); see also, *e.g.*, *Weyerhaeuser Co.* v. *United States Fish and Wildlife Serv.*, 586 U. S. ——, ——, 139 S.Ct. 361, 371, 202 L.Ed.2d 269 (2018); *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 346, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005). The use of the word "may" in section 1225(b)(2)(C) thus makes clear that contiguous-territory return is a tool that the Secretary "has the authority, but not the duty," to use. *Lopez v. Davis*, 531 U.S. 230, 241, 121 S.Ct. 714, 148 L.Ed.2d 635 (2001).

Respondents and the Court of Appeals concede this point. Brief for Respondents 21 (contiguous-territory return is a "discretionary authority"); 20 F.4th, at 996, n. 18 ("It's obviously true that § 1225(b)(2)(C) is discretionary."). They base their interpretation instead on section 1225(b)(2)(A), which provides that, "in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title." Respondents and the Court of Appeals thus urge an inference from the statutory structure: Because section 1225(b)(2)(A) makes detention mandatory, they argue, the otherwise-discretionary return authority in section 1225(b)(2)(C) becomes mandatory when the Secretary violates that detention mandate.

[8] The problem is that the statute does not say anything like that. The statute says "may." And "may" does not just suggest discretion, it "*clearly* connotes" it. *Opati*, 590 U. S., at ——, 140 S.Ct., at 1609 (emphasis in original); see also *Jama*, 543 U.S., at 346, 125 S.Ct. 694 ("That connotation is particularly apt where, as here, 'may' is used in contraposition to the word 'shall.' "). Congress's use of the word "may" is therefore inconsistent with respondents' proposed inference from the statutory structure. If Congress had intended section 1225(b)(2)(C) to operate as a mandatory cure of any noncompliance with the Government's detention obligations, it would not have conveyed that intention through an unspoken inference in conflict with the unambiguous, express term "may." It would surely instead have coupled that grant of discretion with some indication of its sometimes-mandatory nature—perhaps by providing that the Secretary "may return" certain aliens to Mexico, "unless the government fails to comply with its detention obligations, in which case the Secretary must return them." The statutory grant of discretion here contains no such caveat, and we will not rewrite it to include one. See *id.*, at 341, 125 S.Ct. 694 ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.").

The principal dissent emphasizes that section 1225(b)(2)(A) requires detention of all aliens that fall within its terms. See, *e.g.*, *post*, at 2553 (ALITO, J., dissenting) ("The language of 8 U.S.C. § 1225(b)(2)(A) is unequivocal."). While the Government

contests that proposition, we assume *arguendo* for purposes of this opinion that the dissent's interpretation of section 1225(b)(2)(A) is correct, and that the Government is currently violating its obligations under that provision.[5] Even so, the dissent's conclusions regarding section 1225(b)(2)(C) do not follow. Under the actual text of the statute, Justice ALITO's interpretation is practically self-refuting. He emphasizes that " '[s]hall be detained' means 'shall be detained,' " *post*, at 2554, and criticizes the Government's "argument that 'shall' means 'may,' " *post*, at 2554. But the theory works both ways. Congress conferred contiguous-territory return authority in expressly discretionary terms. " '[M]ay return the alien' means 'may return the alien.' " The desire to redress the Government's purported violation of section 1225(b)(2)(A) does not justify transforming the nature of the authority conferred by section 1225(b)(2)(C).[6]

The historical context in which the provision was adopted confirms the plain import of its text. See, *e.g.*, *Niz-Chavez* v. *Garland*, 593 U. S. ——, ——, 141 S.Ct. 1474, 1482, 209 L.Ed.2d 433 (2021) (textual analysis confirmed by "a wider look at [the statute's] structure and history"). Section 1225(b)(2)(C) was not added to the statute until 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), § 302, 110 Stat. 300–583—more than 90 years after the Immigration Act of 1903 added the "shall be detained" language that appears in section 1225(b)(2)(A). And section 1225(b)(2)(C) was enacted in the immediate aftermath of a Board of Immigration Appeals (BIA) decision that specifically called into question the legality of the contiguous-territory return practice. Prior to that decision, the longstanding practice of the Immigration and Naturalization Service (INS) had been to require some aliens arriving at land border ports of entry to await their exclusion proceedings in Canada or Mexico. The BIA noted the lack of "any evidence that this is a practice known to Congress" and "the absence of a supporting regulation." *In re Sanchez-Avila*, 21 I. & N. Dec. 444, 465 (1996) (en banc). Congress responded mere months later by adding section 1225(b)(2)(C) to IIRIRA and conferring on the Secretary express authority ("may") to engage in the very practice that the BIA had questioned. And INS acknowledged that clarification shortly thereafter, explaining that section 1225(b)(2)(C) and its implementing regulation "simply add[ ] to the statute and regulation a long-standing practice of the Service." 62 Fed. Reg. 445 (1997). That modest backstory suggests a more humble role for section 1225(b)(2)(C) than as a mandatory "safety valve" for any

5. For this reason, Justice ALITO misunderstands our analysis in insisting that our opinion authorizes the Government to release aliens subject to detention under section 1225(b)(2)(A). See *post*, at 2553 – 2554 (dissenting opinion). We need not and do not decide whether the detention requirement in section 1225(b)(2)(A) is subject to principles of law enforcement discretion, as the Government argues, or whether the Government's current practices simply violate that provision.

6. In arguing that the Court should do so, the dissent proposes a number of hypotheticals in which a party fails to comply with a legal obligation imposed by statute and additionally refuses to exercise a discretionary alternative authorized by that statute. *Post*, at 2555 – 2556 (ALITO, J., dissenting). We wholeheartedly endorse the conclusion that the dissent draws from these hypotheticals: that "the failure to make use of the discretionary option would not be seen as a valid excuse for noncompliance with the command that certain conduct 'shall' be performed." *Post*, at 2556. But the question before us is not whether the Government is violating the immigration laws generally. The question is whether the INA requires the government to continue implementing MPP. And the statutory text clearly answers that question in the negative.

alien who is not detained under section 1225(b)(2)(A).

In addition to contradicting the statutory text and context, the novelty of respondents' interpretation bears mention. Since IIRIRA's enactment 26 years ago, every Presidential administration has interpreted section 1225(b)(2)(C) as purely discretionary. Indeed, at the time of IIRIRA's enactment and in the decades since, congressional funding has consistently fallen well short of the amount needed to detain all land-arriving inadmissible aliens at the border, yet no administration has ever used section 1225(b)(2)(C) to return all such aliens that it could not otherwise detain.

[9, 10] And the foreign affairs consequences of mandating the exercise of contiguous-territory return likewise confirm that the Court of Appeals erred. Article II of the Constitution authorizes the Executive to "engag[e] in direct diplomacy with foreign heads of state and their ministers." *Zivotofsky v. Kerry*, 576 U.S. 1, 14, 135 S.Ct. 2076, 192 L.Ed.2d 83 (2015). Accordingly, the Court has taken care to avoid "the danger of unwarranted judicial interference in the conduct of foreign policy," and declined to "run interference in [the] delicate field of international relations" without "the affirmative intention of the Congress clearly expressed." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115–116, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013). That is no less true in the context of immigration law, where "[t]he dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy." *Arizona v. United States*, 567 U.S. 387, 397, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012).

By interpreting section 1225(b)(2)(C) as a mandate, the Court of Appeals imposed a significant burden upon the Executive's ability to conduct diplomatic relations with Mexico. MPP applies exclusively to non-Mexican nationals who have arrived at ports of entry that are located "in the United States." § 1225(a)(1). The Executive therefore cannot unilaterally return these migrants to Mexico. In attempting to rescind MPP, the Secretary emphasized that "[e]fforts to implement MPP have played a particularly outsized role in diplomatic engagements with Mexico, diverting attention from more productive efforts to fight transnational criminal and smuggling networks and address the root causes of migration." App. to Pet. for Cert. 262a. Yet under the Court of Appeals' interpretation, section 1225(b)(2)(C) authorized the District Court to force the Executive to the bargaining table with Mexico, over a policy that both countries wish to terminate, and to supervise its continuing negotiations with Mexico to ensure that they are conducted "in good faith." 554 F.Supp.3d, at 857 (emphasis deleted). That stark consequence confirms our conclusion that Congress did not intend section 1225(b)(2)(C) to tie the hands of the Executive in this manner.

[11] Finally, we note that—as DHS explained in its October 29 Memoranda—the INA expressly authorizes DHS to process applicants for admission under a third option: parole. See 8 U.S.C. § 1182(d)(5)(A). Every administration, including the Trump and Biden administrations, has utilized this authority to some extent. Importantly, the authority is not unbounded: DHS may exercise its discretion to parole applicants "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." *Ibid.* And under the APA, DHS's exercise of discretion within that statutory framework must be reasonable and reasonably explained. See *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S.

29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). But the availability of the parole option additionally makes clear that the Court of Appeals erred in holding that the INA required the Government to continue implementing MPP.

In sum, the contiguous-territory return authority in section 1225(b)(2)(C) is discretionary—and remains discretionary notwithstanding any violation of section 1225(b)(2)(A). To reiterate: we need not and do not resolve the parties' arguments regarding whether section 1225(b)(2)(A) must be read in light of traditional principles of law enforcement discretion, and whether the Government is lawfully exercising its parole authorities pursuant to sections 1182(d)(5) and 1226(a). We merely hold that section 1225(b)(2)(C) means what it says: "may" means "may," and the INA itself does not require the Secretary to continue exercising his discretionary authority under these circumstances.

IV

[12] The Court of Appeals also erred in holding that "[t]he October 29 Memoranda did not constitute a new and separately reviewable 'final agency action.' " 20 F.4th, at 951. To recap, the Secretary first attempted to terminate MPP through the June 1 Memorandum. As the Court of Appeals correctly held, that constituted final agency action. See *id.*, at 947 (citing *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)). But the District Court found that the Secretary's stated grounds in the June 1 Memorandum were inadequate, and therefore "vacated" the June 1 Memorandum and "remanded [the matter] to DHS for further consideration." 554 F.Supp.3d, at 857.

[13] As we explained two Terms ago in *Department of Homeland Security* v. *Regents of Univ. of Cal.*, 591 U. S. ——, 140 S.Ct. 1891, 207 L.Ed.2d 353 (2020), upon finding that the grounds for agency action are inadequate, "a court may remand for the agency to do one of two things." *Id.*, at ——, 140 S.Ct., at 1907. "First, the agency can offer 'a fuller explanation of the agency's reasoning at the time of the agency action.' " *Ibid.* (emphasis deleted). If it chooses this route, "the agency may elaborate" on its initial reasons for taking the action, "but may not provide new ones." *Id.*, at ——, 140 S.Ct., at 1908. Alternatively, "the agency can 'deal with the problem afresh' by taking *new* agency action." *Ibid.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 201, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947) (*Chenery II*)). "An agency taking this route is not limited to its prior reasons." *Regents*, 591 U. S., at ——, 140 S.Ct., at 1908.

Here, perhaps in light of this Court's previous determination that the Government had "failed to show a likelihood of success on the claim that the [June 1 Memorandum] was not arbitrary and capricious," 594 U. S. ——, 142 S.Ct. 926, 210 L.Ed.2d 1014, the Secretary selected the second option from *Regents*: He accepted the District Court's vacatur and dealt with the problem afresh. The October 29 Memoranda made that clear "by its own terms," *Regents*, 591 U. S., at ——, 140 S.Ct., at 1908, in which the Secretary stated: "I am hereby terminating MPP. Effective immediately, I hereby supersede and rescind the June 1 memorandum." App. to Pet. for Cert. 263a–264a. And consistent with that approach, the October 29 Memoranda offered several "new reasons absent from" the June 1 Memorandum, *Regents*, 591 U. S., at ——, 140 S.Ct., at 1908, including an examination of the "considerations that the District Court determined were insufficiently addressed in the June 1 memo," App. to Pet. for Cert. 259a.

[14] The October 29 Memoranda were therefore final agency action for the same

reasons that the June 1 Memorandum was final agency action. That is, both the June 1 Memorandum and the October 29 Memoranda, when they were issued, "mark[ed] the 'consummation' of the agency's decisionmaking process" and resulted in "rights and obligations [being] determined." *Bennett*, 520 U.S., at 178, 117 S.Ct. 1154. As the Court of Appeals explained, the June 1 Memorandum "bound DHS staff by forbidding them to continue the program in any way from that moment on." 20 F.4th, at 947. That rationale also applies to the October 29 Memoranda, which were therefore final agency action under the APA.[7]

The various rationales offered by respondents and the Court of Appeals in support of the contrary conclusion lack merit.[8] First, the Court of Appeals framed the question by postulating the existence of an agency decision wholly apart from any "agency statement of general or particular applicability . . . designed to implement" that decision. 5 U.S.C. § 551(4); see 20 F.4th, at 950–951 ("The States are challenging the *Termination Decision*—not the June 1 Memorandum, the October 29 Memoranda, or any other memo."). To the extent that the Court of Appeals understood itself to be reviewing an abstract decision apart from specific agency action, as defined in the APA, that was error. It was not the case that the June 1 Memorandum and the October 29 Memoranda "simply *explained* DHS's decision," while only the decision itself "had legal effect." *Id.*, at 951. To the contrary, the June 1 Memorandum and the October 29 Memoranda were themselves the operative agency actions, each of them an "agency statement . . . designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4).

