No. 20-322

In the Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,

Petitioners,

v.

ESTEBAN ALEMAN GONZALEZ, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE LAW PROFESSORS IN SUPPORT OF RESPONDENTS

RICHARD P. BRESS
CHERISH A. DRAIN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004

SAMIR DEGER-SEN
Counsel of Record
LYDIA FRANZEK
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020
(212) 906-4619
samir.deger-sen@lw.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

INTERESTS OF AMICI CURIAE[1]

Amici are a group of philosophically diverse law school professors who offer a unique perspective about federal courts' equitable powers and principles of statutory interpretation. Together, amici share an interest in ensuring that federal law be construed in accordance with its text and longstanding background principles regarding review of executive action.

A complete list of amici who reviewed and join in this brief is included in the attached Addendum. Amici file this brief solely as individuals and not on behalf of any institution with which they are affiliated. Affiliations are provided solely for identification.

INTRODUCTION AND SUMMARY OF ARGUMENT

From our Nation's Founding, federal courts have exercised broad equitable authority to issue injunctions prohibiting executive officials from acting beyond their lawfully conferred authority. This bedrock power to restrain *ultra vires* acts by the executive branch is a foundational tenet of the American legal system. This Court has long recognized that this equitable authority should not be abridged "[a]bsent the clearest command to the contrary from Congress." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) (emphasis added).

---

[1] No counsel for a party authored this brief in whole or in part; and no party, counsel for a party, or any person or entity other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Amici file this brief with all parties' written consent.

In this case, the government advocates for an extraordinary departure from these long-held principles. The government seeks to read a provision of the immigration laws as stripping federal courts of their equitable power to order classwide injunctive relief whenever an executive official even *claims* to be acting pursuant to statutory authority. In the government's telling, as soon as an executive official claims that his action is authorized by Title IV of the Immigration and Nationality Act, 8 U.S.C. § 1252(f)(1) prohibits a court from enjoining his action on a classwide basis—no matter how implausible the official's basis for the claimed authority, or how flagrantly unlawful the underlying conduct.

Reading Section 1252(f)(1) as such an extraordinary grant of power simply does not comport with the statutory text. By its plain terms, Section 1252(f)(1) bars courts only from enjoining the "operation" of the statute. "Operation" is defined as "the action or process or method of working or operation" and "the state of being active or functioning." "Operation," *Oxford English Reference Dictionary* 1018 (2d ed. 2003) (def. 1a and 1b). And an injunction that prohibits executive conduct that is *not authorized* by the statute does not "enjoin or restrain" the statute's "functioning"; rather, the statute continues to "function" exactly as intended. Section 1252(f)(1) plainly does not revoke jurisdiction to enjoin *ultra vires* agency action by the "clearest command," *Califano*, 442 U.S. at 705.

In any event, even if this Court were to accept the government's expansive reading, this case falls within the statutory exception for relief sought by individuals in removal proceedings. The government contends that Section 1252(f)(1)'s use of the word

"individual" bars classwide injunctive relief. But courts historically have interpreted similar statutory provisions, which refer to singular individuals or plaintiffs, to nonetheless permit use of Rule 23's class action mechanism. That interpretative approach provides an independent basis to affirm the decision below.

Finally, regardless of this Court's holding on the questions presented, this Court should re-affirm that classwide *declaratory* relief remains available under Section 1252(f)(1). The government does not contend otherwise, and settled precedent makes clear that declaratory relief remains a viable mechanism for plaintiffs to obtain classwide adjudication of their claims, even in circumstances where injunctive relief is unavailable.

In short, the government's extreme position in this case should be rejected. There is nothing in the text or structure of Section 1252(f)(1) that warrants the extraordinary conclusion that classwide injunctive relief against even flagrantly unlawful immigration policies is barred, simply because the executive branch *purports* to be acting under statutory authority.

ARGUMENT

I. SECTION 1252(f)(1) DOES NOT BAR INJUNCTIVE RELIEF IN THIS CASE

A. Congress must speak in unmistakable terms to limit a court's equitable powers

For nearly two centuries, this Court has recognized that "[t]he great principles of equity . . . should not be yielded to light inferences, or doubtful construction." *Brown v. Swann*, 35 U.S. (10 Pet.) 497,

503 (1836). Accordingly, "[a]bsent the *clearest command to the contrary* from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) (emphasis added); *see also Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (The "comprehensiveness" of a court's "equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command."). A court must therefore "resolve [any] ambiguities . . . in favor of that interpretation which affords a full opportunity for equity courts to [act] in accordance with their traditional practices." *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944).

