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; STATE OF MISSOURI

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

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. § 1252(f)(1) imposes any jurisdictional or remedial limitations on the entry of injunctive relief, declaratory relief, or relief under 5 U.S.C. § 706.

2. Whether such limitations are subject to forfeiture.

3. Whether this Court has jurisdiction to consider the merits of the questions presented in this case.

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INTRODUCTION

Neither 8 U.S.C. § 1252(f)(1) nor petitioners' litigation choices prevent this Court from affirming the district court's order enjoining the June Termination of the Migrant Protection Protocols. The latter, however, counsels in favor of dismissing the writ of certiorari as improvidently granted.

The relief the district court entered does not prevent the operation of our Nation's immigration laws. Quite the contrary: the district court's injunction requires petitioners "to enforce and implement MPP in good faith" until petitioners can rescind that policy without violating either the APA or section 1225(b)'s detention mandate "because of a lack of detention resources." Pet. App. 212a (emphasis omitted). Such an order was necessary because petitioners "indicated that, *even if* the June 1 Memorandum were declared invalid," they might not reimplement MPP. *Id.* at 211a. Nevertheless, the district court made clear that "[n]othing in [its] injunction requires DHS to take any" action "towards any individual that it would not otherwise take." *Id.* at 213a.

Section 1252(f)(1), which forbids lower courts "to enjoin or restrain the operation" of certain provisions of the INA, poses no obstacle to such an injunction. The district court's injunction prevents petitioners from unilaterally refusing to enforce Congress's unequivocal mandate; it does not prevent the operation of that mandate. And in any event, section 1252(f)(1) does not affect a district court's authority to vacate an unlawful action or to enter declaratory relief.

But whatever the contours of section 1252(f)(1)'s prohibition, it cannot help petitioners who have forfeited any argument based on it. Section 1252(f)(1) either (a) limits the remedies a district court may order, such as under

5 U.S.C. §§ 703, 706 or its inherent equitable powers, or (b) it withdraws the United States' sovereign-immunity waiver wherever applicable, such as under 5 U.S.C. § 702. Either possibility may be forfeited. Petitioners did so by failing to sufficiently raise section 1252(f)(1) in their petition or brief it on the merits beyond a single footnote in each. This Court should give effect to that forfeiture.

Finally, if the Court is in doubt as to the lower courts' jurisdiction to issue the challenged order, it should enter an injunction itself—as section 1252(f)(1) expressly allows—or dismiss the writ as improvidently granted. Petitioners forfeited a critical argument antecedent to ruling on the merits of the first question presented, and both parties agreed at oral argument that the merits of the second question presented—"[w]hether the court of appeals erred by concluding that the Secretary's [October Memoranda] terminating MPP had no legal effect," Pet. (I)—should be addressed first by the district court. Tr. 67:13-16; 113:21-23. Under such circumstances, this Court would be justified in reconsidering its decision to review the Fifth Circuit's judgment in the first place.

ARGUMENT

I. Section 1252(f)(1) Does Not Preclude the Relief Ordered by the District Court.

Section 1252(f)(1) does not affect the district court's power to vacate and enjoin petitioners' unlawful attempt to rescind MPP or to order petitioners to continue to implement MPP in good faith. That provision prevents an order that "enjoin[s] or restrain[s]" the operation of part IV of the INA; it does not prevent an order requiring the enforcement of part IV. Even if it did apply, the provision at most limits available remedies—not lower courts' jurisdiction. And because section 1252(f)(1)'s text limits

only injunctive relief, it does not affect district courts' authority to vacate unlawful administrative action or to issue declaratory relief.

A. The district court's injunction falls outside section 1252(f)(1)'s scope.

In district court, petitioners asserted that vacating the June Termination would not require them to reimplement MPP. Pet. App. 211a. Given this admission that vacatur would not fully remedy respondents' injuries, the district court both vacated the June Termination and ordered petitioners "to enforce and implement MPP in good faith" until petitioners could lawfully rescind the program. *Id.* at 212a. Neither order implicates section 1252(f)(1).