Second, and relatedly, respondents characterized the October 29 Memoranda as *post hoc* rationalizations of the June 1 Memorandum under our decision in *Regents*. Brief for Respondents 40 ("[T]he [October 29] Memoranda are nothing more than improper, post hoc rationalizations for terminating MPP."); see also 20 F.4th, at 961 (questioning how the October 29 Memoranda "[could] be anything more than *post hoc* rationalizations of the Termination Decision"). But *Regents* involved the exact opposite situation from this one. There, as here, DHS had attempted to rescind a prior administration's immigration policy, but a District Court found the rescission inadequately explained. Faced with the same two options outlined above,

7. Justice ALITO contends that the October 29 Memoranda were not final agency action because they did not obligate DHS employees to immediately cease implementing MPP; instead, they required them to do so "as soon as practicable after a final judicial decision to vacate" the District Court's injunction. App. to Pet. for Cert. 264a. But as he acknowledges, the standard for final agency action is whether the action "*result[ed] in a final determination* of 'rights or obligations.' " *Post,* at 2558 (quoting *Bennett,* 520 U.S., at 178, 117 S.Ct. 1154; emphasis added). The fact that the agency could not cease implementing MPP, as directed by the October 29 Memoranda, until it obtained vacatur of the District Court's injunction, did not make the October 29 Memoranda any less the agency's final determination of its employees' obligation to do so once such judicial authorization had been obtained.

8. One rationale that we do not address at length is the Court of Appeals' extended analogy to the D. C. Circuit's "reopening doctrine." Respondents do not defend the Court of Appeals' reliance on that doctrine. In any event, this Court has never adopted it, and the doctrine appears to be inapposite to the question of final agency action. See *National Assn. of Reversionary Property Owners v. Surface Transp. Bd.,* 158 F.3d 135, 141 (CADC 1998) (describing the doctrine as an "exception to statutory limits on the time for seeking review of an agency decision" (alterations omitted)).

then-Secretary Nielsen elected the first option rather than the second. That is, she chose to "rest on the [original] Memorandum while elaborating on [her] prior reasoning," rather than "issue a new rescission bolstered by new reasons absent from the [original] Memorandum." 591 U. S., at ——, 140 S.Ct., at 1908. As such, her elaboration "was limited to the agency's original reasons," and was " 'viewed critically' to ensure that the rescission [was] not upheld on the basis of impermissible '*post hoc* rationalization.' " *Id.*, at ——–——, 140 S.Ct., at 1908. And because the then-Secretary's reasoning had "little relationship to that of her predecessor," the Court characterized the new explanations as "impermissible *post hoc* rationalizations . . . not properly before us." *Id.*, at ——, 140 S.Ct., at 1909.

The prohibition on *post hoc* rationalization applies only when the agency proceeds by the first option from *Regents*. Under that circumstance, because the agency has chosen to "rest on [its original action] while elaborating on its prior reasoning," *id.*, at ——, 140 S.Ct., at 1908, the bar on *post hoc* rationalization operates to ensure that the agency's supplemental explanation is anchored to "the grounds that the agency invoked when it took the action," *Michigan v. EPA*, 576 U.S. 743, 758, 135 S.Ct. 2699, 192 L.Ed.2d 674 (2015). By contrast, as noted above, the Secretary here chose the second option from *Regents*, and " 'deal[t] with the problem afresh' by taking *new* agency action." 591 U. S., at ——, 140 S.Ct., at 1908. That second option can be more procedurally onerous than the first—the agency "must comply with the procedural requirements for new agency action"—but the benefit is that the agency is "not limited to its prior reasons" in justifying its decision. *Ibid.* Indeed, the entire purpose of the October 29 Memoranda was for the Secretary to "issue a new rescission bolstered by new reasons absent from the [June 1] Memorandum," *ibid.*—reasons that he hoped would answer the District Court's concerns from the first go-round. Having returned to the drawing table and taken new action, therefore, the Secretary was not subject to the charge of *post hoc* rationalization.

[15] Third, respondents invoke our decision in *Department of Commerce* v. *New York*, 588 U. S. ——, 139 S.Ct. 2551, 204 L.Ed.2d 978 (2019), to contend that DHS's failure to "hew[ ] to the administrative straight and narrow" deprives the October 29 Memoranda of the presumption of regularity that normally attends agency action, Brief for Respondents 43. As we explained in that case, "in reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Department of Commerce*, 588 U. S., at ——, 139 S.Ct., at 2573. *Department of Commerce* involved a "narrow exception to th[at] general rule" that applies where the challengers to the agency's action make a "strong showing of bad faith or improper behavior" on the part of the agency. *Id.*, at ——, 139 S.Ct., at 2574 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)). We held that exception satisfied by an accumulation of "unusual circumstances" that demonstrated an "explanation for agency action that [was] incongruent with what the record reveal[ed] about the agency's priorities and decisionmaking process." *Department of Commerce*, 588 U. S., at ——, 139 S.Ct., at 2575.

The circumstances in this case do not come close to those in *Department of Commerce*. Nothing in this record suggests a "significant mismatch between the decision the Secretary made and the rationale he provided." *Id.*, at ——, 139 S.Ct., at 2575.

Respondents direct us instead to the Government's litigation conduct. But the examples of misconduct to which respondents refer—such as a failure to timely complete the administrative record, Brief for Respondents 42—have no bearing on the legal status of the October 29 Memoranda. And in any event, they fall well short of the "strong showing of bad faith or improper behavior," *Overton Park*, 401 U.S., at 420, 91 S.Ct. 814, that we require before deviating from our normal rule that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based," *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 87 L.Ed. 626 (1943).

The Court of Appeals leveled the related but more modest charge that the Secretary failed to proceed with a sufficiently open mind. See, *e.g.*, 20 F.4th, at 955 (agency proceeded "without a hint of an intention to put the Termination Decision back on the chopping block and rethink things"). But the agency's *ex ante* preference for terminating MPP—like any other feature of an administration's policy agenda—should not be held against the October 29 Memoranda. "It is hardly improper for an agency head to come into office with policy preferences and ideas . . . and work with staff attorneys to substantiate the legal basis for a preferred policy." *Department of Commerce*, 588 U. S., at ——, 139 S.Ct., at 2574; see also *State Farm*, 463 U.S., at 59, 103 S.Ct. 2856 (Rehnquist, J., concurring in part and dissenting in part) ("As long as [an] agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration." (footnote omitted)).

And the critique is particularly weak on these facts. The Court of Appeals took the agency to task for its September 29 announcement of its "inten[tion] to issue in the coming weeks a new memorandum terminating" MPP. 20 F.4th, at 954; see *ibid.* ("Rather than announcing an intention to *reconsider* its Termination Decision, the announcement set forth DHS's *conclusion* in unmistakable terms."). But that announcement came over six weeks after the District Court's August 13 remand—a substantial window of time for the agency to conduct a bona fide reconsideration.

[16] More importantly, this Court has previously rejected criticisms of agency closemindedness based on an identity between proposed and final agency action. See *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 591 U. S. ——, ——, 140 S.Ct. 2367, 2385, 207 L.Ed.2d 819 (2020) ("declin[ing] to evaluate the [agency's] final rules under [an] open-mindedness test" where interim and final rules were "virtually identical" but procedural requirements were otherwise satisfied). Similar principles refute the Court of Appeals' criticism of the October 29 Memoranda for their failure to "alter the Termination Decision in any way." 20 F.4th, at 946. It is black-letter law that an agency that takes superseding action on remand is entitled to "reexamine[ ] the problem, recast its rationale and reach[ ] the same result." *Chenery II*, 332 U.S., at 196, 67 S.Ct. 1760; see also *Regents*, 591 U. S., at ——, 140 S.Ct., at 1934 (KAVANAUGH, J., concurring in judgment in part and dissenting in part) ("Courts often consider an agency's . . . additional explanations made . . . on remand from a court, even if the agency's bottom-line decision itself does not change.").

[17] Finally, the Court of Appeals erred to the extent it viewed the Government's decision to appeal the District Court's injunction as relevant to the question of the October 29 Memoranda's status

as final agency action. Nothing prevents an agency from undertaking new agency action while simultaneously appealing an adverse judgment against its original action. That is particularly so under the circumstances of this case. The second condition of the District Court's injunction, which purported to bind DHS to implement MPP in perpetuity subject only to congressional funding choices outside its control, as a practical matter left the Government no choice but to appeal. And the agency reasonably chose to accede to the District Court's APA analysis of the June 1 Memorandum and seek to ameliorate those concerns in the meantime.

* * *

For the reasons explained, the Government's rescission of MPP did not violate section 1225 of the INA, and the October 29 Memoranda did constitute final agency action. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion. On remand, the District Court should consider in the first instance whether the October 29 Memoranda comply with section 706 of the APA. See *State Farm*, 463 U.S. at 46–57, 103 S.Ct. 2856.

It is so ordered.

Justice KAVANAUGH, concurring.

I agree with the Court that the District Court had jurisdiction over Texas's suit. I also agree with the Court that the Government prevails on the merits of the two specific legal questions presented here. I note, moreover, that six Members of the Court agree with the Court's merits conclusion. See *post*, at 2560 (BARRETT, J., dissenting).

I write separately to briefly elaborate on my understanding of the relevant statutory provisions and to point out one legal issue that remains open for resolution on remand.

When the Department of Homeland Security lacks sufficient capacity to detain noncitizens at the southern border pending their immigration proceedings (often asylum proceedings), the immigration laws afford DHS two primary options.

Option one: DHS may grant noncitizens parole into the United States if parole provides a "significant public benefit." 8 U.S.C. § 1182(d)(5)(A). Parole entails releasing individuals on a case-by-case basis into the United States subject to "reasonable assurances" that they "will appear at all hearings." 8 C.F.R. § 212.5(d) (2020); see 8 U.S.C. § 1182(d)(5)(A). Notably, every Administration beginning in the late 1990s has relied heavily on the parole option, including the administrations of Presidents Clinton, Bush, Obama, Trump, and Biden. See Tr. of Oral Arg. 4, 49–54.

Option two: DHS may choose to return noncitizens to Mexico. 8 U.S.C. § 1225(b)(2)(C). Consistent with that statutory authority, the prior Administration chose to return a relatively small group of noncitizens to Mexico.

In general, when there is insufficient detention capacity, both the parole option and the return-to-Mexico option are legally permissible options under the immigration statutes. As the recent history illustrates, every President since the late 1990s has employed the parole option, and President Trump also employed the return-to-Mexico option for a relatively small group of noncitizens. Because the immigration statutes afford substantial discretion to the Executive, different Presidents may exercise that discretion differently. That is Administrative Law 101. See *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 59, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)

(Rehnquist, J., concurring in part and dissenting in part).

To be sure, the Administrative Procedure Act and this Court's decision in *State Farm* require that an executive agency's exercise of discretion be reasonable and reasonably explained. See *id.*, at 43, 103 S.Ct. 2856 (majority opinion); see also *FCC* v. *Prometheus Radio Project*, 592 U. S. ——, ——– ——, ——, 141 S.Ct. 1150, 209 L.Ed.2d 287 (2021); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–515, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009); 5 U.S.C. § 706. For example, when there is insufficient detention capacity and DHS chooses to parole noncitizens into the United States rather than returning them to Mexico, DHS must reasonably explain why parole provides a "significant public benefit." 8 U.S.C. § 1182(d)(5)(A); see, *e.g.*, *State Farm*, 463 U.S., at 46–57, 103 S.Ct. 2856. Review under that *State Farm* standard is deferential but not toothless. *Id.*, at 56, 103 S.Ct. 2856.

The question of whether DHS's October 29 decision satisfies the *State Farm* standard is not before this Court at this time. The Court today therefore properly leaves the *State Farm* issue for consideration on remand. See *ante*, at 2543 – 2544, 2547–2548; Tr. of Oral Arg. 67 – 68.

