No. 21-954

IN THE

Supreme Court of the United States

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

Petitioners,

v.

STATE OF TEXAS, ET AL.,

Respondents.

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

SUPPLEMENTAL BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PETITIONERS

NANDAN M. JOSHI
Counsel of Record
ALLISON M. ZIEVE
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
njoshi@citizen.org

Attorneys for Amicus Curiae

May 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes

Miscellaneous

INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a consumer advocacy organization with members in all 50 states. Public Citizen appears on behalf of its members before Congress, administrative agencies, and the courts to advocate for policies that benefit the public. And it is often involved in litigation either challenging or defending agency actions under the Administrative Procedure Act (APA). Public Citizen submitted an amicus brief earlier in this case explaining that the Secretary of Homeland Security's October 2021 memorandum constituted final agency action under the APA.

Public Citizen submits this supplemental amicus brief to address the Court's question whether 8 U.S.C. § 1252(f)(1) imposes any jurisdictional or remedial limitations on the entry of relief under 5 U.S.C. § 706. Although Public Citizen continues to support Petitioners' position that the decision below should be reversed, this brief explains that section 1252(f)(1) would not impose either a jurisdictional or remedial bar to APA remedies if the final agency action at issue were unlawful.

BACKGROUND

The Immigration and Nationality Act (INA), in a section titled "Limit on Injunctive Relief," states that "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

---

[1] This brief was not written in whole or in part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for both parties have consented in writing to its filing through blanket consents submitted to the Court.

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). As pertinent here, part IV addresses "[i]nspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing." *Id.* § 1225.

As explained in the parties' briefs, this case poses a challenge under the APA to an agency action rescinding a government policy, known as the Migrant Protection Protocols (MPP), which purportedly implemented section 1225. Seeking relief under section 706 of the APA, Respondents primarily argue that rescission of MPP was arbitrary, capricious, and contrary to section 1225.

Under section 706 of the APA, a "reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be," among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

SUMMARY OF ARGUMENT

Section 1252(f)(1) poses no barrier to judicial review and entry of relief under section 706 of the APA. Section 1252(f)(1)'s plain language refers to injunctions and restraining orders. The APA remedy for unlawful agency action—a court order holding unlawful and setting aside the agency action—is not an order "enjoin[ing] or restrain[ing] operation of" a law.

Moreover, in the circumstances of this case, the granting of such relief would not even arguably enjoin or restrain the *operation of a statute*, which is the only

form of relief barred by section 1252(f)(1). By its unambiguous terms, section 1252(f)(1) has no application to an APA challenge to the promulgation or rescission of a policy such as MPP.

ARGUMENT

Section 1252(f)(1) poses no barrier to entry of relief under 5 U.S.C. § 706.

A. Even if this case could be described as a challenge to "the operation of the provisions of part IV" of the INA's immigration subchapter, *but see infra* part B, section 1252(f)(1) would pose no barrier to judicial review and relief under section 706 of the APA. "By its plain terms, and even by its title, [section 1252(f)(1)] is nothing more or less than a limit on injunctive relief." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999). The relief authorized by section 706(2), however, is not an injunction, but an order vacating—that is, "hold[ing] unlawful and set[ting] aside"—agency action. *See Black's Law Dictionary* (11th ed. 2019) (defining "set aside" as "to annul or vacate").

Whereas an injunction is an "extraordinary" equitable remedy as to which a court has considerable discretion, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982), "setting aside" is a statutory remedy under the APA that is normally available when agency action is unlawful. *Long Island Power Auth. v. FERC*, 27 F.4th 705, 717 (D.C. Cir. 2022). Indeed, the APA mandates that the reviewing court "shall … hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2); *see Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (stating that

"shall" "normally creates an obligation impervious to judicial discretion"). Although the APA elsewhere grants courts discretion to withhold the remedy otherwise required by section 706, *see* 5 U.S.C. § 702, exercise of that discretion is appropriate only in carefully defined circumstances. *See Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 151 (D.C. Cir. 1993).

Thus, as the D.C. Circuit has stated, when a reviewing court determines that agency regulations are unlawful, "[t]he ordinary practice is to vacate unlawful agency action." *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (citing 5 U.S.C. § 706(2)). And when a court has fulfilled its "obligation to 'set aside' [an] unlawful regulation," injunctive relief is ordinarily unnecessary, *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1222 (D.C. Cir. 2012)—indeed, it is "anomalous." *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012). *Reynolds*, for example, vacated a district court's injunction against the agency and held that the proper remedy was vacatur of the regulation at issue. *Id.*[2]

This Court too has distinguished the APA remedy from the remedy of an injunction. In *Monsanto v. Geertson Seed Farms*, 561 U.S. 139 (2010), this Court described the set-aside remedy of section 706 as "less drastic" than the "drastic and extraordinary remedy" of an injunction. *Id.* at 165–66 ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. If a less drastic remedy (such as partial or complete vacatur of [the

---

[2] Part of *Reynolds*'s merits analysis was later overruled, *see Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014), but that later decision had no effect on the remedial analysis.

agency's] deregulation decision) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted." (citation omitted)).