This Court has expressly reaffirmed that principle in recent cases. For example, in *McQuiggin v. Perkins*, this Court concluded that the statute at issue "contain[ed] no clear command countering the courts' equitable authority" and reiterated that it will "'not construe a statute to displace courts' traditional authority absent the clearest command.'" 569 U.S. 383, 397 (2013) (citation omitted); *see also Holland v. Florida*, 560 U.S. 631, 646 (2010) (same); *Miller v. French*, 530 U.S. 327, 340 (2000) (same).[2]

---

[2] Section 1252(f)(1) is, of course, by its terms a "[l]imit on injunctive relief." 8 U.S.C. § 1252(f)(1). Section 1252(f)(1) thus doubtless revokes *some* of a court's equitable power. But the provision must be construed such that a district court "retain[s]" all jurisdiction not revoked by Congress's "clearest command." *Califano*, 442 U.S. at 705. Put another way, the provision must be construed narrowly so as to only limit a court's power to grant injunctions to those areas where the statute's limitations are unmistakable. *See Alli v. Decker*, 650 F.3d 1007, 1013 (3d Cir. 2011) (holding that Section 1252(f)(1) did not preclude

This principle reflects the historic significance of federal courts' equitable powers. The authority of a federal court to enjoin unlawful conduct is one of the most deeply rooted principles in our judicial system. *See Ex parte Young*, 209 U.S. 123, 149, 165, 167 (1908). As this Court has explained, "the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the Judiciary Act." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (citation omitted); *see also generally Brown*, 35 U.S. (10 Pet.) 497. The use of that equitable jurisdiction to review official conduct "reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

The historic equity practices of England were incorporated into American law at the Founding. *See* Act of May 8, 1792, ch. 35, § 2, 1 Stat. 275, 276 (mandating "the forms and modes" of equitable proceedings follow "the principles, rules and usages which belong to courts of equity"); *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 648, 658 (1832) ("remedies in equity are to be administered . . . according to the practice of courts of equity in the parent country"); *see also* 1 Joseph Story, *Commentaries on Equity Jurisprudence: As Administered in England and America* 64-65 (1836) ("[I]n the Courts of the United States, Equity Jurisprudence embraces the same

---

declaratory relief, noting that "[t]his moderate construction of 'restrain' is in keeping with the Supreme Court's instruction that statutes limiting equitable relief are to be construed narrowly").

matters of jurisdiction and modes of remedy, as exist in England.").

Those equitable powers are particularly important in the context of restraining *unauthorized* executive conduct. Traditionally, courts of equity granted injunctive relief barring conduct by officials who acted "beyond the line of their authority." *Frewin v. Lewis*, 41 Eng. Rep. 98, 100 (Ch. 1838); *see, e.g.*, *Hughes v. Trs. of Morden Coll.*, 27 Eng. Rep. 973 (Ch. 1748). This key aspect of the judicial branch's equitable powers was carried over to our federal courts. *See Carroll v. Safford*, 44 U.S. (3 How.) 441, 463 (1845) (expressing "no doubt" that "relief may be given in a court of equity . . . to prevent an injurious act by a public officer, for which the law might give no adequate redress" if that officer exceeded his statutory authority); *see also Osborn v. President, Directors & Co. of the Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 845 (1824) ("But it is the province of a Court of equity, in such cases, to arrest the injury and prevent the wrong."). That practice—with its roots in the historic English Chancery Court tradition—has continued to the modern era. *See Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958) ("Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." (citing *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902)). Indeed, it has formed the basis for judicial review of our administrative state. *See* Louis L. Jaffe, *Judicial Control of Administrative Action* 176 (1965) (describing use of writs of certiorari and mandamus as "the twin pillars of the common law of judicial control" of government bodies in eighteenth-century England).

These principles undergird this Court's recognition that equitable powers may be revoked only by the clearest command.[3] Because Congress "must be taken to have acted cognizant to the historic power of equity to provide complete relief," *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960), any limitation on such power must be construed narrowly—especially when it implicates the executive's authority to act in an *ultra vires* manner. The government's approach entirely ignores these longstanding principles of equity.

In short, the relevant question under this Court's precedent is whether Section 1252(f)(1) represents the "clearest" possible "command" revoking a federal court's historic equitable authority to grant relief here. The language of Section 1252(f)(1) does not satisfy that high bar.

B. Section 1252(f)(1) operates only as a limitation on the award of injunctions that affect the "operation of" the statute

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* the provisions of part IV of this subchapter . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1)

---

[3] This maxim is grounded, in part, in concerns regarding incremental decisionmaking and decisional independence. *Cf.* Justice Amy Coney Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813, 841 (2008) ("Even apart from expertise, which does not itself confer power, the federal courts have a stronger claim to constitutional authority in matters of procedure than in matters of substance.").

(emphasis added). That provision does not bar a court from issuing an injunction that prohibits agency action *not authorized* by statute—just as the injunction does in this case. Such an injunction neither commands nor restrains the "operation of" a statute; it merely restrains agency action that is not supported by a grant of statutory authority.