To be clear, when there is insufficient detention capacity and the President chooses the parole option because he determines that returning noncitizens to Mexico is not feasible for foreign-policy reasons, a court applying *State Farm* must be deferential to the President's Article II foreign-policy judgment. Cf., *e.g.*, *Trump* v. *Hawaii*, 585 U. S. ——, ——– ——, 138 S.Ct. 2392, 2408–11, 201 L.Ed.2d 775 (2018). Nothing in the relevant immigration statutes at issue here suggests that Congress wanted the Federal Judiciary to improperly second-guess the President's Article II judgment with respect to American foreign policy and foreign relations. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–637, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring); see also *Dames & Moore v. Regan*, 453 U.S. 654, 678–679, 686–688, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981).

One final note: The larger policy story behind this case is the multi-decade inability of the political branches to provide DHS with sufficient facilities to detain noncitizens who seek to enter the United States pending their immigration proceedings. But this Court has authority to address only the legal issues before us. We do not have authority to end the legislative stalemate or to resolve the underlying policy problems.

With those additional comments, I join the Court's opinion in full.

Justice ALITO, with whom Justice THOMAS and Justice GORSUCH join, dissenting.

In fiscal year 2021, the Border Patrol reported more than 1.7 million encounters with aliens along the Mexican border.[1] When it appears that one of these aliens is not admissible, may the Government simply release the alien in this country and hope that the alien will show up for the hearing at which his or her entitlement to remain will be decided?

Congress has provided a clear answer to that question, and the answer is no. By law, if an alien is "not clearly and beyond a doubt entitled to be admitted," the alien

1. U. S. Customs and Border Protection, Southwest Land Border Encounters, FY Southwest Land Border Encounters by Month (chart) (May 3, 2022), https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (showing 1,734,686 total encounters in fiscal year 2021).

"*shall* be detained for a [removal] proceeding." 8 U.S.C. § 1225(b)(2)(A) (emphasis added). And if an alien asserts a credible fear of persecution, he or she "*shall* be detained for further consideration of the application for asylum," § 1225(b)(1)(B)(ii) (emphasis added). Those requirements, as we have held, are mandatory. See *Jennings* v. *Rodriguez*, 583 U. S. ——, ——, 138 S.Ct. 830, 200 L.Ed.2d 122 (2018).

Congress offered the Executive two—and only two—alternatives to detention. First, if an alien is "arriving on land" from "a foreign territory contiguous to the United States," the Department of Homeland Security (DHS) "may return the alien to that territory pending a [removal] proceeding." § 1225(b)(2)(C). Second, DHS may release individual aliens on "parole," but "only on a case-by-case basis for urgent humanitarian reasons or a significant public benefit." § 1182(d)(5)(A).

Due to the huge numbers of aliens who attempt to enter illegally from Mexico, DHS does not have the capacity to detain all inadmissible aliens encountered at the border, and no one suggests that DHS must do the impossible. But rather than avail itself of Congress's clear statutory alternative to return inadmissible aliens to Mexico while they await proceedings in this country, DHS has concluded that it may forgo that option altogether and instead simply release into this country untold numbers of aliens who are very likely to be removed if they show up for their removal hearings. This practice violates the clear terms of the law, but the Court looks the other way.

In doing so, the majority commits three main errors. First, it unnecessarily resolves difficult jurisdictional questions on which—due to the Government's litigation tactics—we have received only hurried briefing and no argument. Second, when the majority reaches the merits, it contrives a way to overlook the clear statutory violations that result from DHS's decision to terminate the use of its contiguous-territory return authority. Finally, the majority unjustifiably faults the Court of Appeals for rejecting the Government's last-minute attempt to derail the ordinary appellate process. I cannot go along with any of this, and I therefore respectfully dissent.

I

In 2018, a surge of foreign migrants attempted to enter the United States unlawfully at the United States-Mexico border, creating a " 'humanitarian and border security crisis.' " 554 F.Supp.3d 818, 831 (ND Tex. 2021). Because existing detention facilities could not house all the people who were attempting to enter unlawfully, many "illegal aliens with meritless asylum claims were being released into the United States," and many, once released, simply " 'disappeared.' " *Ibid.* (emphasis deleted). To address this problem, DHS promulgated the Migrant Protection Protocols (MPP) in December of that year. See *id.*, at 832. The MPP program relied on Congress's express grant of authority to "return" "alien[s] . . . arriving on land . . . from a foreign territory contiguous to the United States" "to that territory pending a proceeding" to remove them to their countries of origin. § 1225(b)(2)(C).[2] MPP provided that certain non-Mexican nationals arriving at the United States border by land from Mexico would be returned to Mexico to await the results of their removal proceedings. The Mexican Government

2. That policy was almost immediately enjoined by a Federal District Court. *Innovation Law Lab v. Nielsen,* 366 F.Supp.3d 1110 (ND Cal. 2019). This Court stayed that injunction. *Wolf* v. *Innovation Law Lab,* 589 U. S. ——, 140 S.Ct. 1564, 206 L.Ed.2d 389 (2020).

agreed to cooperate and to accept aliens while they awaited removal.

While the policy was in effect, DHS issued a memorandum in which it determined that MPP was "an indispensable tool in addressing the ongoing crisis at the southern border." App. 189 (Department of Homeland Security: Assessment of the Migrant Protection Protocols (Oct. 28, 2019)). It concluded that MPP directly reduced the number of aliens unlawfully released into the United States and deterred others from attempting to cross the border unlawfully in the first place. 554 F.Supp.3d, at 833. DHS found that total border encounters decreased by 64 percent after MPP was implemented. App. 189. With MPP in place, aliens who lacked meritorious claims could no longer count on "a free ticket into the United States," and as a result, many "voluntarily return[ed] home." *Id.*, at 192. MPP also helped DHS process meritorious asylum claims "within months," rather than leaving asylum applicants "in limbo for years." *Id.*, at 190.

Hours after his inauguration on January 20, 2021, President Biden issued an Executive Order suspending MPP, and the effects on the border were immediate. According to the Government's own data, border "encounters jump[ed] from 75,000 in January 2021," when MPP was first suspended, to about "173,000 in April 2021." 554 F.Supp.3d, at 837.

Two States, Texas and Missouri, brought suit under the Administrative Procedure Act (APA) in April 2021, alleging that suspending MPP was arbitrary and capricious and violated the Immigration and Nationality Act (INA). The District Court ordered the Government to file the administrative record for the January suspension, and on May 31, 2021, the Government filed a three-line suspension memorandum as the entire administrative record. See *id.*, at 856, n. 16. The next day, in a 7-page memo issued by the Secretary, DHS terminated the already-suspended program.

The States amended their complaint to challenge the June termination decision on largely the same grounds that they had advanced with respect to the January suspension. After a consolidated preliminary injunction hearing and a trial on the merits under Federal Rule of Civil Procedure 65(a)(2), the District Court vacated the Government's decision to rescind MPP and enjoined the Secretary to continue to implement that policy "in good faith" until all the aliens in question could be detained or lawfully paroled. *Id.*, at 857. The Government sought a stay of this order, but the United States Court of Appeals for the Fifth Circuit, while expediting the Government's appeal, refused to issue a stay. 10 F.4th 538, 543–561 (2021) (*per curiam*). The Government then sought a stay in this Court, but we denied that application. 594 U. S. ——, 142 S.Ct. 926, 210 L.Ed.2d 1014 (2021).

On September 29, 2021, while briefing in the Court of Appeals was underway, DHS announced that it intended to issue a new memorandum terminating MPP, and the Government asked the Court of Appeals to hold its appeal in abeyance pending this promised administrative action. App. 51–52. The Court of Appeals denied that motion, *id.*, at 54, and then, two business days before oral argument, DHS issued two memoranda declaring that DHS had made a new decision terminating MPP. See App. to Pet. for Cert. 257a–345a. At the same time, the Government asked the Court of Appeals to hold that the case before it was moot, to vacate the District Court's judgment and injunction, and to remand the case for further proceedings. 20 F.4th 928, 946 (CA5 2021). The Fifth Circuit refused and held that the October 29 Memoranda did not moot the appeal or have any other

legal effect on the appellate proceedings. *Id.*, at 956–966, 998–1000. The Fifth Circuit then affirmed the District Court on the merits.

II

I agree with the majority that the injunction entered by the District Court in this case exceeded its "jurisdiction or authority to enjoin or restrain the operation of " the relevant statutes. § 1252(f)(1). That conclusion follows from a straightforward analysis of the text of § 1252(f)(1), as recognized by the Court's decision in *Garland* v. *Aleman Gonzalez*, 596 U. S. ——, 142 S.Ct. 2057, 213 L.Ed.2d 102 (2022). But that is where the majority and I part ways.

I agree with Justice BARRETT that the majority should not go any further and should not resolve other questions about § 1252(f)(1) without adequate briefing or argument. The Government admits that "this Court could in theory vacate the judgment below without reaching the merits," Supp. Brief for Petitioners 23, but the majority chooses to decide far more than is necessary or advisable under the circumstances.

As Justice BARRETT explains, the interpretation of § 1252(f)(1) presents difficult questions that the parties should have addressed in the briefs they filed before oral argument. In its opening brief, the Government's only discussion of this issue appeared in a footnote that reads as follows in its entirety:

> "In addition, the lower courts lacked jurisdiction to grant injunctive relief under 8 U.S.C. [§]1252(f)(1). This Court is considering the scope of Section 1252(f)(1) in *Garland* v. *Aleman Gonzalez*, No. 20–322 (argued Jan. 11, 2022)." Brief for Petitioners 18, n. 3.

That footnote's reference to the Government's brief in *Gonzalez* raised an obvious question. Section 1252(f)(1) refers to orders that "enjoin or restrain the operation of " specified statutory provisions, and in *Gonzalez*, the Government suggested that this provision should not be interpreted to apply only to injunctions. Brief for Petitioners 17–19, 32, n. 3, and Tr. of Oral Arg. 15–16, in *Garland* v. *Aleman Gonzalez*, O. T. 2021, No. 20–322. Instead, the Government refused to rule out the possibility that the provision might also apply to class-wide declaratory relief, and it analogized § 1252(f)(1) to the Tax Injunction Act, 28 U.S.C. § 1341, and cited our decision in *California v. Grace Brethren Church*, 457 U.S. 393, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982), which interpreted that provision in a " 'practical sense.' " *Id.*, at 408, 102 S.Ct. 2498.

In the present case, the Government challenged the order of the District Court "set[ting] aside" under the APA, 5 U.S.C. § 706(2), the June termination of MPP, and since this order had a practical effect that was in some respects similar to an injunction, the Government's argument in *Gonzalez* raised the question whether the Government thought that § 1252(f)(1) also barred the District Court from reviewing the termination of the MPP under the APA. That is an important question the resolution of which could have effects extending far beyond this particular dispute, and at oral argument the Solicitor General took the far-reaching position that § 1252(f)(1) does indeed bar APA review. See Tr. of Oral Arg. 13–14. But none of the papers filed by the Government in this case or in *Gonzalez* said one word about APA review. Nor did the respondents' brief. Indeed, their brief did not discuss jurisdiction at all.

Faced with this situation, the Court was correctly concerned about deciding the reach of § 1252(f)(1) and the important APA question without any briefing. The

Court could have—and, in my judgment, should have—dealt with this problem by deciding this case without saying anything about § 1252(f)(1) other than that it bars injunctive relief. Instead, with the end of the Term looming ahead, the Court directed the parties to brief these issues, but it gave them just one week to do so. And as the Court should have anticipated, those briefs raised new questions that it would have been useful to explore at argument had that been held. But determined to accommodate the Government's request that this case be decided this Term, the majority inadvisably plows ahead.

I would not do so. Because of the Government's request for a speedy decision, we established an expedited schedule for the filing of merits briefs and squeezed in oral argument on the next-to-last argument date. We would have been in a position to give thorough consideration to the § 1252(f)(1) issue if it had been addressed in the parties' regular briefs, but having relegated the issue to a terse footnote in its brief, and having been unprepared to discuss the issue at argument, the Government is not entitled to any further special treatment. We should simply vacate the decision below and remand for reconsideration in light of our decision in *Gonzalez*.[3] Nothing more is either necessary or appropriate under the circumstances.

III

The Court is not only wrong to reach the merits of this case, but its analysis of the merits is seriously flawed. First, the majority errs in holding that the INA does not really mean what it says when it commands that the aliens in question "shall" be detained pending removal or asylum proceedings unless they are either returned to Mexico or paroled on a case-by-case basis. According to the majority, it is fine for DHS simply to release these aliens en masse and allow them to disappear. Second, the majority improperly faults the Court of Appeals for refusing to allow the Government to derail the appellate process by a last-minute maneuver designed to thwart review of the manner in which it initially terminated MPP.