1. Section 1252(f)(1) prohibits injunctive relief only where such relief "enjoin[s] or restrain[s] the operation" of covered provisions. Read in context, section 1252(f)(1) prevents the lower courts from *prohibiting* the enforcement of covered provisions, but it does not prevent them from *requiring* such enforcement. *Cf. Nken v. Holder*, 556 U.S. 418, 436 (2009). To "enjoin" is to "forbid" or "prohibit," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 754 (2002), and to "restrain" is to "prevent from doing something," *id.* at 1936. The word "enjoin" is a "term[] of art in equity" that "refer[s] to" an "equitable remed[y] that restrict[s] or stop[s] official action." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 13 (2015). Here, the official action to be enjoined or restrained is the "operation" of the specified provisions—a term that means the condition of functioning or being active." NEW OXFORD AMERICAN DICTIONARY 1229 (2010); *see also* WEBSTER'S THIRD, *supra* at 1581. Taken together, these terms mean that a district

court cannot prohibit or prevent the functioning of part IV of the INA.

But section 1252(f)(1) does not prohibit injunctions requiring the Executive to *continue* the functioning of the INA. An injunction against a violation of a statute does not "forbid" or "prevent" that statute's "functioning." It instead aids its operation. Thus, section 1252(f)(1) permits injunctions requiring continued enforcement of covered provisions while forbidding lower courts from prohibiting executive enforcement of those provisions.[1]

2. The district court's order did not enjoin or restrain the operation of covered statutory provisions. It enjoined implementation of unlawful administrative action—the June Termination—that the district court found would lead to "systemic violation[s] of Section 1225's detention requirements." Pet. App. 205a. No aspect of the district court's order restricts, stops, or restrains the exercise of section 1225 authority.

The June Termination was instead what "forbade [petitioners'] officers from invoking the 'operation' of § 1225(b)(2)(C)," and the "injunction undid that restraint." *Id.* at 135a. "Far from 'restrain[ing]' the 'operation' of the statute, the injunction restored it." *Id.*; *see also id.* at 184a (rejecting petitioners' argument because the order "attempt[s] to make [petitioners] *comply* with Section 1225" rather than "*restrain* [them] from enforcing" the law). The district court's order requiring petitioners "to enforce and implement MPP in good faith"

[1] Section 1252(f)(2) reinforces this conclusion: it prohibits enjoining executive action—namely, "the removal of any alien pursuant to a final order"—but does not restrict injunctions against the Executive's refusal to act.

until the program's lawful rescission, *id.* at 212a (emphasis omitted), merely sets out the conditions under which MPP may be lawfully terminated. Nothing in the district court's order enjoined or restrained petitioners' exercise of statutory authority or compelled any result as to any particular alien. *Id.* At most, it enjoined petitioners' attempt to rescind a policy designed to implement the operations contemplated by part IV's mandatory-detention and contiguous-return provisions. Such an injunction falls outside section 1252(f)(1)'s limitation.

3. The order here is different in kind from the injunctions that this Court has previously considered in the section 1252(f)(1) context. For example, in *Nielsen v. Preap*, the lower courts had enjoined section 1226's detention mandate, "holding that criminal aliens are exempt from mandatory detention under [8 U.S.C.] § 1226(c) (and are thus entitled to a bond hearing) unless they are arrested when [they are] released, and no later." 139 S. Ct. 954, 961 (2019) (quotation marks omitted). Though the Court did not reach the issue, that injunction prevented the enforcement of Congress's detention requirements pending resolution of the merits—and thus violated section 1252(f)(1). *Id.* at 962. The injunction here does nothing of the sort: it enjoins the rescission of MPP until petitioners can do so lawfully.

And the district court's order here bears no resemblance to the injunction in *Gonzalez v. Garland*, No. 20-322. There, the Ninth Circuit determined that the plaintiffs were "likely to succeed on the merits of their claim that § 1231(a)(6) requires the Government to provide class members with an individualized bond hearing." *Aleman Gonzalez v. Barr*, 955 F.3d 762, 765 (9th Cir. 2020), *cert. granted sub nom. Garland v. Gonzalez*, 142

S. Ct. 919 (2021). Where the injunction in *Gonzalez* restrains the Executive's ability to remove aliens that Congress has deemed removable by requiring bond hearings, *id.*, the injunction here requires only the good-faith continuation of MPP until petitioners lawfully rescind it, Pet. App. 212a. And the district court's order expressly does not require petitioners to take any specific action as to any particular alien. *Id.*

4. Insofar as petitioners assert—as they did before forfeiting the argument in this Court, *infra* at 15-16—that the term "enjoin" includes mandatory injunctions, that argument fails for at least three reasons.