1. Section 1252(f)(1) does not bar injunctions against agency action that is not authorized by a statutory grant of authority

a. By its plain terms, Section 1252(f)(1) is limited to injunctions affecting the "operation of" the statute. At the time of Section 1252(f)(1)'s enactment, dictionaries defined the word "operation" as "the action or process or method of working or operation" and "the state of being active or functioning." "Operation," *Oxford English Reference Dictionary* 1018 (def. 1a and 1b); *see also* "Operation," *Webster's Third New International Dictionary of the English Language* 1581 (2002) (def. 2b) (defining "operation" as "the quality or state of being functional or operative").

Section 1252(f)(1) therefore limits *only* injunctive relief that "enjoins or restrains" the "functioning" of the statute. An injunction that enjoins or restrains an agency action that is *not authorized* by a statute does not interfere with the "operation of" the statute. To the contrary, the statute continues operating precisely as Congress intended. It is only the operation of the *agency* that is enjoined.

The only connection between the enjoined agency conduct and the statute is the executive official's *claim* that his conduct is authorized by the statute.

But once a court has concluded that the statute does not authorize the relevant conduct, any link between the statute and the enjoined action is severed. Thus, as the D.C. Circuit has explained, because "Section [1252(f)(1)] . . . refers only to 'the operation of the provisions'—i.e., the statutory provisions themselves, [it] places no restriction on the district court's authority to enjoin *agency action* found to be unlawful." *Grace v. Barr*, 965 F.3d 883, 907 (D.C. Cir. 2020).

b. The government's contention that any *claimed* statutory authorization is enough to bar injunctive relief does not withstand serious textual scrutiny. Indeed, under the government's reading, Congress could have omitted the word "operation" and the provision would have the exact same meaning. *See* Justice Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) ("If possible, every word . . . is to be given effect . . . . None should be ignored." (bold omitted)); *Bloate v. United States*, 559 U.S. 196, 209 (2010) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (alteration in original) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))).

There is no reason to read this crucial word out of the statute. As noted above, Congress's use of "operation" captures an important and longstanding distinction between executive conduct taken pursuant to statutory authority and conduct taken beyond the bounds of that authority. This Court has historically held that federal courts may grant injunctive relief to remedy "violations of federal law by federal officers" that exceed the scope of their

statutory authority. *McAnnulty*, 187 U.S. at 110; *see, e.g.*, *Harmon*, 355 U.S. at 582. Congress must be assumed to have drafted with that long-established principle in mind. *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) (stating this Court "normally assume[s] that, when Congress enacts statutes, it is aware of relevant judicial precedent"). It makes much more sense to construe Congress as using the word "operation" to capture this important distinction, rather than assuming Congress simply added a wholly unnecessary word to the statutory text.

c. This Court implicitly recognized that Section 1252(f)(1) does not bar classwide injunctive relief against *ultra vires* agency action in *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018).

In *Rodriguez*, the Ninth Circuit adopted the same view advanced here—that Section 1252(f)(1) did not foreclose injunctive relief because the injunction merely barred conduct *not* authorized by statute. *Id.*; *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010) (holding that Section 1252(f)(1) did not affect its jurisdiction over respondents' statutory claims because those claims did not "seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct . . . not authorized by the statutes"). This Court nonetheless addressed the merits of respondents' class claims seeking injunctive relief, with no suggestion whatsoever that they were barred by Section 1252(f)(1). To the contrary, this Court suggested that respondents' claim for classwide injunctive relief based on constitutional claims may be barred because, *unlike* their statutory claims, those claims appeared to go beyond determining whether "conduct" was "not authorized" by a statute. *See Rodriguez*, 138 S. Ct. at 851 ("This reasoning [as

applied to statutory claims] does not seem to apply to an order granting relief on constitutional grounds, and therefore the Court of Appeals should consider on remand whether it may issue classwide injunctive relief based on respondents' constitutional claims.").

By differentiating between the constitutional and statutory claims, this Court recognized that injunctions affecting the operation of a statute (like the constitutional claims) remain distinct from those restraining conduct that is not authorized by statute. Indeed, this Court's language directing the Ninth Circuit to consider whether the rationale for the statutory claims applied to the constitutional ones would have made no sense if Section 1252(f)(1) actually barred classwide injunctive relief for both statutory and constitutional claims. *Rodriguez* thus strongly supports the conclusion that Section 1252(f)(1) does not bar classwide injunctions that prohibit statutorily unauthorized conduct.

d. This case falls squarely into the category that Section 1252(f)(1) does not impact. As the government acknowledges, this case "concern[s] the *authority* of U.S. Immigration and Customs Enforcement (ICE) to detain noncitizens who have been ordered removed from the United States." Pet.Br.3 (emphasis added). ICE may not detain aliens absent statutory authorization to do so. *See Clark v. Martinez*, 543 U.S. 371, 385 (2005). The government *purported* to have statutory authority to detain respondents under 8 U.S.C. § 1231(a)(6). Respondents filed suit *not* to prevent Section 1231(a)(6) from "functioning," but rather to obtain a determination that the provision did not authorize detention in the circumstances here. The district court's decision simply interpreted the scope

of ICE's statutory authorization. And the court's resulting injunction only enjoined and restrained the *ultra vires* action of government officials who, based on the court's interpretation, lacked statutory authority for continued detention.