A

As described above, the INA gives DHS three options regarding the treatment of the aliens in question while they await removal or asylum proceedings. They may be (1) detained in this country or (2) returned to Mexico or (3) paroled on a case-by-case basis. Congress has provided no fourth option, but the majority now creates one. According to the majority, an alien who cannot be detained due to a shortage of detention facilities but could be returned to Mexico may simply be released. That is wrong.

1

The language of 8 U.S.C. § 1225(b)(2)(A) is unequivocal. With narrow exceptions that are inapplicable here,[4] it provides that every alien "who is an applicant for admission" and who "the examining immigration officer determines . . . is not clearly and beyond a

3. Alternatively, the Court could have put the case over to next Term, received full briefing, and heard argument in October.

4. Entitled "Exception," § 1225(b)(2)(B) provides:

> "Subparagraph (A) shall not apply to an alien—
>
> "(i) who is a crewman,
>
> "(ii) to whom paragraph (1) applies, or
>
> "(iii) who is a stowaway."

If anything, the narrowness of the enumerated exceptions demonstrates the force of the rule: Detention for all others is mandatory.

doubt entitled to be admitted . . . *shall be detained* for a [removal] proceeding." (Emphasis added.) Six years ago, the Government argued strenuously that this requirement is mandatory, and its brief could hardly have been more categorical or emphatic in making this point. See Brief for Petitioners in *Jennings* v. *Rodriguez*, O. T. 2017, No. 151204, p. 15 ("Aliens seeking admission who are not 'clearly and beyond a doubt entitled to be admitted' are statutorily prohibited from physically entering the United States and must be detained during removal proceedings . . ., unless the Secretary exercises his discretion to release them on parole"); *id.*, at 17 ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement. And here, the repeated 'shall be detained' clearly means what it says" (internal quotation marks and citations omitted)).

The *Jennings* Court correctly accepted that argument, which was central to our holding. See 583 U. S., at ——, 138 S.Ct., at 842 ("Read most naturally, §§ 1225(b)(1) and (b)(2) thus mandate detention of applicants for admission until certain proceedings have concluded"). But now, in an about-face, the Government argues that "shall be detained" actually means "may be detained." See Brief for Petitioners 29 ("[T]he Court will not construe a provision stating that law enforcement 'shall' take some action as a 'true mandate' absent 'some stronger indication from the . . . Legislature' ").

The Government was correct in *Jennings* and is wrong here. "[S]hall be detained" means "shall be detained." The Government points out that it lacks the facilities to detain all the aliens in question, and no one questions that fact. But use of the contiguous-return authority would at least reduce the number of aliens who are released in violation of the INA's command. The District Court made a factual finding that rescinding MPP would cause additional violations of Congress's unambiguous detention mandate. 554 F.Supp.3d, at 851–852. It also found that "the termination of MPP has contributed to the current border surge" by giving aliens the "perverse incentiv[e]," *id.*, at 837, App. 196, to cross the border illegally in hopes of being paroled and released. *Id.*, at 79. Thus, the Government is failing to meet the statutory detention mandate, not only because of limitations on its detention capacity but also because it refuses to use the contiguous-territory return authority.

Other than the argument that "shall" means "may," the Government's only other textual argument is that it is paroling aliens "on a case-by-case basis for urgent humanitarian reasons or significant public benefit," as permitted under § 1182(d)(5)(A). But the number of aliens paroled each month under that provision—more than 27,000 in April of this year [5]—gives rise to a strong inference that the Government is not really making these decisions on a case-by-case basis. The Government argues that respondents had the burden to show that it is not making case-by-case determinations and that they have not met that burden, see Brief for Petitioners 34, but information about the true

5. See, *e.g.*, Defendants' Monthly Report for April 2022 in No. 2:21–cv–67, ECF Doc. 139, p. 4 (ND Tex., May 16, 2022) (''For the month of April 2022, DHS reported that the total number of applicants for admission under Section 1225 paroled into the United States was 91,250. This figure combines 88,452 [Customs and Border Patrol] grants of parole . . . and 27,654 individuals '. . . Paroled into the U. S. on a case-by-case basis pursuant to 8 U.S.C. § 1182(d)(5)' ''); see also Defendants' Monthly Report for March 2022, ECF Doc. 136, p. 3.

nature of these proceedings is in the Government's possession, and it has revealed little about what actually takes place. At argument, however, the Solicitor General argued that the case-by-case determination requirement can be met simply by going through a brief checklist for each alien. See Tr. of Oral Arg. 58–60. Even the rudimentary step of verifying that an alien does not have a criminal record is not performed in every case. *Id.*, at 31. Such procedures are inconsistent with the ordinary meaning of "case-by-case" review, and as the Court of Appeals pointed out, the circumstances under which § 1182(d)(5)(B)) was adopted bolster that conclusion. See 20 F.4th, at 947 (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" (citing T. Aleinikoff et al., Immigration and Citizenship: Process and Policy 300 (9th ed. 2021))).

The majority claims that the Government's use of its parole authority under § 1182(d)(5)(A) is not before us, *ante,* at 2543 – 2544, but the Government cites that authority as a reason why it does not need to use its contiguous-territory return authority. Brief for Petitioners 6, 33–36. Moreover, the District Court's judgment relied on factual findings regarding DHS's abuse of its parole authority on the record that the Government provided. 554 F.Supp.3d, at 837.

For these reasons, § 1182(d)(5)(A) cannot justify the release of tens of thousands of apparently inadmissible aliens each month, and that leaves the Government with only one lawful option: continue to return inadmissible aliens to Mexico. See § 1225(b)(2)(C).

2

The majority's chief defense of the Government's rejection of MPP is based on a blinkered method of statutory interpretation that we have firmly rejected. The majority largely ignores the mandatory detention requirement imposed by § 1225(b)(2)(A) and, instead, reads the contiguous-return provision, § 1225(b)(2)(C), in isolation. That provision says that the Secretary "may" return aliens to the country from which they entered, not that the Secretary must do so, and for the majority, that is enough to show that use of that authority is not required.

That reading ignores "the statutory structure" of the INA, *ante*, at 2541 – 2542, and wrongly "confine[s] itself to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). We have an obligation to read the INA as a "coherent regulatory scheme." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995); see also *FTC* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 389, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959); *Epic Systems Corp.* v. *Lewis*, 584 U. S. ——, ——, 138 S.Ct. 1612, 1624, 200 L.Ed.2d 889 (2018); A. Scalia & G. Garner, Reading Law 180 (2012) (describing the "harmonious-reading canon"). And if we follow that canon, the majority's interpretation collapses.

Read as a whole, the INA gives DHS discretion to choose from among only three options for handling the relevant category of inadmissible aliens. The Government must either: (1) detain them, (2) return them to a contiguous foreign nation, or (3) parole them into the United States on an individualized, case-by-case basis. These options operate in a hydraulic relationship: When it is not possible for the

Government to comply with the statutory mandate to detain inadmissible aliens pending further proceedings, it must resort to one or both of the other two options in order to comply with the detention requirement to the greatest extent possible.

There is nothing strange about this interpretation of how the relevant provisions of the INA work together. Consider this example. Suppose a state law provides that every school district "shall" provide a free public education to every student from kindergarten through the 12th grade and that another statute says that a district "may" arrange for its students to attend high school in an adjacent district. A small district refuses to operate its own high school because it lacks the necessary funds, and this district also declines to arrange for its students to attend a school in an adjacent district because the law says only that a district "may" take that course of action. Refusing to exercise this discretionary authority, the district throws up its hands and says to its high school students: "We're sorry. If you want to go to high school, you will have to make your own arrangements and foot the bill." If those students sue, would any court sustain what the district did?

Other examples come readily to mind. Suppose that a building code says that every multi-unit residential building "shall" have at least two means of egress from upper floors, and suppose that another provision says that such a building "may" have an external fire escape. The owner of such a building refuses to construct a second internal stairway because the cost would be prohibitive and also declines to install a fire escape because the law says that option is discretionary. Would the owner's non-compliance be permitted?

Here is one more example. A State that operates its own motor vehicle inspection facilities has a law that says that every vehicle "shall" be inspected every year. The law also says that motorists "may" have their vehicles inspected at a licensed private garage. A motorist fails to have his car inspected because he must work during the time when the state facility is open and would be fired if he took time off. This motorist also declines to have his car inspected at a private garage that is open during his off hours because the law says only that he "may" use such a facility. Would the motorist escape a citation?

The answer in each of the above examples is that the failure to make use of the discretionary option would not be seen as a valid excuse for non-compliance with the command that certain conduct "shall" be performed, and it is also hard to see the difference between those examples and the situation here.

3

The majority's main reason for rejecting the argument just described is that the contiguous-return provision does not say expressly that it was meant to "operate as a mandatory cure of any non-compliance with the Government's detention obligations." *Ante*, at 2541. But what logic compels need not be stated expressly.

The majority also relies on the fact that the contiguous- return provision was enacted 90 years after the provision requiring detention and the fact that the circumstances under which the contiguous-return provision was adopted suggest that it was intended to serve only a "humble role." *Ante*, at 2542 – 2543. Those circumstances cannot change what the relevant provisions say or the way in which they logically work together. See *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005) ("Extrinsic materials have a role in statutory interpretation only to the extent that

they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms"). The Court should not use extra-textual evidence to demote one of DHS's three lawful alternatives to the status of a historical footnote.

The majority and the concurrence fault the lower courts for intruding upon the foreign policy authority conferred on the President by Article II of the Constitution. *Ante*, at 2542 – 2543 (majority opinion); *ante*, at 2549 (opinion of KAVANAUGH, J.). But enforcement of immigration laws often has foreign relations implications, and the Constitution gives Congress broad authority to set immigration policy. See Art. I, § 8, cl. 4. This means, we have said, that "[p]olicies pertaining to the entry of aliens" are "entrusted *exclusively* to Congress." *Galvan v. Press*, 347 U.S. 522, 531, 74 S.Ct. 737, 98 L.Ed. 911 (1954) (emphasis added). The President has vital power in the field of foreign affairs, so does Congress, and the President does not have the authority to override immigration laws enacted by Congress. Indeed, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring). And it is Congress, not the Judiciary, that gave the Executive only three options for dealing with inadmissible aliens encountered at the border.

Finally, the majority emphasizes the fact that prior administrations have also failed to detain inadmissible aliens, but that practice does not change what the law demands. The majority cites no authority for the doctrine that the Executive can acquire authority forbidden by law through a process akin to adverse possession.

B

Not only does the majority fail to heed the clear language of the INA, but it gratuitously faults the Court of Appeals for what appears to be a fairly modest and correct conclusion: that the October 29 Memoranda purporting to re-terminate MPP did not ultimately affect the merits of the appeal of the judgment that was before that court. The Government issued its October 29 Memoranda after briefing in the Court of Appeals had been completed and only days before the appeal was set to be argued. Based on those memoranda, the Government asked the Court of Appeals to vacate the judgment below, but it did not provide a full administrative record or give the District Court an opportunity to review the purported new decision in the first instance by filing a Rule 60(b) motion.[6] The majority now says that the Court of Appeals erred by failing to treat the October 29 Memoranda as a new, final agency action, but the majority does not say what applying that label would have required the Fifth Circuit to do differently.

As I see it, the Government's litigation tactic—filing the October 29 Memoranda with a suggestion of mootness but without seeking to dismiss its appeal—could have triggered one of four responses from the Court of Appeals. The Court of Appeals could have (1) dismissed the appeal as moot and vacated the District Court's judgment and injunction; (2) held the appeal in abeyance for an unspecified time; (3) evaluated the October 29 Memoranda

6. See generally 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2961 (3d ed. 2013).

as final agency action in the first instance under the APA; or (4) concluded that the October 29 Memoranda did not affect the appeal, which challenged the June termination. The Court of Appeals picked the fourth option, and taking each option in turn, I will explain why that was the response best suited to avoid derailing the ordinary appellate process.

First, the October 29 Memoranda did not moot the appeal. A case becomes moot only if it is impossible for the court to " 'grant any effectual relief.' " *Chafin v. Chafin*, 568 U.S. 165, 172, 133 S.Ct. 1017, 185 L.Ed.2d 1 (2013). Under this high standard, the Fifth Circuit was correct that the case was not moot. Although the Government claimed that the appeal was moot, it asked the Court of Appeals for relief, namely, vacatur of District Court's injunction. It was compelled to take that position because the October 29 Memoranda, by their own terms, did not take effect as long as that injunction remained in force. See 20 F.4th, at 957. And without an appellate decision holding that the INA allows the Government to release aliens who could be returned to Mexico, the issuance of a new administrative order terminating MPP could not provide a ground for vacating the injunction. It is telling that the Government's briefing in this Court never suggests that the case was moot at the time of the Fifth Circuit's decision or that the case is now moot.

