AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Presidential War and Foreign Policy Powers

**Biden v. Texas, \_\_\_U.S. \_\_** (2022)

*President Joseph Biden upon taking office immediately terminated the Migrant Protection Protocols promulgated by the Trump Administration, which required the United States to return to Mexico all non-Mexicans who had entered the United States illegally through Mexico. Texas immediately filed a lawsuit, claiming that termination violated the Administrative Procedure Act (APA) and Immigration Nationality Act. A federal district court granted a nationwide injunction that required the Biden Administration to maintain the MPP. The Court of Appeals refused to lift the stay while the appeal was pending. The Biden Administration appealed to the Supreme Court of the United States.*

 *The Supreme Court by a 5-4 vote lifted the stay. Chief Justice Roberts’ majority opinion held that the Biden Administration had acted legally when deciding to allow non-citizens to remain in the United States without detention pending a hearing on whether they should be deported. All the justices agreed that federal law gave the Biden Administration three options when a person illegally entered the United States from Mexico. The executive could return that person to Mexico, detain that person, or allow that person to go free provided they attended a hearing on whether they should be deported. How does each opinion analyze the three options? Which understanding of the three options do you believe is correct? Roberts insists that presidential power under Article II supports deference to the Biden Administration’s understanding of federal law. Why does he make that claim? Why does the dissent disagree? Who has the better of the argument? What do the various opinions in this case suggest about the ways in which different justices balance partisanship, policy preferences and commitments to executive power?*

Chief Justice [Roberts](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)&analyticGuid=I741aae63f84c11eca841d44555f1c91a) delivered the opinion of the Court.

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. . . . [Section 1225(b)(2)(C)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RB&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)#co_pp_526b000068e67) 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](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1229A&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=LQ&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)).” [Section 1225(b)(2)(C)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RB&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)#co_pp_526b000068e67) 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.”  The use of the word “may”. . .  thus makes clear that contiguous-territory return is a tool that the Secretary “has the authority, but not the duty,” to use.

Respondents and the Court of Appeals concede this point. They base their interpretation instead on [section 1225(b)(2)(A)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RB&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)#co_pp_1eca000045f07), 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](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1229A&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=LQ&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)) of this title.” Respondents and the Court of Appeals thus urge an inference from the statutory structure: Because [section 1225(b)(2)(A)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RB&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)#co_pp_1eca000045f07) makes detention mandatory, they argue, the otherwise-discretionary return authority in [section 1225(b)(2)(C)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RB&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)#co_pp_526b000068e67) becomes mandatory when the Secretary violates that detention mandate.

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. . . . The principal dissent emphasizes that [section 1225(b)(2)(A)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RB&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)#co_pp_1eca000045f07) requires detention of all aliens that fall within its terms. 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)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RB&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)#co_pp_1eca000045f07) is correct, and that the Government is currently violating its obligations under that provision. Even so, the dissent's conclusions regarding [section 1225(b)(2)(C)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RB&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)#co_pp_526b000068e67) 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,’ ”  and criticizes the Government's “argument that ‘shall’ means ‘may.’ ”  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)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RB&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)#co_pp_1eca000045f07) does not justify transforming the nature of the authority conferred by [section 1225(b)(2)(C)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RB&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)#co_pp_526b000068e67).

. . . . 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](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTII&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=LQ&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)) authorizes the Executive to “engag[e] in direct diplomacy with foreign heads of state and their ministers.”  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.”  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.”

By interpreting [section 1225(b)(2)(C)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RB&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)#co_pp_526b000068e67) 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. 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.” Yet under the Court of Appeals’ interpretation, [section 1225(b)(2)(C)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RB&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)#co_pp_526b000068e67) 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.”  That stark consequence confirms our conclusion that Congress did not intend [section 1225(b)(2)(C)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RB&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)#co_pp_526b000068e67) to tie the hands of the Executive in this manner.

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. 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.”  And under the APA, DHS's exercise of discretion within that statutory framework must be reasonable and reasonably explained. 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.

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Justice [Kavanaugh](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)&analyticGuid=I741aae63f84c11eca841d44555f1c91a), concurring.

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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.”  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.”  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.

Option two: DHS may choose to return noncitizens to Mexico. 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.

To be sure, the Administrative Procedure Act and this Court's decision in Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co. (1983)  require that an executive agency's exercise of discretion be reasonable and reasonably explained. . . .

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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](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTII&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=LQ&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)) foreign-policy judgment. 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](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTII&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=LQ&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)) judgment with respect to American foreign policy and foreign relations.

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.

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Justice [Alito](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)&analyticGuid=I741aae63f84c11eca841d44555f1c91a), with whom Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)&analyticGuid=I741aae63f84c11eca841d44555f1c91a) and Justice [Gorsuch](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)&analyticGuid=I741aae63f84c11eca841d44555f1c91a) join, dissenting.

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The language of [8 U. S. C. § 1225(b)(2)(A)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RB&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)#co_pp_1eca000045f07) is unequivocal. With narrow exceptions that are inapplicable here,[4](https://1.next.westlaw.com/Document/I741aae63f84c11eca841d44555f1c91a/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad7403500000181b550bf94cca9f51e%3Fppcid%3Da3ee8d3acfec4d82bd997b35a746b385%26Nav%3DCASE%26fragmentIdentifier%3DI741aae63f84c11eca841d44555f1c91a%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f3d43e431838b7d7deaa528e7cd30e8f&list=CASE&rank=1&sessionScopeId=1ce947b266f6443f7ecd17c57007e5fbd3fd5d2744da805f1592cac798e3a9f3&ppcid=a3ee8d3acfec4d82bd997b35a746b385&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00132056513600) it provides that every alien “who is an applicant for admission” and who “the examining immigration officer determines ... is not clearly and beyond a doubt entitled to be admitted ... *shall be detained* for a [removal] proceeding.” (Emphasis added.) . . . “[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. . . . .

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.” But the number of aliens paroled each month under that provision—more than 27,000 in April of this year—gives rise to a strong inference that the Government is not really making these decisions on a case-by-case basis. . . .

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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?

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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](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTII&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=LQ&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)).  But enforcement of immigration laws often has foreign relations implications, and the Constitution gives Congress broad authority to set immigration policy. This means, we have said, that “[p]olicies pertaining to the entry of aliens” are “entrusted *exclusively* to Congress.”  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* (1952)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1952120254&pubNum=0000780&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RP&fi=co_pp_sp_780_637&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)#co_pp_sp_780_637) (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.

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Justice [Barrett](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0505709001&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)&analyticGuid=I741aae63f84c11eca841d44555f1c91a), with whom Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)&analyticGuid=I741aae63f84c11eca841d44555f1c91a), Justice [Alito](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)&analyticGuid=I741aae63f84c11eca841d44555f1c91a), and Justice [Gorsuch](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)&analyticGuid=I741aae63f84c11eca841d44555f1c91a) 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)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1252&originatingDoc=I741aae63f84c11eca841d44555f1c91a&refType=LQ&originationContext=document&transitionType=DocumentItem&ppcid=adc7b1bb2a3545388a0ea8d6ad9c63d7&contextData=(sc.Search)), 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*, (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*.