That injunction left the statute itself to "function[]" precisely as before—and as Congress intended. It did no more than stop an agency from taking an action that it could not take in the absence of the statute. Enjoining conduct that is not authorized by a statute neither restrains nor enjoins the statute. It does not affect the "functioning" of the statute in any way, and is plainly permissible under Section 1252(f)(1).

At a minimum, the text of Section 1252(f)(1) lacks the "clearest command" to withdraw equity jurisdiction. *Califano*, 442 U.S. at 705. The language of this provision does not unequivocally strip the courts from providing injunctive relief in a case such as this one, where respondents challenged agency action that is not authorized by statute.

2. The government's arguments to the contrary are misplaced

The government openly embraces a radical and extreme conception of Section 1252(f)(1), as barring classwide injunctive relief whenever a government official *asserts* that he is acting pursuant to statutory authorization—even "a claim that 'the Executive's action does not comply with the statutory grant of authority.'" Pet.Br.16 (citation omitted). The government makes six arguments in support of that broad reading. None are persuasive. To the contrary, the government's convoluted arguments only underscore that Congress has *not* revoked equitable

authority by the "clearest command." *Califano*, 442 U.S. at 705.

First, the government asserts that "enjoining the operation of the covered provisions includes commanding their purported operation just as much as it includes prohibiting it." Pet.Br.17. But as this Court has stated, the word "enjoin" is a "term[] of art in equity." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 13 (2015). It "refer[s] to" an "equitable remed[y] that *restrict[s] or stop[s]* official action." *Id.* (emphasis added). Where Congress chooses to use a term of art, the term should be interpreted in light of its historic meaning. *See FAA v. Cooper*, 566 U.S. 284, 292 (2012) ("[I]t is a 'cardinal rule of statutory construction' that, when Congress employs a term of art, 'it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.'" (citations omitted)). The word "enjoin" is thus best read as prohibiting, rather than compelling, agency action.

But, in any event, the distinction is immaterial here. Respondents have not requested relief that would force a government official to *comply* with an affirmative statutory obligation. Instead, the respondents only seek relief that the agency *refrain* from unauthorized action. Accordingly, nothing in the injunction here affirmatively commands the operation of the statute. Rather, the injunction prohibits a government agency from acting in a manner that is *ultra vires*, and without statutory authorization. *See Grace*, 965 F.3d at 907.

Second, the government argues that the "term 'operation,' in this context, is synonymous with execution, enforcement, or implementation" and so "Section 1252(f)(1) therefore prohibits injunctions

that restrain the Executive's implementation of the immigration laws." Pet.Br.18. But, again, the injunction does not prevent the government from "implementing" any provision it is *authorized* to implement—it merely prevents the government from taking actions *beyond* those actually authorized by the statute. Just because an agency official *purports* to be "implementing" a statutory provision does not mean that he or she actually is. It is up to a court to determine whether the challenged action actually "implements" the statute, or exists apart from it as an act the statute does not authorize. If the action falls into the latter category, the official's act cannot fairly be characterized as "implementation." Thus, even stretching the word "operation" to include an official's "implementation" of a statute does not help the government here.

Third, the government suggests that the Ninth Circuit's approach reworks the statute to read "proper operation" rather than "operation." Pet.Br.19. That too is false. When an agency acts beyond its statutory authority, it is not the statute "operat[ing]" in an "improper" way. In fact, it is not an "operation" of the statute at all; it is just an official *claiming* that his action is authorized by the statute. But Section 1252(f)(1) bars only injunctions against the actual "operation of" the statute—not all "claimed operation" by government officials. It is thus the government's interpretation itself that adds words to the ordinary meaning of "operation."

Fourth, the government argues that "the Ninth Circuit's . . . approach effectively deletes" the clause "[r]egardless of the nature of the action or claim," by distinguishing between statutory and constitutional claims. *Id.* But the introductory clause of the

provision does not purport to *expand* the scope of the bar *beyond* injunctions against the "operation" of the statute. The introductory clause simply directs that *as to* injunctions properly within the scope of the provision—i.e., those that "enjoin or restrain the operation" of the statute—the prohibition is "[r]egardless of the nature of the action or claim." 8 U.S.C. § 1252(f)(1). Nothing about the introductory clause requires this Court to read the word "operation" in a way that departs from its ordinary meaning.