Second, the Court of Appeals did not err by declining to hold the appeal in abeyance. The Government originally asked the Court of Appeals to hold the appeal while it completed the process of issuing a new termination decision, but by the time of oral argument in that court, the Government claimed that such a decision had been issued. And the Government did not file a motion in the District Court to vacate its judgment under Federal Rule of Civil Procedure 60(b). The Government had sought to expedite proceedings at every stage, including by seeking emergency relief in the Fifth Circuit and this Court, and under these circumstances, it was eminently reasonable for the Court of Appeals to conclude that additional delay would not have served the interests of "economy of time and effort." *Landis v. North American Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936).

Third, the Court of Appeals correctly concluded that the October 29 Memoranda could not satisfy our criteria for a final agency action that could be reviewed in the first instance in the Court of Appeals under the APA. Like this Court, the courts of appeal are courts of " 'review, and not first view.' " *City of Austin* v. *Reagan Nat. Advertising of Austin, LLC*, 596 U. S. ——, —— – ——, 142 S.Ct. 1464, 1476, 212 L.Ed.2d 418 (2022) (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 201, 132 S.Ct. 1421, 182 L.Ed.2d 423 (2012)). With no administrative record for the October 29 Memoranda before it, the Court of Appeals was in a poor position to assess whether the memoranda actually "mark[ed] the consummation of the agency's decisionmaking process," *Bennett v. Spear*, 520 U.S. 154, 178, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (internal quotation marks omitted). Moreover, the October 29 Memoranda did not purport to result in a final determination of " 'rights or obligations.' " *Ibid.* As DHS acknowledged, "the termination of MPP" could not "be implemented" until there was "a final judicial decision to vacate the . . . injunction." App. to Pet. for Cert. 264a, 270a. And until that was accomplished, the memoranda did not impose on DHS officers or employees any " 'obligatio[n]' " to cease implementation of MPP. *Bennett*, 520 U.S., at 178, 117 S.Ct. 1154. On this basis, the Fifth Circuit rightly understood that the October 29 Memoranda could have no legal effect while DHS

was bound by an injunction to implement MPP in good faith and that this injunction would remain in force unless the Government's challenge to the June termination was decided in its favor.[7]

Even if the Fifth Circuit had somehow concluded that the October 29 Memoranda constituted final agency action with some future legal consequences, the Court does not explain what the Fifth Circuit should have done differently in the circumstances it faced. The Fifth Circuit had little ability to review whether the agency had acted reasonably. See *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). And the Fifth Circuit provided a reasonable explanation for its actions.

With these three options off the table, the Fifth Circuit reasonably chose the fourth option. It correctly concluded that the October 29 Memoranda did not affect its ability to review the District Court judgment. To find fault with proceeding in that fashion, the majority seems to assume that an administrative agency may obviate a district court decision setting aside agency action under § 706 of the APA by pursing the following course of conduct: first, appeal the district court decision; second, take a purportedly "new" action that achieves the same result as the one previously set aside; and third, while declining to seek vacatur of the earlier judgment in the district court, ask the court of appeals to vacate that judgment without reviewing its correctness or the lawfulness of the second action. The Court of Appeals was correct to view this as an effort to thwart the normal appellate process.

* * *

While I would affirm the Fifth Circuit if we reached the merits, I agree with the majority that the District Court on remand should consider in the first instance whether the October 29 Memoranda complied with § 706 of the APA. The District Court should assess, among other things, whether it is "arbitrary and capricious" for DHS to refuse to use its contiguous-territory return authority to avoid violations of the statute's clear detention mandate; whether the deterrent effect that DHS found MPP produced in reducing dangerous attempted illegal border crossings, as well as MPP's reduction of unmeritorious asylum claims, is adequately accounted for in the agency's new decision; and whether DHS's rescission of MPP is causing it to make parole decisions on an unlawful categorical basis rather than case-by-case, as the statute prescribes.

7. The majority concludes that the October 29 Memoranda had legal consequences because they represented DHS's "final determination of its employees' obligation" to terminate MPP, even if that "'determination'" could not generate any obligations until the agency "obtained vacatur of the District Court's injunction." *Ante*, at 2545, n. 7 (emphasis deleted). This expansive, formalist approach to the second *Bennett* factor is at odds with the usual "'pragmatic' approach we have long taken to finality." *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 599, 136 S.Ct. 1807, 195 L.Ed.2d 77 (2016) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). "To determine when an agency action is final, we have looked to, among other things, whether its impact 'is sufficiently direct and immediate' and has a 'direct effect on . . . day-to-day business.'" *Franklin v. Massachusetts*, 505 U.S. 788, 796–797, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992) (quoting *Abbott Laboratories*, 387 U.S., at 152, 87 S.Ct. 1507). By their own terms, as the majority acknowledges, the October 29 Memoranda had no direct or immediate effect on the day-to-day business of DHS employees. To conclude that such future agency intentions may nevertheless meet the formal definition of final agency action may result in many agencies facing judicial scrutiny over interim rules, guidance documents, letters, and informal opinions that may not bind anyone now or even later.

Justice BARRETT, with whom Justice THOMAS, Justice ALITO, and Justice GORSUCH join as to all but the first sentence, dissenting.

I agree with the Court's analysis of the merits—but not with its decision to reach them. The lower courts in this case concluded that 8 U.S.C. § 1252(f)(1), a provision of the Immigration and Nationality Act sharply limiting federal courts' "jurisdiction or authority to enjoin or restrain the operation of " certain immigration laws, did not present a jurisdictional bar. Just two weeks ago, however, we repudiated their reasoning in *Garland* v. *Aleman Gonzalez*, 596 U. S. ——, 142 S.Ct. 2057, 213 L.Ed.2d 102 (2022). Because we are a court of review and not first view, I would vacate and remand for the lower courts to reconsider their assertion of jurisdiction in light of *Aleman Gonzalez*.

* * *

Section 1252(f)(1) provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of " specified immigration provisions, except as applied to "an individual alien against whom proceedings under [those provisions] have been initiated." Some lower courts have narrowly interpreted this provision, holding that it does not bar relief that a plaintiff frames as "requir[ing]" (rather than preventing) the Government's enforcement of or compliance with the covered immigration laws. *E.g.*, 20 F.4th 928, 1004 (CA5 2021). In this case, that was the only ground pressed by respondents below and relied on by the lower courts to hold that § 1252(f)(1) did not "ba[r] jurisdiction." *Ibid.*; see App. to Pet. for Cert. 184a; Brief for Appellees in No. 21–10806 (CA5), pp. 40–41. But we just rejected this interpretation in *Aleman Gonzalez*. There, we held that § 1252(f)(1) deprives lower courts of "jurisdiction to entertain" requests for "injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions" (subject to an exception, indisputably inapplicable to this case, for a suit by an individual noncitizen in proceedings under those provisions). 596 U. S., at ——, ——, 142 S.Ct., at 2062–2063, 2064–2065.

In the normal course, we would vacate and remand this case for further proceedings in light of *Aleman Gonzalez*. Instead, the Court plows ahead to break new jurisdictional ground. Acting on a compressed timeline, it embraces a theory of § 1252(f)(1) that—so far as I can tell—no court of appeals has ever adopted: that § 1252(f)(1) limits only the lower courts' remedial authority, not their subject-matter jurisdiction. The only court of appeals to have addressed this theory rejected it. *Miranda v. Garland*, 34 F.4th 338, 354–356 (CA4 2022). Still, the Court is confident enough to proceed based on short, barely adversarial supplemental briefs. (The United States' original brief devoted only a conclusory footnote to the jurisdictional question, and Texas and Missouri did not respond.) And these supplemental briefs are particularly unhelpful because, having been submitted prior to our decision in *Aleman Gonzalez*, they could not address that decision's significance for this case. In fact, they devoted a considerable portion of their allotted length to the issue that *Aleman Gonzalez* subsequently resolved.

This would all matter less if the jurisdictional question were easy or unimportant—but it is neither. The Court's opinion papers over difficult issues, as I will discuss below, and its jurisdictional holding is likely to affect many cases. See, *e.g.*, *Texas v. Biden*, —— F. Supp. 3d ——, ——, 2022 WL 658579, *14 (ND Tex., Mar. 4, 2022) (§ 1252(f)(1) does not bar Texas' claim that the Federal Government is wrongly refus-

ing to detain noncitizens to determine if they have COVID–19); Defendants' Opposition to Plaintiffs' Motion for Temporary Restraining Order 8–9 in *Arizona* v. *CDC*, Civ. No. 6:22–cv–00885 (WD La., Apr. 22, 2022) (arguing that § 1252(f)(1) prohibits a district court from constraining the Federal Government's removal discretion in litigation challenging termination of Title 42 order). We should not short circuit the ordinary process.

I have several doubts about the Court's analysis of § 1252(f)(1). To begin with, the Court assumes that we face an either/or choice between subject-matter jurisdiction and remedial authority, with the former being only about a court's authority to decide merits questions and the latter being only about the relief a court can grant. *Ante*, at 2554. This dichotomy makes the Court's job easier, because it can use the obvious point that § 1252(f)(1) strips lower courts of remedial authority to establish that § 1252(f)(1) does *not* strip them of subject-matter jurisdiction. But why is it a binary choice? I would think that Congress is free to link a court's subject-matter jurisdiction to its remedial authority. That is not so different from an amount-in-controversy requirement, which conditions a district court's ability to address the merits on the relief that the plaintiff seeks. See, *e.g.*, 28 U.S.C. § 1332 (district courts have subject-matter jurisdiction over diversity cases only when the amount in controversy exceeds $75,000). And the redressability requirement of Article III itself establishes a tie between jurisdiction and remedies, because a court's inability to order effective relief deprives it of jurisdiction to decide the merits of a question otherwise within its competence. See, *e.g.*, *California* v. *Texas*, 593 U. S. ——, ——, 141 S.Ct. 2104, 2115, 210 L.Ed.2d 230 (2021) (redressability "consider[s] the relationship between 'the judicial relief requested' and the 'injury' suffered"); *Los Angeles v. Lyons*, 461 U.S. 95, 105–107, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (failure to allege sufficient likelihood of future injury deprives a federal court of Article III "jurisdiction to entertain [the count] of the complaint" seeking injunctive relief).

So it seems to me quite possible that § 1252(f)(1) withdraws subject-matter jurisdiction over cases seeking certain remedies. Indeed, while the Government has a theory for why the Court can reach the merits in this case, it characterizes § 1252(f)(1) as imposing "jurisdictional limitations" that "speak to 'a court's *power*' " and " 'can never be forfeited or waived.' " Supplemental Brief for Petitioners 19–20; see also *Miranda*, 34 F.4th, at 354 (concluding that "§ 1252(f)(1) is a jurisdiction-stripping statute" that cannot be waived). If there is a reason to treat limitations on subject-matter jurisdiction and limitations on remedial authority as mutually exclusive—either in general or in this statutory scheme—the Court does not explain it.

The Court breezes past other questions too. Most notably, it gives surprisingly little attention to a phrase on which it places significant weight: § 1252(f)(1)'s parenthetical exempting "the Supreme Court" from its general bar on "jurisdiction or authority." The parties hardly discuss this parenthetical, which does not appear to have an analogue elsewhere in the United States Code. The Court, however, takes the phrase as conclusive evidence that § 1252(f)(1) does not deprive district courts of subject-matter jurisdiction over "non-individual claims under [the covered provisions]," because if it did, "no such claims could ever arrive at this Court, rendering the provision's specific carveout for Supreme Court injunctive relief nugatory." *Ante*, at 2532.

While this interpretation has some surface appeal, the Court does not explain how it would work. Does it mean that the restriction on remedial authority is subject to waiver or forfeiture, so that a lower court can sometimes properly enter non-individual injunctive relief that this Court can then review? That a district court has the authority to enter some kinds of non-individual relief (for example, a classwide declaratory judgment) and that this Court can enter different relief (for example, a classwide injunction) on review of that judgment? Or that this Court can enter an injunction on appeal if the district court *could* have entered at least one form of relief, even if it actually entered only relief that exceeded its authority?* Or perhaps the parenthetical serves the very different purpose of clarifying that § 1252(f)(1) does not disturb any pre-existing authority this Court has under the All Writs Act or other sources. These are difficult questions, yet the Court does not address any of them.