First, though the term "enjoin" can at times mean to "order that something be done," BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 317 (3d ed. 2009), adopting such a reading here would ignore linguistic context. The direct object of "enjoin" is "operation," and to "enjoin the *operation*" of something ordinarily means to prevent it from operating, not to require it to operate. *See* WEBSTER'S THIRD, *supra*, at 754. Further, the term appears in conjunction with the term "restrain," which suggests the two terms "should be given related meanings." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 195-98 (2012). Ordinarily, the term "restrain" refers to preventing an actor from acting—not to require an actor to act. WEBSTER'S THIRD, *supra* at 1936.

That principle applies with greater force here because giving the terms "enjoin" and "restrain" diametrically opposite meanings would make the word "operation" in section 1252(f)(1) superfluous. But "[a] statute ought, upon the whole, to be so construed that, if it can be prevented, no . . . word shall be superfluous, void, or insignificant." *Bloate v. United States*, 559 U.S. 196, 209

(2010). A different phrasing—such as "compel" or "require" the "continued operation"—would have been a far more natural way to convey the opposite meaning here.

Second, given that "enjoin" may be fairly read as reaching either only prohibitory orders or both prohibitory and mandatory orders, this Court's longstanding precedent counsels the narrower meaning. "Absent 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). Because Congress did not clearly seek to prevent lower courts from reviewing alleged executive dereliction, this Court should "resolve [any] ambiguities" as allowing lower courts to act "in accordance with their traditional practices." *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944).

Third, that view would read section 1252(f)(1) as amended by IIRIRA ahistorically. As respondents' merits brief explained (at 19, 23), IIRIRA was passed in response to persistent executive refusal to enforce Congress's immigration mandates. Section 1252(f)(1)'s legislative history confirms that Congress did *not* contemplate that provision would prevent injunctive relief against administrative policies seeking to nullify IIRIRA's detention mandate. As a report of the House Judiciary Committee noted, section 1252(f)(1) was designed to ensure that "the new removal procedures established in this legislation . . . . will remain in force while . . . lawsuits are pending." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, Mar. 4, 1996, at 161. This history confirms that section 1252(f)(1) lacks the "clearest command" this Court requires to extinguish equitable authority. *Califano*, 442 U.S. at 705.

B. Section 1252(f)(1) is a remedial limitation only.

1. Section 1252(f)(1) limits the lower courts' equitable remedies, not their jurisdiction.

Even if the district court's order fell within section 1252(f)(1), that provision would not have limited the lower courts' *jurisdiction* to hear respondents' claims—only the available remedies for those claims. The contours of this distinction can be blurry, *cf. Fort Bend County v. Davis*, 139 S. Ct. 1843, 1848-49 (2019), but section 1252(f)(1) is best understood as limiting lower courts' remedial powers.

After all, this Court has described section 1252(f)(1) as a remedial limitation. "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) ("*AADC*"). When responding to a meritless argument that section 1252(f)(1) conferred lower-court jurisdiction, this Court held that it "plainly serves as a limit on injunctive relief rather than a jurisdictional grant," *id.* at 487. If section 1252(f)(1) unambiguously restricted the lower courts' jurisdiction, this Court would have said so.

Only section 1252(f)(1)'s imprecise use of the term "jurisdiction" suggests otherwise. "Jurisdictional requirements mark the bounds of a court's adjudicatory authority." *Boechler, P.C. v. Commissioner*, -- S. Ct. --, No. 20-1472, 2022 WL 1177496, at *3 (U.S. Apr. 21, 2022) (cleaned up). Neither Congress nor this Court has used the term "jurisdiction" in a consistent way. *See Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 & n.3 (2019). This Court accordingly treats provisions as jurisdictional only if Congress clearly indicates they must be regarded as such. *Boechler*, 2022 WL 1177496, at *3.