Further, the standard for issuing an injunction is meaningfully different from the standard for setting aside agency action under section 706. "The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Weinberger*, 456 U.S. at 312 (citing cases). No such findings are necessary to set aside agency action under the APA. Rather, the standard for setting aside final agency action is that the reviewing court has "found [the action] to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," among other possibilities. 5 U.S.C. § 706(2).

The consequences of an order vacating an agency action are also meaningfully different from those of an order "enjoin[ing] or restrain[ing]" the agency from acting. 8 U.S.C. § 1252(f)(1). An order setting aside an agency action nullifies it; but unlike an injunction or restraining order, the order neither compels nor prohibits further action on pain of contempt sanctions. *See Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (holding that a judgment declaring agency action unlawful is not enforceable by contempt). And outside the rare circumstance in which the order is premised on a holding that the statute authorizing any agency action is unconstitutional, an order setting aside agency action as arbitrary, capricious, or otherwise contrary to law does not even arguably "enjoin or restrain" the operation of the statute that governs its actions. The agency remains fully subject to the requirements of

the statute; in fact, often, an order setting aside an agency action is premised on the agency's failure properly to carry out statutory requirements.[3]

That an order setting aside or vacating an action is distinct from one enjoining or restraining a party is confirmed by the "common understanding of judges," who are the decisionmakers "to whom [section 706] is addressed." *Comcast Corp. v. FCC*, 579 F.3d 1, 10 (D.C. Cir. 2009) (Randolph, J., concurring) ("'Set aside' means vacate, according to the dictionaries and the common understanding of judges, to whom the provision is addressed."). Tellingly, the APA adopts judicial usage by incorporating a term commonly used to describe the action that an appellate court takes with respect to an order or judgment improperly entered by a lower court. In such circumstances, the appellate tribunal "sets aside," or vacates, the lower court's action. Indeed, those terms are typically used to describe an appellate court's vacatur of an injunction improperly issued by a lower court.[4] But no

---

[3] For example, here, Respondents seek to have agency action set aside based on their view that it is contrary to the requirements of 8 U.S.C. § 1225. Similarly, earlier challenges to MPP rested on the position (ultimately adopted by the agency in rescinding MPP) that MPP was based on a misconstruction of section 1225 and disregarded the agency's discretionary parole authority under the INA. However a court might resolve these issues in an APA challenge to MPP or to its rescission, any relief that a court provided under section 706 would promote rather than impair the operation of subchapter IV of the INA.

[4] *See*, *e.g.*, *FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1211–12 (9th Cir. 2019) (stating the standard for "set[ting] aside" a preliminary injunction); *N. Mex. Dep't of Game & Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236, 1240 (10th Cir. 2017) ("vacat[ing] the district court's entry of a preliminary

one would say that, in such circumstances, the appellate court has issued an injunction or restraining order against the lower court, let alone that it has enjoined or restrained the operation of a law. The use of the same language to describe the ordinary remedy in APA cases signifies that, under the APA, courts function as "appellate tribunal[s]" in applying the APA's standard of review and set-aside remedy to agency action. *N. Air Cargo*, 674 F.3d at 861.

To be sure, injunctive relief that goes beyond setting aside an unlawful agency action may be available in an APA action when the requirements for issuance of such relief are satisfied. The APA expressly contemplates that, in some circumstances, an "injunctive decree" may be available, 5 U.S.C. § 702; it also provides for the issuance of preliminary equitable relief when necessary "to prevent irreparable injury," *id.* § 705, and allows orders to "compel" agency action in appropriate circumstances, *id.* § 706(1). Injunctive relief under the APA, however, is subject to traditional equitable constraints, *see*, *e.g.*, *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C. Cir. 2006), including those governing the issuance of preliminary and permanent injunctions, *see Winter v. NRDC*, 555 U.S. 7, 20 (2008). That the APA addresses the relief of setting aside agency action separately, and using different terms, from its references to injunctive decrees, orders granting preliminary relief to prevent irreparable injury, and orders compelling agency action underscores that the set-aside remedy is distinct from orders enjoining agency action.

---

injunction"); *Ala. v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1136 (11th Cir. 2005) ("vacat[ing]" a district court injunction).