Fifth, the government argues that the Ninth Circuit's interpretation must be incorrect because "[t]here is no indication that Congress sought to *disfavor* constitutional claims when it enacted Section 1252(f)." Pet.Br.21. Under Section 1252(f)(1), agency action that violates the Constitution can equally be enjoined, so long as the injunction does not "enjoin[] or restrain[] the operation of" the statute.[4]

It is thus unsurprising that there is no language expressing Congress's specific desire to "disfavor" constitutional claims. That is not what Congress was trying to do—it simply wished to place limits on injunctions that actually stop the functioning of laws

---

[4] So, for example, an agency's violation of due process in the deportation process would fall outside the scope of Section 1252(f)(1), unless there were a specific provision of the statute *commanding* that due process violation, such that the "operation of" that provision would be restrained by issuing the injunction. And, in some circumstances, claims premised on statutorily unauthorized conduct may also be constitutional claims premised on the theory that the executive lacks power to do something unless authorized by Congress and that the act therefore violates the separation of powers.

it enacts (regardless of the source of the challenge to those laws).[5]

Finally, the government argues that the "Ninth Circuit's approach . . . greatly complicates the jurisdictional inquiry by collapsing it with the merits." Pet.Br.22. But the government fails to explain why that would be a problem here. This Court has repeatedly recognized that questions of jurisdiction and merits can overlap. *Brownback v. King*, 141 S. Ct. 740, 749-50 (2021); *cf. Perry v Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1986 (2017). Indeed, this Court has recognized that overlap in this area is "familiar." *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351-52 (2011) ("The necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation.").

Of course, overlap between a threshold jurisdictional inquiry and the merits may be problematic where a provision is designed to protect a defendant from suit in the first place. *See, e.g.*, *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1316-17 (2017) (discussing the Foreign Sovereign Immunities Act of 1976 and noting "where jurisdictional questions turn upon further factual development, the trial judge may take evidence" but "consistent with foreign sovereign immunity's basic objective, namely to free a foreign sovereign from *suit*, the court should normally resolve those factual disputes and reach a decision

---

[5] Of course, to the extent that Section 1252(f)(1) limits constitutional claims, it could itself be unconstitutional in certain circumstances. But that is irrelevant to the question presented here.

about immunity as near to the outset of the case as is reasonably possible"). But that is not the circumstance here. Indeed, even the government acknowledges that classwide declaratory relief and injunctive relief for individual claims remain. Accordingly, a court typically will be required to assess the merits in any event. And the scope of appropriate *relief* (whether declaratory or injunctive) is a question commonly left for resolution until after the merits inquiry has been resolved. *See Califano*, 442 U.S. at 702 (stating "scope of injunctive relief is dictated by the extent of the violation established"); 10B Mary Kay Kane, *Federal Practice and Procedure* § 2768 (4th ed. Apr. 2021 update) (noting that scope of declaratory relief is to be determined after and no broader "than the issues tried"). Therefore, there is nothing unusual about resolving the merits before determining if injunctive *relief* is available under the terms of Section 1252(f)(1).

C. The statute does not bar injunctions in class actions brought by individuals in removal proceedings

Even if the government's expansive reading of Section 1252(f)(1) were correct, the claims here fall squarely within Section 1252(f)(1)'s exception for the "application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1). That exception permits all individuals in removal proceedings to seek injunctive relief, regardless of the procedural device they use to bring their claims—be it an individual action, joinder, or as a class under Rule 23.

1. The statute's use of the word "individual" does not overturn the default availability of class actions

Rule 23 establishes a presumption that class actions are available by default to "[o]ne or more members of a class," as long as the class meets certain procedural prerequisites. Fed. R. Civ. P. 23(a). Section 1252(f)(1)'s use of the word "individual" does not overturn the default rule that class actions are permissible. *See Califano*, 442 U.S. at 698-701. Instead, the word "individual" functions to distinguish the relief available to an individual in the removal process rather than organizational or other kinds of plaintiffs not in the removal process. Accordingly, the most sensible reading of the exception here is that it seeks to limit relief to "individual" aliens "*against whom proceedings under such part have been initiated*," 8 U.S.C. § 1252(f)(1) (emphasis added).

The government's assertion to the contrary squarely contradicts this Court's holding in *Califano*. There, this Court explained that "[t]he fact that the statute speaks in terms of an action brought by 'any individual' or that it contemplates case-by-case adjudication does not indicate that the usual Rule providing for class actions is not controlling, where under that Rule certification of a class action otherwise is permissible." *Califano*, 442 U.S. at 700. This Court also made clear that the principle was not limited to the statute before it. Speaking broadly, the Court noted that "a wide variety of federal jurisdictional provisions speak in terms of individual plaintiffs, but class relief has never been thought to be unavailable under them." *Id.*; *see also* 1 U.S.C. § 1

("words importing the singular include and apply to several persons, parties, or things").