Indeed, the Court explicitly chooses *not* to opine on some of the issues that might help explain the parenthetical's unusual reservation. See *ante*, at 2540, n. 4. For example, the Court declines to decide whether the bar in § 1252(f)(1) is subject to forfeiture, even though that is a defining feature of nonjurisdictional rules. See, *e.g.*, *Hamer* v. *Neighborhood Housing Servs. of Chicago*, 583 U. S. ——, ——–——, 138 S.Ct. 13, 199 L.Ed.2d 249 (2017). It reserves the question whether § 1252(f)(1) bars declaratory relief, an issue on which there are conflicting views. Compare *Alli v. Decker*, 650 F.3d 1007, 1013 (CA3 2011) (it does not bar declaratory relief), with *id.*, at 1019–1021 (Fuentes, J., dissenting) (it does), with *Hamama v. Adducci*, 912 F.3d 869, 880, n. 8 (CA6 2018) (it depends). And it avoids a position on whether § 1252(f)(1) prevents a lower court from vacating or setting aside an agency action under the Administrative Procedure Act. See 5 U.S.C. § 706(2). Not that I fault the Court for holding back. Quite the contrary: The questions surrounding § 1252(f)(1) are complex and deserve more attention than we can give them in this posture.

As a final touch, the Court asserts that our precedent has already charted this course. *Ante*, at 2539 – 2541. But the Court cannot muster much on that front. It cites a passing statement rejecting an inapposite argument that § 1252(f)(1) is a jurisdictional *grant*, see *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999), a brief discussion from a plurality opinion in a case where the § 1252(f)(1) issue had not been briefed or argued by the parties in this Court, see *Nielsen* v. *Preap*, 586 U. S. ——, ——–——, 139 S.Ct. 954, 962–963, 203 L.Ed.2d 333 (2019), and a dissent, see *Jennings* v. *Rodriguez*,

* For instance, in this case, the States sought declaratory relief, injunctive relief, and vacatur of the Government's termination of the Migrant Protection Protocols, but the District Court expressly entered only the latter two. If the District Court could have issued a declaratory judgment, perhaps this Court could exercise appellate jurisdiction even if the District Court lacked authority to issue an injunction or vacatur. The Court suggests that this happened in *Nielsen* v. *Preap*, 586 U. S. ——, 139 S.Ct. 954, 203 L.Ed.2d 333 (2019), in which, it says, the District Court also awarded only injunctive relief. *Ante*, at 2539. But the issue is more complicated than the Court lets on. *Preap* involved consolidated cases. In the first, the plaintiffs sought declaratory and injunctive relief, but the District Court entered only the latter. See *Preap v. Johnson*, 303 F.R.D. 566, 587 (ND Cal. 2014). In the second, however, the District Court entered "only [a] declaratory ruling," with no accompanying injunction. *Khoury v. Asher*, 3 F.Supp.3d 877, 892 (WD Wash. 2014). So unlike today's case, *Preap* did not involve only a hypothetical declaratory judgment.

583 U. S ——, ——, 138 S.Ct. 830, 875–876, 200 L.Ed.2d 122 (2018) (opinion of BREYER, J.). None provides a clear roadmap for this case.

* * *

Given all this, I would tread more carefully. We should let the lower courts be the first to address the substantial antecedent questions that § 1252(f)(1) presents in light of our hot-off-the-presses decision in *Aleman Gonzalez*. I respectfully dissent.

Anibal CANALES, Jr.

v.

Bobby LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division

No. 20-7065

Supreme Court of the United States.

Decided June 30, 2022

The petition for a writ of certiorari is denied.

Justice SOTOMAYOR, dissenting from the denial of certiorari.

A jury sentenced Anibal Canales, Jr., to death without hearing any meaningful evidence about why life in prison might be punishment enough. The mitigating evidence put on by Canales' counsel was so thin that the prosecutor remarked in closing that it was " 'an incredibly sad tribute that when a man's life is on the line, about the only good thing we can say about him is he's a good artist.' " *Canales v. Davis*, 966 F.3d 409, 417 (C.A.5 2020) (Higginbotham, J., dissenting) (*Canales II*). In reality, whether to sentence Canales to death was a far more complicated question. Competent counsel would have told the jury of "a tragic childhood rife with violence, sexual abuse, poverty, neglect, and homelessness"; of Canales' kindness to his mother and sisters; and "of a man beset by PTSD, a failing heart, and the dangers of prison life" when he committed the crime for which he was sentenced to die. *Ibid.* The jury had no chance to balance this humanizing evidence against the State's case.

A divided panel of the Court of Appeals for the Fifth Circuit nonetheless held that defense counsel's deficient performance did not prejudice Canales. In the majority's view, the State's case was so weighty that this mitigating evidence would have made no difference. That was wrong, as Judge Higginbotham fully explained in his dissent, *id.*, at 417–418, 420–428, and as our precedents make clear, see *Porter v. McCollum*, 558 U.S. 30, 41–42, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (*per curiam*); *Rompilla v. Beard*, 545 U.S. 374, 390–393, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *Wiggins v. Smith*, 539 U.S. 510, 536–537, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Williams v. Taylor*, 529 U.S. 362, 397–398, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

The Constitution guarantees fundamental rights even to those who commit terrible crimes. Whether to impose the ultimate punishment of death is a complex judgment that requires viewing the defendant as a full and unique individual. Such careful consideration is impossible when incompetent defense counsel prevents the jury from hearing substantial mitigating evidence, leaving nothing to consider but the defendant's crimes. Here, there is more than a reasonable probability that the undisclosed mitigating evidence would have led at least one juror to choose life in

ATTACHMENT C

Robert MESTANEK; Mary Mestanek, Plaintiffs – Appellants,

v.

Ur M. JADDOU, Director, United States Citizenship and Immigration Services, Defendant – Appellee.

No. 22-2285

United States Court of Appeals, Fourth Circuit.

Argued: December 5, 2023

Decided: February 13, 2024

Background: Native and citizen of Czech Republic and his United States citizen wife brought action seeking judicial review of United States Citizen and Immigration Services' (USCIS) denial of his petitions for immediate family immigrant visas. The United States District Court for the District of South Carolina, Bruce H. Hendricks, J., 2022 WL 17841270, entered summary judgment in USCIS's favor, and plaintiffs appealed.

Holdings: The Court of Appeals, Wilkinson, Circuit Judge, held that:

(1) Homeland Security Act did not prohibit USCIS from investigating marriage fraud when adjudicating petitions for immigrant visas;

(2) certified administrative record provided by USCIS was complete for purposes of judicial review;

(3) USCIS applied proper legal standard for marriage fraud in denying petition;

(4) husband's first wife's confession that their marriage had been sham fell within scope of exception to rule permitting petitioner to inspect record of proceeding for unknown derogatory information;

(5) there was sufficient evidence to support USCIS's denial of petition; and

(6) USCIS did not violate citizen's and husband's procedural due process rights.

Affirmed.

1. Administrative Law and Procedure ⚿1743

Court of Appeals will uphold agency's decision so long as it finds that agency acted within zone of reasonableness. 5 U.S.C.A. § 706(2)(A).

2. Aliens, Immigration, and Citizenship ⚿183

Homeland Security Act did not prohibit United States Citizen and Immigration Services (USCIS) from investigating marriage fraud when adjudicating petitions for immigrant visas, even though Act generally assigned Immigration and Naturalization Service's adjudicative functions to USCIS and its investigative program to Immigration and Customs Enforcement (ICE), and Customs and Border Patrol (CBP); Immigration and Nationality Act (INA) instructed adjudicator of immediate relative petitions to conduct "investigation of the facts in each case" before approving or denying request to recognize noncitizen as immediate relative, and Secretary of Homeland Security had transferred adjudication of immediate relative petitions to USCIS. 6 U.S.C.A. §§ 251(4), 271(b); Immigration and Nationality Act § 204, 8 U.S.C.A. § 1154; 8 C.F.R. § 103.2(b)(7).

3. Administrative Law and Procedure ⚿1632(5)

When agency certifies that administrative record it has provided to court is complete, courts generally presume it to be so absent clear evidence to the contrary.

4. Aliens, Immigration, and Citizenship ⚿207

Certified administrative record provided by United States Citizen and Immigration Services (USCIS) in connection with its denial of petitions for immediate family immigrant visas was complete for purposes of judicial review, despite noncitizen's contention that record was missing three items; one item was in fact included in record, and there was nothing in record indicating that other items had ever existed.

5. Administrative Law and Procedure ⚿1901

Court of Appeals will not presume that agency misapplied its own standard unless there is good reason to suspect it did so.

6. Aliens, Immigration, and Citizenship ⚿205, 206

United States Citizen and Immigration Services (USCIS) applied proper legal standard for marriage fraud in denying United States citizen's petition for immediate family visa for her husband, even though USCIS did not cite Board of Immigration Appeals (BIA) decision that clarified standard of proof governing marriage fraud bar's application; BIA decision did not change standard, USCIS referenced appropriate "substantial and probative evidence" standard, and evidence cited by USCIS—including noncitizen's first wife's statement that their marriage was fraudulent—clearly satisfied "substantial and probative evidence" standard. Immigration and Nationality Act § 204, 8 U.S.C.A. § 1154; 8 C.F.R. § 204.2(a)(1)(ii).

7. Aliens, Immigration, and Citizenship ⚿206

Husband's first wife's confession that their marriage had been sham fell within scope of exception to rule permitting petitioner to inspect record of proceeding for derogatory information considered by United States Citizen and Immigration Services (USCIS) in adjudicating United States citizen's petition for immediate family visa for her husband; USCIS advised petitioner and her husband of his first wife's confession and provided them with enough information about confession to allow them chance for rebuttal. 8 C.F.R. § 103.2(b)(16)(i).

8. Aliens, Immigration, and Citizenship ⚿206

There was sufficient evidence to support United States Citizen and Immigration Services' (USCIS) denial of United States citizen's petition for immediate family visa for her husband pursuant to marriage fraud bar, notwithstanding documents evincing true marital relationship between husband and his first wife, and first wife's recantation of her confession that their marriage had been sham, in light of first wife's confession, evidence that recantation had been signed in office of husband's attorney, and other evidence corroborating confession. Immigration and Nationality Act § 204, 8 U.S.C.A. § 1154(c).

9. Aliens, Immigration, and Citizenship ⚿205, 206

Constitutional Law ⚿4438

United States Citizen and Immigration Services' (USCIS) denial of United States citizen's petition for immediate family visa for her husband pursuant to marriage fraud bar did not violate citizen's and husband's procedural due process rights; USCIS applied proper standard in making its marriage-fraud determination, USCIS met its burden to provide them with derogatory evidence in accordance with its regulations, they had chance to respond and submit rebuttal evidence, and USCIS issued careful decision considering that rebuttal evidence and explaining why it did

not refute agency's initial findings. U.S. Const. Amend. 5; Immigration and Nationality Act § 204, 8 U.S.C.A. § 1154(c); 8 C.F.R. § 103.2(b)(16)(i).

10. Constitutional Law ⚿3879

Due process requires only opportunity to be heard at meaningful time and in meaningful manner. U.S. Const. Amend. 5.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Bruce H. Hendricks, District Judge. (2:20–cv–02811–BHH)

ARGUED: Bradley Bruce Banias, BANIAS LAW, LLC, Charleston, South Carolina, for Appellants. Julian Michael Kurz, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C. for Appellee. ON BRIEF: Brian M. Boynton, Principal Deputy Assistant Attorney General, William C. Peachey, Director, District Court Section, Sarah Vuong, Senior Litigation Counsel, Office of Immigration Litigation, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Before WILKINSON, KING and THACKER, Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge King and Judge Thacker joined.

WILKINSON, Circuit Judge:

This appeal concerns the second of two Form I-130 petitions filed on behalf of Robert Mestanek, a native and citizen of the Czech Republic. Both petitions sought to establish that Robert was the bona fide spouse of a U.S. citizen and thus eligible for lawful permanent residence in the United States. The first petition was filed by Robert's then-wife Angel Simmons in August 2013, and the second by Robert's current wife Mary Mestanek in December 2015. U.S. Citizen and Immigration Services (USCIS) denied both petitions—the first because it found that Robert's marriage to Angel was fraudulent, and the second based on the "marriage fraud bar," which prohibits the approval of Form I-130 petitions on behalf of any noncitizen who has previously been found to have entered into a fraudulent marriage in order to circumvent immigration laws. *See* 8 U.S.C. § 1154(c).

Robert and Mary ("the Mestaneks") filed suit in federal district court seeking judicial review of USCIS's denial of Mary's Form I-130 petition. The district court granted summary judgment in favor of USCIS, and the Mestaneks timely appealed. Because we agree with the district court that USCIS's denial was neither arbitrary nor contrary to law, we affirm.

I.

U.S. citizens seeking to obtain lawful permanent resident status for their noncitizen spouses must initiate the process by submitting to USCIS a Form I-130, Petition for Alien Relative. If USCIS determines that the marriage between the citizen and the noncitizen is bona fide, it approves the petition and officially recognizes the noncitizen as an "immediate relative" of the petitioner. The noncitizen may then apply for lawful permanent resident status using Form I-485, Application to Register Permanent Residence or Adjust Status, which is often filed concurrently with the Form I-130 petition.