Another APA provision, 5 U.S.C. § 559, further reinforces that an order setting aside unlawful agency action under section 706(2) of the APA does not enjoin or restrain the operation of statutes and that section 1252(f)(1)'s plain language thus excludes its application to such orders. Section 559 provides that a "[s]ubsequent statute may not be held to supersede or modify … chapter 7 [of title 5] … except to the extent that it does so expressly." Chapter 7 includes section 706, and section 1252(f)(1) was enacted decades after the APA. But section 1252(f)(1) contains no express indication of intent to limit or modify the remedial authority granted by section 706. Accordingly, section 559, together with the more general strong presumption of the availability of judicial review of agency action, *see*, *e.g.*, *DHS v. Regents of Univ. of Calif.*, 140 S. Ct. 1891, 1905 (2020), foreclose any argument that section 1252(f)(1) impliedly limits APA relief.

Similarly, this Court has recognized that section 1252(f)(1) does not strip the courts of jurisdiction to hear cases and issue another type of non-injunctive relief: declaratory relief. Such relief typically is integral to relief under section 706, which instructs courts to "hold unlawful" and "set aside" agency action in specified circumstances. 5 U.S.C. § 706(2). In *Nielsen v. Preap*, 139 S. Ct. 954, 962 (2019), this Court held that section 1252(f)(1) posed no bar on judicial authority to issue declaratory relief, even where the bar on injunctive relief might apply. *Accord Make the Road N.Y. v. Wolf*, 962 F.3d 612, 635 (D.C. Cir. 2020) ("Section 1252(f) prohibits only injunctions against 'the operation of the provisions of part IV of this subchapter' as amended …. It does not proscribe issuance of a declaratory judgment[.]"). That point reflects the more general principle that a bar on

injunctive relief does not ordinarily strip the courts of authority to issue other forms of relief. *See Steffel v. Thompson*, 415 U.S. 452, 472 (1974) ("[T]he only occasions where this Court has ... 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."); *Brito v. Garland*, 22 F.4th 240, 252 (1st Cir. 2021) (quoting *Steffel* and noting that, "[b]ecause section 1252(f)(1) concerns federal courts' ability to enjoin the operation of *federal* law, it does not implicate federalism concerns").

B. The plain language of section 1252(f)(1) does not bar relief under section 706 for an additional reason: Section 1252(f)(1) states that the provision addresses "authority to enjoin or restrain the operation of the provisions of part IV" of the INA subchapter. An APA challenge to an agency regulation or enforcement policy is not a challenge to "the operation of the provisions of" the INA. No one in this case, for instance, disputes the validity of any provision of section 1225 or questions whether section 1225 should remain operative. The dispute focuses instead on the government's approach to implementing those provisions.

The House Committee report addressing the provision that became section 1252(f)(1) reflects that the provision does not bar judicial review of agency policies and, therefore, poses no bar to relief under section 706:

> [The provision] also limits the authority of Federal courts other than the Supreme Court to enjoin the operation of the new removal

> procedures established in this legislation. *These limitations do not preclude challenges to the new procedures, but the procedures will remain in force while such lawsuits are pending*. In addition, courts may issue injunctive relief pertaining to the case of an individual alien, and thus protect against any immediate violation of rights. However, single district courts or courts of appeal do not have authority to enjoin procedures *established by Congress* to reform the process of removing illegal aliens from the U.S.

H.R. Rep. No. 104-469, pt. 1 at 161 (1996) (emphasis added). As one commentator has explained, the report "suggests that the purpose of the provision was to prohibit injunctions that would broadly prevent the application of the new statutory procedures designed by Congress, on the basis of constitutional challenges that the Supreme Court had not yet resolved, rather than to prevent injunctions against unlawful implementation of those procedures by regulations that conflict with the statute." Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 Tex. L. Rev. 1661, 1683 (2000).

Consistent with this view, this Court "has twice noted that section 1252(f) 'prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221–1231'; in neither case did it even hint that the 'operation of the provisions' refers to anything other than the statute itself." *Grace v. Barr*, 965 F.3d 883, 907 (D.C. Cir. 2020) (citing *Reno*, 525 U.S. at 481–82; *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018)). In *Jennings*, the Court noted, while suggesting no disagreement, that the court of appeals in that case had concluded that section 1252(f) had no effect on its authority to adjudicate 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." *Jennings*, 138 S. Ct. at 851 (stating that the court of appeals' "reasoning 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").

CONCLUSION

For the foregoing reasons, section 1252(f)(1) does not impose jurisdictional or remedial limitations on the entry of declaratory relief or relief under section 706. This Court should nonetheless reverse the decision below for the reasons explained in earlier briefing in support of Petitioners.

Respectfully submitted,

NANDAN M. JOSHI
Counsel of Record
ALLISON M. ZIEVE
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
njoshi@citizen.org

Attorneys for Amicus Curiae

May 2022