Statutory provisions affect a court's subject-matter jurisdiction only if they delineate "the classes of cases a court may entertain." *Davis*, 139 S. Ct. at 1848. And the use of the term "jurisdiction" does not make a requirement jurisdictional. A non-jurisdictional requirement does not become jurisdictional merely because the term jurisdiction appears in close proximity. *Cf. Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 155 (2013).

Section 1252(f)(1) does not unambiguously speak in jurisdictional terms. "[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 that term. *Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 248 (2014). Congress's use of the term "jurisdiction" here tracks twentieth-century usages of the term as concerning when a court may grant relief—not when it has the power to adjudicate a case. *E.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90-93 (1998); *Glidden Co. v. Zdanok*, 370 U.S. 530, 557 (1962).

Congress used the term "jurisdiction" in section 1252(f)(1) consistent with this traditional understanding, making it "nothing more or less than a limit on injunctive relief." *AADC*, 525 U.S. at 481. Congress used "jurisdiction" and "authority" as synonyms in defining what courts may "enjoin and restrain." *See generally Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141-42 (2018) (discussing distribution of antecedents). And this Court has characterized section 1252(f)(1) as "'prohibit[ing] federal courts from granting classwide injunctive relief.'" *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) (quoting *AADC*, 525 U.S. at 481); *Nken*, 556 U.S. at 431.

This conclusion is bolstered by section 1252's structure. *See, e.g.*, *Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S. Ct. 2298, 2307 (2021); *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019). The subsection title places a "[l]imit on injunctive relief." 8 U.S.C. § 1252(f). Moreover, where Congress wanted to make "[m]atters not subject to judicial review" in section 1252, it did so expressly—in a different paragraph. *Id.* § 1252(a)(2). That Congress limited the federal courts' jurisdiction unambiguously elsewhere in section 1252 strongly suggests that it did not do so through section 1252(f)(1).

Finally, other well-established principles support the interpretation of section 1252(f)(1) as a remedial limitation. There is a "strong presumption favoring judicial review of administrative action," and "Congress is presumed to legislate with it in mind." *Salinas v. U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021). If section 1252(f)(1) is a jurisdictional rule, it requires litigants to raise certain challenges in this Court in the first instance. But such claims *must* be brought against the United States or one of its officers—falling within the Court's *appellate* jurisdiction and generally not within the Court's original jurisdiction. U.S. CONST. art. III, § 2, cl. 2. Such an expansion of this Court's original jurisdiction would violate Article III. *Ortiz v. United States*, 138 S. Ct. 2165, 2173 (2018). Because interpreting section 1252(f)(1) as a remedial limitation both preserves judicial review and "avoids placing its constitutionality in doubt," that is the interpretation required by well-established canons of construction. SCALIA & GARNER, *supra* at 247.

2. Section 1252(f)(1) permits vacatur of unlawful administrative action.

Section 1252(f)(1) does not affect the district court's authority under 5 U.S.C. § 706 to vacate and remand the

June Termination. That remedy is distinct from injunctive relief.

A district court's authority to set aside or vacate administrative action under 5 U.S.C. § 706 differs from its power to enjoin unlawful action. In *Monsanto Co. v. Geertson Seed Farms*, this Court distinguished vacatur as a "less drastic remedy" than an injunction. 561 U.S. 139, 165-66 (2010). An order vacating administrative action does not "enjoin or restrain" the INA's operation because vacatur alone does not enjoin anything at all.

As petitioners acknowledged in the district court, vacatur of the June Termination would not have provided the same relief as an injunction. Indeed, the district court found an injunction necessary only because petitioners "indicated that, *even if* the June 1 Memorandum were declared invalid, they would not necessarily return any aliens to Mexico." Pet. App. 211a. Having acknowledged the difference between the two remedies below, petitioners cannot equate them here.