A citizen who files a Form I-130 petition on behalf of her spouse bears the burden of establishing that her spouse is eligible for the benefit. As part of that burden, she must establish not only the validity of her marriage to the noncitizen, but also "the legal termination of all previous marriages." 8 C.F.R. § 204.2(a)(2).

Additionally, USCIS is prohibited from approving any Form I-130 application on behalf of a noncitizen who "has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws." 8 U.S.C. § 1154(c)(2). This prohibition—known as the "marriage fraud bar"—applies not only to a petition predicated on a fraudulent marriage, but also to any future petitions filed on behalf of the same beneficiary, regardless of merit. *See* 8 U.S.C. § 1154(c)(1).

A.

Appellant Robert Mestanek entered the United States on a student visa in July 2005 to attend a language school in Florida. Although his visa expired in August of that year, Robert did not return to the Czech Republic. Instead, Robert remained in the United States without lawful status, at some point moving from Florida to Hilton Head, South Carolina. There Robert met Angel Simmons, and they married in February 2013.

Angel filed a Form I-130 petition on Robert's behalf a few months later seeking to establish him as her immediate relative, and Robert concurrently filed a Form I-485 application to adjust his immigration status. They submitted various documents in support of their application, including joint tax returns, a lease agreement for the apartment they shared, and assorted photographs of the couple.

A USCIS officer interviewed Robert and Angel together in January 2014. Before the interview, the officer marked the marriage as potentially fraudulent because law enforcement reports indicated that Robert and Angel—contrary to what they wrote on their application—had been living at different addresses. At the interview, however, the couple maintained that they were still married and living together in South Carolina at the Hilton Head address listed on the petition. The officer ended the interview so he could conduct additional research, noting that the two were a "very unlikely couple." J.A. 917.

After conducting additional research, the officer scheduled a second interview in June 2014. This time, the officer interviewed Robert and Angel separately and asked them each a series of the same questions. Again, they each testified that they had been living together since February 2013 at the Hilton Head apartment listed on the petition. But information gathered during the officer's pre-interview research cast doubt on whether that was accurate. For example, traffic-court records from October and December 2013 listed a different address for Angel. Moreover, although Angel said that she had gone multiple times to the leasing office of the apartment complex where the couple allegedly resided together, the leasing manager had advised USCIS that, although she often saw Robert, she had seen Angel only once, when Angel came to the office to sign a new lease in March 2014.

The interviewer also noted several discrepancies between Robert's and Angel's answers at the second interview. For example, Angel said that she and Robert had spent time apart only once since their wedding, when Robert went to a bodybuilding contest in Columbia, South Carolina, and stayed overnight. But Robert said that he had also been away several times to visit a friend in Orlando, Florida. And when the officer asked how the parties had traveled to their wedding, Angel testified that she and Robert drove together, while Robert said he rode separately with a friend.

After the interview, the officer referred the case to USCIS's Fraud Detection and National Security Directorate ("FDNS") for further investigation. FDNS investigated from September 2014 to April 2015 and

determined that "the marriage strongly appear[ed] to be one of convenience and designed to provide an immigration benefit to [Robert]." J.A. 923. It also noted that Robert did "not appear to reside with [Angel] and may have moved to Florida." J.A. 919. But because "neither [Robert] nor [Angel] ha[d] made an admission of fraud," FDNS ultimately concluded that "insufficient info ha[d] been discovered to establish fraud" and categorized the fraud determination as "inconclusive." J.A. 920, 923.

While FDNS was still investigating, Robert and Angel's marriage started to falter, and Robert had indeed moved back to Florida. Robert initiated divorce proceedings in Florida in November 2014—just five months after USCIS's second interview. A Florida court granted the divorce in January 2015. A few months later Robert notified USCIS of the divorce and requested to withdraw his pending Form I-485 adjustment-of-status application. The agency issued an "acknowledgment of withdrawal" for Robert's application in February 2016. Angel's Form I-130 petition, however, was never withdrawn.

B.

During this time, Robert moved back to Hilton Head where he met his current wife, Mary. They dated briefly before marrying in November 2015. Soon after, Mary filed a Form I-130 petition on Robert's behalf, and Robert again filed a concurrent Form I-485 application. Robert and Mary were interviewed in connection with those petitions in April 2016. The adjudicating officer did not identify any discrepancies in their interview, but because Robert had been previously suspected of marriage fraud, the officer referred Mary's petition to FDNS as well. After an investigation, FDNS concluded that Robert and Mary lived together and that their marriage was likely genuine.

But there was another impediment to Mary's petition: it would have to be denied under the marriage-fraud bar if Robert's prior marriage to Angel was found fraudulent. At this point, Angel's Form I-130 petition was still pending and there had not yet been a conclusive fraud determination. Thus, FDNS reopened the investigation into Robert and Angel's marriage to determine whether Robert was subject to the marriage-fraud bar.

In connection with the renewed investigation, two FDNS agents met with Angel outside of a Starbucks in January 2017 to ask her about her marriage to Robert. At the meeting, which lasted less than an hour, Angel admitted to the agents that her marriage to Robert was fraudulent. She said that she had met Robert when they worked together briefly at a cleaning service. According to Angel, after she and Robert became friends he approached her about marrying him so that he could get a "green card"—a permanent residency permit. She told the agents that he promised her $10,000 to marry him and that she agreed because she was homeless and struggling financially. In the end, though, Angel said that he had only given her $800, although he had promised the rest would come once his permanent residency status was confirmed.

Angel reported that, a few months after their marriage, she had cohabited with Robert briefly when she did not have another place to live, and that they had been intimate during that time. Angel, however, was starting to get cold feet. When she eventually decided that she did not want to continue with the sham marriage, she said that Robert became enraged and threatened to kill her if he was deported. She said that he also threatened her with a secretly recorded video tape of them hav-

ing sex and an audio recording of them agreeing to engage in the sham marriage. At the end of the interview, Angel wrote out and signed a statement confessing to her role in the sham marriage. FDNS then returned the case to USCIS with a determination of "Fraud Found," J.A. 1063, and USCIS denied Angel's Form I-130 petition in May 2017.

A few days later, USCIS sent Mary a notice that it intended to deny her Form I-130 petition as well. The notice stated that the agency had found "substantial and probative evidence" that Robert had engaged in prior marriage fraud. J.A. 849. In support, it referenced Robert's and Angel's conflicting January 2014 interview answers. It also described Angel's January 2017 confession.

In response, Robert and Mary asked to inspect the record of proceedings. They also informed USCIS that they would be requesting a copy of their file through the Freedom of Information Act (FOIA) process. USCIS responded that it would issue the Mestaneks an amended notice with more detailed information, and that Mary and Robert would have thirty additional days to respond after that amended notice was issued.

USCIS did not issue the promised notice until three years later. In it, the agency reiterated that Robert was subject to the marriage-fraud bar based on his first marriage to Angel and provided a more detailed account of Angel's confession. But it also questioned whether Robert's marriage to Mary was valid. According to the agency, Robert had never successfully divorced from Angel because he had not satisfied Florida's statutory six-month residency requirement before filing for divorce in November 2014.

In support of this new ground for denying Mary's petition, the agency provided several pieces of evidence. First, it noted that Robert's second Form I-485 application indicated that he had resided in Florida only from August 2014 to January 2015. That meant that he had lived in Florida for only three months when he filed for divorce. Moreover, at Robert's June 2014 interview, he had testified that he was still living with Angel in Hilton Head and presented a lease to that effect. Based on those two pieces of evidence, USCIS concluded that Robert had lived in Florida for fewer than six months at the time he filed for divorce, and that the Florida court thus lacked jurisdiction to enter the divorce decree. Given that Robert had never validly divorced Angel, Mary had not met her burden to establish "the legal termination of all [Robert's] previous marriages." 8 C.F.R. § 204.2(a)(2).

Robert and Mary responded to the second notice of intent to deny with new rebuttal evidence, most notably a declaration signed by Angel in late January 2020 that said her prior confession was coerced and false and that she had written and signed the statement only because the FDNS agents had threatened her with jail if she did not do so.

After considering the rebuttal evidence, USCIS issued a decision denying Mary's Form I-130 petition in June 2020. First, it found that Angel's new declaration was not credible and that it conflicted with prior evidence and testimony from earlier interviews. Second, it found that Robert had not rebutted the agency's finding that he had not established Florida residency at the time of his petition for divorce. It thus denied Mary's Form I-130 petition and denied Robert's Form I-485 application as well.

C.

Mary chose not to file an administrative appeal with the Board of Immigration Ap-

peals. Instead, the Mestaneks sought judicial review of USCIS's denial of their petitions in the U.S. District Court for the District of South Carolina under the Administrative Procedure Act (APA). The parties cross-moved for summary judgment.

The Mestaneks' motion set forth several arguments: (1) that USCIS's denial of Mary's petition was ultra vires because Congress had not authorized USCIS to undertake "investigations" like the one that resulted in Angel's confession; (2) that the certified administrative record provided by USCIS was incomplete; (3) that USCIS's denial was arbitrary and capricious because it applied the wrong legal standard for marriage fraud; (4) that USCIS violated its own regulations when it refused to allow the Mestaneks to inspect the record of proceedings after issuing the notice of intent to deny; (5) that USCIS misapplied Florida law when it deemed Robert's Florida divorce decree invalid; (6) that USCIS had ignored key evidence throughout its decision and failed to give due credit to Angel's 2020 recantation; and (7) that USCIS violated the Mestaneks' due process rights.

USCIS's motion countered each of the Mestaneks' grievances, arguing that none gave the court grounds to set aside the agency's decision. In a thorough and well-reasoned order, the district court agreed with USCIS that each of the Mestaneks' claims was without merit and thus granted summary judgment to USCIS. *Mestanek v. Jaddou*, No. 2:20-CV-2811-BHH, 2022 WL 17841270, at *7 (D.S.C. Dec. 14, 2022). The Mestaneks timely appealed.

II.

[1] On appeal, the Mestaneks make largely the same arguments as they did in the district court. We review a district court's evaluation of an agency action challenged under the APA de novo, "independently assess[ing] whether, based on the administrative record, the agency action was unlawful." *Ren v. USCIS*, 60 F.4th 89, 93 (4th Cir. 2023). In accordance with the APA, we look only at whether an agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* (quoting 5 U.S.C. § 706(2)(A)). Thus, we will uphold an agency's decision so long as we find that the agency "acted within a zone of reasonableness." *Id.* (quoting *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423, 141 S.Ct. 1150, 209 L.Ed.2d 287 (2021)).

After reviewing the record, we agree with the district court that the Mestaneks' arguments are unavailing. We take each argument in turn.

A.

The Mestaneks start with the ambitious claim that USCIS lacks the authority to investigate marriage fraud when adjudicating Form I-130 petitions. In essence, they argue that the Homeland Security Act of 2002 prohibited USCIS from undertaking any investigations unless specifically authorized to do so by Congress in subsequent legislation. But the Homeland Security Act is not as disabling to the workings of our immigration laws as the Mestaneks contend it to be.

Before the Homeland Security Act, federal immigration laws and regulations were administered by the Immigration and Naturalization Service (INS), which was housed in the Department of Justice and overseen by the Attorney General. The Homeland Security Act abolished the INS and transferred most of its functions to three new entities: USCIS, U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Patrol (CBP). These entities were housed within the

newly created Department of Homeland Security (DHS) under the purview of the new Secretary of Homeland Security.

[2] The Mestaneks are correct that the Homeland Security Act generally assigned INS's adjudicative functions to USCIS and its investigative program to the subagencies that would become ICE and CBP. *See* 6 U.S.C. § 271(b); 6 U.S.C. § 251(4). But they take this general division of labor and read in a hardline prohibition that finds no support in the statutory text. Nowhere in the Homeland Security Act does it restrict the new subagencies' jurisdictions to only those functions explicitly allocated to them under the Act. On the contrary, the Act specifically instructs the Director of USCIS to "establish the policies for performing such functions as are transferred to the Director" under the Act "*or otherwise vested in the Director by law.*" 6 U.S.C. § 271(a)(3)(A) (emphasis added). This language confirms that the Homeland Security Act is not the exclusive source of USCIS's authority.

Another source of authority is 8 U.S.C. § 1154, which provides directions on how to treat several special categories of visa applicants. One such category is persons seeking to be classified as immediate relatives of U.S. citizens via a Form I-130 petition. Those petitions are adjudicated by USCIS, and the statute instructs the adjudicator to conduct "an investigation of the facts in each case" before approving or denying a request to recognize a noncitizen as an immediate relative. 8 U.S.C. § 1154(b). The statute also expressly prohibits the approval of petitions on behalf of noncitizen beneficiaries who have previously sought immediate relative status "by reason of a marriage determined by the [Secretary of Homeland Security] to have been entered into for the purpose of evading the immigration laws." 8 U.S.C. § 1154(c)(1).