Indeed, numerous statutes refer to individual plaintiffs but have *not* been construed as barring class relief. To start, this Court's decision in *Califano* specifically references three such statutes. *See* 442 U.S. at 700-01 (referencing 29 U.S.C. § 1132(a); 28 U.S.C. § 1361; 28 U.S.C. § 1343(a)).

And other examples abound. For instance, in *Brown v. Plata*, this Court considered a provision in the Prison Litigation Reform Act that stated "[p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right *of a particular plaintiff or plaintiffs*." 563 U.S. 493, 531 (2011) (emphasis added). The Court concluded that classwide injunctive relief nonetheless remained available. *Id.* at 535. Similarly, a variety of other statutes speak in terms of individual plaintiffs. *See* 15 U.S.C. § 77k(a) (Securities Act of 1933, "any person acquiring such security . . . may either at law or in equity, in any court of competent jurisdiction, sue"); 18 U.S.C. § 2707(a) (Stored Communications Act, "any provider of electronic communication service, subscriber, or other person aggrieved"); 15 U.S.C. § 80a-35(b) ("Investment Company Act, empowers "a security holder" to bring a derivative action). Plaintiffs have pursued (and been permitted) class relief for claims related to all three of those statutes. *See, e.g.*, *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2047 (2017) (Securities Act); *Franks v. Gaos*, 139 S. Ct. 1041, 1043 (2019) (per curiam) (Stored Communications Act); *Ross v.*

Bernhard, 396 U.S. 531, 531-32 (1970) (Investment Company Act).[6]

The government asserts that statutes like those described above are different because they use the word "individual" as a noun rather than an adjective. But the government identifies no authority to support giving such far-reaching effect to that distinction. As a matter of ordinary meaning, an "individual alien," an "alien," and an "individual" are all synonymous in this context: They each refer to a single person. And this Court's settled precedent makes clear that a statute's reference to an individual claimant does not make class relief unavailable. *See Califano*, 442 U.S. at 700-01.

Indeed, it is entirely implausible that Congress sought to create a bar on classwide relief through cryptic invocation of the word individual as an "adjective" rather than a "noun" when it is presumed to be "aware of relevant judicial precedent"—including the settled principle that use of the word "individual" alone is *not* enough to bar class proceedings. *Merck*, 559 U.S. at 648; *see also North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) (same).

If Congress had intended to create such a limitation, it could have done so much more

---

[6] Agencies similarly have interpreted references in the singular to permit group resolution of claims. *See, e.g.*, 81 Fed. Reg. 75,926, 75,964-65 (Nov. 1, 2016) (concluding that the Higher Education Act's reference to those defenses "a borrower may assert" permitted the agency to utilize a group resolution process and noting that "[w]hile the language of the statute refers to a borrower in the singular, it is [a] common default rule of statutory interpretation that a term includes both the singular and the plural").

straightforwardly—just as it did in another provision in the Act at issue here. *See* 8 U.S.C. § 1252(e)(1)(B). Section 1252(e)(1)(B) provides that: "Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may . . . certify a class under Rule 23 of the Federal Rules of Civil Procedure." *Id.* It makes no sense to think Congress would wish to create a class action bar in *both* Sections (f)(1) and (e)(1)(B), but try to accomplish the latter expressly through plain language, and the former through a convoluted use of the word "individual" as an adjective. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (citation omitted)); *see also Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) ("Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision.").

Finally, the government's proposed reading would create a nonsensical and inefficient bar on joinder. Under the government's interpretation, a family seeking the same relief arising from common questions of law and fact would be prohibited from joining their claims, and instead be forced to bring individual suits for each and every family member. *See* Fed. R. Civ. P. 20(a). There is no sensible reason for Congress to have created such an inefficient and pointless restriction—and it should not be assumed to have done so.

2. The government's arguments to the contrary are again misplaced

The government makes two broad arguments for why the word "individual" should, for the first time, be read as an implicit bar on class actions. Again, neither is persuasive.

First, the government argues that "[t]his Court has already concluded" that classwide injunctions fall outside the exception to Section 1252(f)(1). Pet.Br.26. Specifically, the government contends that this Court offered a definitive interpretation that mirrors the government's in three cases, *Rodriguez*; *Reno v. American-Arab Anti-Discrimination Committee* ("*AADC*"), 525 U.S. 471 (1999); and *Nken v. Holder*, 556 U.S. 418 (2009).

But in both *AADC* and *Nken*, this Court was interpreting the scope of a *different* statutory provision, and mentioned Section 1252(f)(1) only in passing. For example, in *AADC*, the Court considered whether federal courts had jurisdiction over a suit to enjoin deportation proceedings, in light of the recently-enacted limitations in Section 1252(g). 525 U.S. at 472-73. The Court referred to Section 1252(f) only to emphasize that its limit could not be construed as an affirmative jurisdictional grant, as the Ninth Circuit had suggested. *Id.* at 481-82. This description was simply to draw a contrast in the course of defining the scope of Section 1252(g)—a different section altogether. *Id.* The Court's language on this point was thus plainly dicta.

Similarly, in *Nken*, this Court considered whether a limitation on injunctions also limits stays pending judicial review. 556 U.S. at 425. The supposedly definitive interpretation of Section 1252(f)(1) appears

only in passing, as part of a remark on the unlikely location of a limitation on stays in a provision addressing injunctions (as opposed to the provision directly addressing stays). *Id.* at 431.

The government's reliance on *Rodriguez* is even more tenuous. As the government acknowledges, this Court noted in *Rodriguez* that the Ninth Circuit had "held that [Section 1252(f)(1)] did not affect its jurisdiction over respondents' *statutory* claims because those claims did not 'seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct . . . not authorized by the statutes.'" *Rodriguez*, 138 S. Ct. at 851 (omission in original) (citation omitted). The government suggests that the "sole purpose of the remand" was to consider whether the Ninth Circuit's prior logic would apply to constitutional claims. Pet.Br.27. But if the Court had somehow held that Section 1252(f)(1) barred *all* classwide injunctive relief for statutory and constitutional claims, it would have had no cause to remand the case for the Ninth Circuit to consider whether "its own logic" applied to constitutional claims. That question would be entirely academic, because (in the government's telling), the Court had already held that the Ninth Circuit's "logic" was wrong.

Second, the government asserts that the word "individual" would be redundant if the provision is not read as a bar on classwide injunctive relief because only natural persons can be placed in removal proceedings. But "[r]edundancy is not a silver bullet." *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019). Congress has employed similarly redundant language in numerous immigration statutes. *See, e.g.*, 8 U.S.C. § 1601(4) ("[Certain public

assistance rules] have proved wholly incapable of assuring that individual aliens not burden the public benefits system."); *id.* § 1255(h)(2)(B) ("in the case of individual aliens for humanitarian purposes"); *id.* § 1160(c)(2)(B)(i) ("in the case of individual aliens for humanitarian purposes"); *id.* § 1254a(c)(2)(A)(ii) ("in the case of individual aliens for humanitarian purposes"); *id.* § 1255a(d)(2)(B)(i) ("in the case of individual aliens for humanitarian purposes").

This "individual alien" formulation is hardly surprising since "redundancies are common in statutory drafting—sometimes in a congressional effort to be doubly sure, sometimes because of congressional inadvertence or lack of foresight, or sometimes simply because of the shortcomings of human communication." *Barton v. Barr*, 140 S. Ct. 1442, 1453 (2020); *cf. Rimini*, 139 S. Ct. at 881 ("We have recognized that some 'redundancy is "hardly unusual . . . ."'" (quoting *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013))). And, of course, the government has its own superfluity problem, because its theory reads out the word "operation" from the provision. *See Marx*, 568 U.S. at 385 (rejecting argument based on canon against surplusage because "in th[at] case, no interpretation of § 1692k(a)(3) g[ave] effect to every word"); *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011) (same).

II. SECTION 1252(f)(1) DOES NOT BAR A CLASS ACTION SEEKING DECLARATORY RELIEF

Even if Section 1252(f)(1) bars classwide injunctive relief, this Court may still grant declaratory relief—a remedy wholly independent of injunctive relief. *See Nielsen v. Preap*, 139 S. Ct. 954,

962 (2019) (plurality opinion). In *Preap*, this Court explicitly acknowledged that whether a district court has "jurisdiction to enter . . . an injunction is *irrelevant*" to the separate question of whether the court has "jurisdiction to entertain the plaintiffs' request for declaratory relief." *Id.* (emphasis added).

Despite this clear guidance, the government suggests in passing that declaratory relief might be unavailable because the classes here were certified under Rule 23(b)(2). The government notes that Rule 23(b)(2) "applies only if 'final injunctive relief or *corresponding* declaratory relief is appropriate respecting the class as a whole." Pet.Br.32 n.3. The government thus seemingly implies that a classwide declaratory judgment may be precluded because any declaratory relief under Rule 23(b)(2) must "correspond" to injunctive relief—and, so, where injunctive relief is barred, so is declaratory relief.

As an initial matter, the government does not squarely present any argument regarding classwide declaratory relief. A vague allusion to an argument in a footnote does not properly place a question before this Court.

a. But, in any event, the suggestion that Section 1252(f)(1) may bar classwide declaratory relief is without merit. *See Preap*, 139 S. Ct. at 962. The statute's structure and text make that beyond clear. Section 1252(f)(1) is titled "Limit on injunctive relief," and specifically references a court's power to "enjoin or restrain the operation of" the statute. That is in stark contrast to Section 1252(e)(1)'s "Limitations on relief," which prohibits courts from "enter[ing] declaratory, injunctive, or other equitable relief" in certain cases involving expedited removal. Indeed, this Court has previously noted that "[b]y its

plain terms, and even by its title, [Section 1252(f)(1)] is nothing more or less than a limit on *injunctive* relief." *AADC*, 525 U.S. at 481 (emphasis added).