Of course, Congress did not expect the Secretary himself to personally make each individual determination. To that end, Congress gave the Secretary the power to "require or authorize any employee of the Service ... to perform or exercise any of the powers, privileges, or duties conferred" on him or other members of the Service. 8 U.S.C. § 1103(a)(4). The term "Service" here once referred to the old INS, but after the 2002 reorganization Congress instructed that it "shall be deemed to refer to ... the component of the Department [of Homeland Security] to which such function [was] transferred." 6 U.S.C. § 557. The adjudication of I-130 petitions authorized under § 1154 was transferred to USCIS, and so the Secretary has the clear authority to delegate to USCIS his obligation to determine whether a marriage was fraudulent for purposes of those petitions.

The Secretary made just such a delegation by issuing 8 C.F.R. § 103.2(b)(7), which authorizes USCIS to take testimony and "direct any necessary investigation" when adjudicating benefit requests, such as the requests for immediate relative status at issue in this case. In addition to that general delegation, the Secretary has specifically authorized USCIS to "investigate ... alleged fraud with respect to applications." Delegation No. 0150.1(I).

In response to these delegations of authority, USCIS has created an entire 650-officer-strong department—the FDNS—whose mission is to "detect, deter, and administratively investigate immigration-related fraud." U.S. Citizen and Immigration Services, *Fraud Detection and National Security Directorate: Mission Essential Functions* (May 2002). That task includes "conduct[ing] site visits and administrative investigations unilaterally or jointly with law enforcement agencies." *Id.* Were we to agree with the Mestaneks, we

would not merely be undoing the work of an isolated USCIS officer. Rather, we would be holding that much of the labor undertaken by the FDNS is ultra vires and undermining its investigatory work in countless marriage-fraud determinations. Given that the statutory regime described above provides ample support for the agency's current practice, we decline to take such a disruptive stance.

In allocating USCIS a set of nonexhaustive functions, Congress did not intend to hamstring USCIS's ability to fulfill the statutory mandate to investigate cases before adjudicating them. We therefore reject the Mestaneks' challenge to USCIS's investigations in their case and decline to strike the results of those investigations, including Angel's 2017 confession.

B.

The Mestaneks next assert that USCIS provided the district court with an incomplete administrative record that was insufficient for judicial review. They assert that the certified administrative record is missing three things: a memo referenced in the attachment list of the FDNS investigation results, the notes taken by FDNS investigators during Angel's confession, and an "ICE declination" document giving a reason for why ICE did not take up the case.

[3] We have long recognized that public officials enjoy a "presumption of regularity" in the performance of their official duties. *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1368 (4th Cir. 1975); *see also United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). And so when an agency certifies that the administrative record it has provided to the court is complete, courts generally presume it to be so absent clear evidence to the contrary. *See Outdoor Amuse. Bus. Assn., Inc. v. DHS*, 2017 WL 3189446, at *12 (D. Md. July 27, 2017) (collecting cases).

[4] There is no such evidence here. As for the memo, the district court correctly identified that it is in fact included in the record at J.A. 1099–1100. *See Mestanek*, 2022 WL 17841270, at *4. As for the other two "missing" documents, it is not even clear that they exist. Nothing in the record refers to any notes taken by the FDNS investigators or even suggests that notes were taken, and the Mestaneks' speculation alone will not suffice. The ICE declination document's existence is even more speculative. USCIS never referred the case to ICE, *see* J.A. 1092, so it is unsurprising that there is no document to memorialize ICE declining a case it never received.

For these reasons, we find that the certified administrative record provided by USCIS is complete for purposes of judicial review.

C.

The Mestaneks then argue that USCIS's denial of Mary's petition was arbitrary and capricious because it applied the wrong legal standard for marriage fraud. In support, they point to USCIS's failure to cite *Matter of Singh*, 27 I. & N. Dec. 598 (BIA 2019), a recent Board of Immigration Appeals decision that clarified the standard of proof that governs the application of the marriage-fraud bar.

[5, 6] We will not presume that the agency misapplied its own standard unless there is good reason to suspect it did so. Here, all evidence points the other way.

To begin with, *Matter of Singh* did not change the standard. It was merely a recent clarification of the Board's preexisting standard for applying the marriage-fraud bar. USCIS regulations establish that a noncitizen is subject to the marriage-fraud

bar whenever there is "substantial and probative evidence" that "he attempted or conspired to enter into a marriage for the purposes of evading the immigration laws." 8 C.F.R. § 204.2(a)(1)(ii). In *Matter of Singh*, the Board explained that to qualify as "substantial and probative," "evidence must establish that it is more than probably true that the marriage is fraudulent." 27 I. & N. Dec. at 607. But in doing so, the Board noted that this interpretation was "consistent with the standard [it] currently employ[ed] in adjudicating visa petitions involving marriage fraud." *Id.* Thus, USCIS's failure to reference *Matter of Singh* was neither here nor there.

Indeed, the USCIS decision denying Mary's Form I-130 petition referenced the appropriate "substantial and probative evidence" standard twice. *See* J.A. 792. And it cited the Board of Immigration Appeals' decision in *Matter of Tawfik*, 20 I. & N. Dec. 166 (BIA 1990), which *Matter of Singh* heavily relied on in articulating the standard applied therein. *See Matter of Singh*, 27 I. & N. Dec. at 602–03.

Moreover, *Matter of Singh* does not assist the Mestaneks' case. In that case, the Board relied on evidence that clearly resembled the evidence USCIS relied on in denying the Form I-130 petition here. In *Matter of Singh*, the noncitizen's spouse had admitted to FDNS agents that the marriage was fraudulent but later submitted an affidavit denying that she had made such an admission. *Id.* at 600. The Board was not swayed. It held that an affidavit-based recantation alone "will generally not be sufficient to overcome evidence of marriage fraud," especially when "other evidence in the record supports the reliability of the admissions." *Id.* at 609–10.

Just so here. Angel's admission coheres with the other evidence much more neatly than her recantation. The sham marriage to which she confessed explains the discrepancies between her and Robert's interview answers and the evidence that they were not cohabiting. In short, the record evidence amply supports USCIS's determination that Angel's confession was more reliable than her recantation, which in turn makes it "more than probably true" that the marriage was fraudulent. *Id.* at 607. Like the district court, we have "no difficulty in finding that the evidence cited by the agency clearly satisfies" the "substantial and probative evidence" standard as clarified in *Matter of Singh*. *See Mestanek*, 2022 WL 17841270, at *5.

D.

The Mestaneks next claim that USCIS violated its own regulations when it refused to allow them to inspect the record of proceedings. USCIS's general rule is that "[a]n applicant or petitioner shall be permitted to inspect the record of proceeding which constitutes the basis for the decision." 8 C.F.R. § 103.2(b)(16). But the regulation codifying that rule lists four exceptions, one of which is for "derogatory information unknown to [the] petitioner or applicant." 8 C.F.R. § 103.2(b)(16)(i). That exception stipulates that:

> If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered.

8 C.F.R. § 103.2(b)(16)(i).

[7] USCIS's denial of Mary's Form I-130 petition clearly qualifies for the exception. It was a decision adverse to the Mestaneks based on information that they were unaware of—namely, Angel's January 2017 confession. USCIS thus complied with its regulation when it advised the

Mestaneks of the confession and provided them with enough information about the confession to allow them a chance for rebuttal.

The Mestaneks urge that the unknown-derogatory-information exception is not an exception at all, but rather a separate notice requirement. But the regulation's text and structure undermine this contention. The regulation provides the general rule that applicants and petitioners are entitled to inspect the record of proceedings "except as provided in the following paragraphs." 8 C.F.R. § 103.2(b)(16). The provision that covers unknown derogatory information comes directly after that phrase. *Id.* Thus, the regulation specifically "except[s]" unknown derogatory information from the general rule of access. Indeed, other courts that have considered the question have agreed with this reading. *See, e.g., Mangwiro v. Johnson*, 554 Fed. App'x 255, 261–62 (5th Cir. 2014) (per curiam). The exception for unknown derogatory information also makes good sense in that it will sometimes be necessary to protect the privacy and safety of the third-party sources who provided the adverse statements.

We thus agree with the district court that, in a case of an adverse decision based on information unknown to the petitioner, USCIS's regulations require only that the petitioner be notified of the information and given a chance to rebut it. USCIS thus fulfilled its obligations when it advised the Mestaneks of Angel's confession, provided them with a summary of its contents, and allowed them to rebut the allegations therein.

E.

The Mestaneks next turn to contesting the way that USCIS weighed the evidence before it.

[8] First, they contend that USCIS ignored key documents that evinced a true marital relationship between Robert and Angel, including joint tax records, shared leases and bills, phone records, photos of the couple together, and letters of support. But we decline to impose on the agency a requirement to discuss every piece of evidence it receives, *see Fosso v. Sessions*, 692 Fed. App'x 744, 754 (4th Cir. 2017), especially when it is clear from the decision that USCIS did address the rebuttal evidence submitted by Mary.

Moreover, the Mestaneks' view fails to overcome the evidence in favor of the marriage-fraud bar. 8 U.S.C. § 1154(c). The Mestaneks insist, however, that USCIS failed to give Angel's 2020 retraction of her confession the weight it deserved. But it is not our role to reweigh the evidence and "substitute [our] judgment for that of the agency," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983), when it is clear, as here, that the agency had a sound basis for its decision. *See Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 422 (4th Cir. 2012). It was hardly irrational for USCIS to conclude that Angel's retraction, signed in the office of Robert's attorney, was not credible given the other evidence in the record, which (as recounted at length above) corroborated not the retraction but the confession. *See Matter of Singh*, 27 I. & N. Dec. at 609–10.

In short, we find that USCIS had a rational basis for weighing the evidence as it did and finding that Robert was subject to the marriage-fraud bar. 8 U.S.C. § 1154(c).*

F.

[9] Finally, the Mestaneks assert a procedural due process violation based on

* The Mestaneks also argue that USCIS's other rationale for denying their petition—that Robert's Florida divorce was not valid—was in error because it misapplied Florida law. Hav-

their allegations that USCIS failed to apply the proper standard of proof and failed to provide copies of the derogatory evidence. But we have already determined that USCIS applied the proper standard in making its marriage-fraud determination and that USCIS met its burden to provide the Mestaneks with derogatory evidence in accordance with its regulations. *See supra* Sections II.C–D.

[10] Moreover, the Mestaneks were afforded plenty of process. Due process requires only "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). USCIS provided the Mestaneks with a notice of intent to deny that described in detail the derogatory evidence against them. That description included a thorough review of Angel's confession as well as an account of the evidence that Angel and Robert were not cohabiting during their marriage. *See* J.A. 833. The Mestaneks had a chance to respond and submit rebuttal evidence. USCIS then issued, as noted, a careful decision considering that rebuttal evidence and explaining why it did not refute the agency's initial findings. In the case of a Form I-130 petition, that is certainly enough process to pass constitutional muster. *See Gebhardt v. Nielsen*, 879 F.3d 980, 988 (9th Cir. 2018); *Bremer v. Johnson*, 834 F.3d 925, 932–33 (8th Cir. 2016); *see also Kerry v. Din*, 576 U.S. 86, 102–04, 135 S.Ct. 2128, 192 L.Ed.2d 183 (2015) (Kennedy, J., concurring in the judgment). We therefore conclude that the Mestaneks have failed to establish a due process violation on the part of USCIS.

III.

In sum, adopting the Mestaneks' position in this case would upend Congress's instruction that prior marriage fraud should bar the granting of Form I-130 petitions. It would also overturn the agency's thoughtful application here of the relevant statutory and regulatory provisions. The respect of federal courts is owing to both. For the foregoing reasons, the judgment of the district court is hereby

AFFIRMED.

SMARTSKY NETWORKS, LLC, a Delaware limited liability company, Plaintiff – Appellee,

v.

DAG WIRELESS, LTD., an Israeli company; DAG Wireless USA, LLC, a North Carolina limited liability company; Laslo Gross, a North Carolina resident; Susan Gross, a North Carolina resident; Wireless Systems Solutions, LLC, a Delaware limited liability company; David D. Gross, a resident of Israel, Defendants – Appellants.

No. 22-1253

United States Court of Appeals, Fourth Circuit.

Argued: October 25, 2023

Decided: February 13, 2024

Background: Wireless-communication company brought action against other wireless-communication companies with which plaintiff had once had a business relationship and associated individuals, al-

ing found that the marriage-fraud bar applies, we have no need to address that state-law question and instead uphold USCIS's denial on the basis of the marriage-fraud bar alone.

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Jesse Busen
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