Moreover, Section 1252(f)(1) would make little sense as a bar on both injunctive and declaratory relief, because the provision only applies to courts "other than the Supreme Court." If both classwide injunctive and declaratory relief were barred in the lower courts, this Court would never be able to obtain jurisdiction, and the "other than the Supreme Court" language would be entirely meaningless. *See* Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 Tex. L. Rev. 1661, 1686 (2000) ("Assuming that section 1252(f)(1) is interpreted as barring the district court from affording either declaratory or injunctive relief on behalf of the class prior to the Supreme Court's authorization, it is difficult to see how the district court could acquire jurisdiction over the class action in the first place.").

b. The implication that Rule 23(b)(2) somehow *generally* prevents the grant of declaratory relief in all circumstances where injunctive relief is inappropriate is equally misplaced. This Court has long made clear that declaratory relief is "an alternative to the strong medicine of the injunction," and is thus available in circumstances where injunctions are not. *See Steffel v. Thompson*, 415 U.S. 452, 466 (1974); *see also id.* at 472 ("The *only* occasions where this Court has disregarded the[] 'different considerations' [supporting injunctive and declaratory relief] and found that a preclusion of injunctive relief inevitably led to a denial of declaratory relief have been cases in which principles of federalism militated altogether against federal intervention in a class of adjudications." (emphasis

added)); 7AA Mary Kay Kane, *Federal Practice and Procedure* § 1775 (3d ed., Apr. 2021 update) (collecting cases where courts certified class actions for "corresponding declaratory relief").

For instance, a party seeking declaratory relief need not demonstrate irreparable injury to obtain a declaratory judgment. *Steffel*, 415 U.S. at 471-72. But if classwide declaratory relief under Rule 23(b)(2) must always "correspond[]" to injunctive relief, then a party would effectively be barred from obtaining declaratory relief on a classwide basis, absent a showing they could obtain the "corresponding" injunction—which *would* require irreparable injury. That result would contravene the Rules Enabling Act's clear instruction that use of the class device cannot "abridge" a party's substantive rights. 28 U.S.C. § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right."); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407-08 (2010).

The government's implication that classwide declaratory relief may be precluded here because any declaratory relief under Rule 23(b)(2) must "correspond" to injunctive relief reads far too much into that word. The "corresponding" language that the government points to was not designed to limit the scope of declaratory relief. Rather, as explained in a memorandum by the provision's drafters to the Rules Advisory Committee, the term "corresponding" was included to address a concern that a tortfeasor might use Rule 23(b)(2) as a mechanism to obtain binding and preclusive declaratory judgments against a class of victims who might otherwise sue for money damages. *See* Andrew Bradt, *"Much to Gain and Nothing to Lose" Implications of the History of the*

Declaratory Judgment for the (b)(2) Class Action, 58 Ark. L. Rev. 767, 799-800 (2006). As the memorandum explained, "concern was expressed that the text of (b)(2) . . . might inadvertently permit class actions for a declaration related exclusively or predominantly to liability for money damages." *Id.* (citation omitted). The Committee rewrote the rule "to make clear that the class actions under [Rule 23](b)(2) are limited to instances in which the appropriate final relief is either injunctive relief or is declaratory relief corresponding to injunctive relief." *Id.* (citation omitted). "Corresponding declaratory relief" is thus best understood as corresponding in nature to injunctive relief, to exclude declaratory relief that corresponds in nature to monetary damages. *Id.*; *see also id.* at 797-802.

In sum, even if this Court accepts the government's argument regarding Section 1252(f)(1), courts still remain able to grant classwide declaratory relief.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decisions as to the first question presented in this case should be affirmed.

Respectfully submitted,

RICHARD P. BRESS
CHERISH A. DRAIN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004

SAMIR DEGER-SEN
Counsel of Record
LYDIA FRANZEK
LATHAM & WATKINS LLP
1271 Avenue of the
Americas
New York, NY 10020
(212) 906-4619
samir.deger-sen@lw.com

Counsel for Amici Curiae

November 29, 2021

ADDENDUM

LIST OF AMICI CURIAE

Andrew Bradt

Professor of Law, University of California, Berkeley School of Law (Boalt Hall)

Helen Hershkoff

Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties, New York University School of Law

Leah Litman

Assistant Professor of Law, University of Michigan Law School

David Marcus

Professor of Law, UCLA School of Law

Gerald Neuman

J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law, Harvard Law School

Howard M. Wasserman

Professor of Law, Florida International University College of Law

Michael J. Wishnie

William O. Douglas Clinical Professor of Law, Yale Law School

Adam Zimmerman

Professor of Law, Gerald Rosen Fellow, Loyola Law School, Los Angeles