3. Section 1252(f)(1) permits declaratory relief.

Like vacatur, declaratory relief is distinct from injunctive relief. Though a declaratory judgment binds the parties, "Congress plainly intended declaratory relief to act as an alternative" to injunctive relief, *Steffel v. Thompson*, 415 U.S. 452, 466 (1974), because declaratory relief does not directly coerce any party or enjoin any action.

Section 1252(f)(1)'s silence regarding declaratory relief stands in contrast to the preceding subsection, which explicitly enumerates "declaratory, injunctive, or other equitable relief." 8 U.S.C. § 1252(e)(1)(A). The APA similarly distinguishes between "declaratory judgments" and "writs of prohibitory or mandatory injunction."

5 U.S.C. § 703. Yet section 1252(f)(1) refers to injunctive relief alone. "[W]hen 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." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (quotation marks omitted).

Consistent with section 1252's text, this Court has suggested that section 1252(f)(1) does not bar declaratory relief. *Jennings*, 138 S. Ct. at 851 ("[I]f the Court of Appeals concludes that it may issue only declaratory relief [under § 1252(f)(1)], then the Court of Appeals should decide whether that remedy can sustain the class on its own."). The *Jennings* dissent explicitly embraced that view. *Id.* at 875 (Breyer, J.). And the *Preap* plurality similarly indicated that section 1252(f)(1) did not deprive courts of jurisdiction to entertain a "request for declaratory relief." 139 S. Ct. at 962. Even where section 1252(f)(1) prohibits a given injunction, it does not limit district courts' power to issue declaratory relief.

II. Section 1252(f)(1)'s Limitation Is Subject to Forfeiture.

Whether understood as a limitation on remedies or jurisdiction, however, section 1252(f)(1) is subject to forfeiture. Remedial limitations may be forfeited. Even if section 1252(f)(1) were jurisdictional, it would be a limit on the United States' waiver of sovereign immunity—which sounds in *personal* jurisdiction, and thus likewise may be forfeited. In either event, petitioners have forfeited section 1252(f)(1)'s limitation.

A. Because section 1252(f)(1) is non-jurisdictional, it may be forfeited.

It is well established that non-jurisdictional objections are forfeitable if a party does not properly invoke them. *E.g.*, Fed. R. Civ. P. 12(b) & 12(h). This principle extends to countless non-jurisdictional requirements. Even a "mandatory claim-processing rule [is] subject to forfeiture if not properly raised." *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 16 (2017). This Court, for example, has construed Rule 23(f)'s time limit for taking an immediate appeal as waivable. *Nutraceutical Corp.*, 139 S. Ct. at 714 & n.3. Likewise, parties may forfeit objections to personal jurisdiction and venue. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999); *Hoffman v. Blaski*, 363 U.S. 335, 343 (1960). If understood as a non-jurisdictional remedial limitation, section 1252(f)(1) is thus subject to forfeiture.

B. Even if section 1252(f)(1) were jurisdictional, it would still be subject to forfeiture.

Even if section 1252(f)(1) were jurisdictional, it would still be subject to forfeiture because it is best understood as a limitation on the United States' waiver of sovereign immunity. The United States' sovereign immunity sounds in personal jurisdiction and is thus subject to forfeiture. Yet if section 1252(f)(1) were a subject-matter jurisdictional limitation—and it is not—rules of party presentation suggest that this Court should dismiss the writ of certiorari as improvidently granted rather than reversing the Fifth Circuit.

1. To the extent it is jurisdictional, section 1252(f)(1) limits the United States' sovereign-immunity waiver. The claims and remedies contemplated in section 1252(f)(1) run against the federal government alone, and thus they require a waiver of sovereign immunity—as

relevant here, the waiver provided by the APA. 5 U.S.C. § 702; *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012). Absent some other statutory limitation, section 702 of the APA waives sovereign immunity in the federal courts "for relief other than money damages." 5 U.S.C. § 702. Section 1252(f)(1), which applies "[r]egardless of the nature of the action," limits the waiver the APA provides.

Sovereign immunity sounds in personal jurisdiction. *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1493-94 (2019); *see also PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2264 (2021) (Gorsuch, J., dissenting) ("Structural immunity sounds in personal jurisdiction, so the sovereign can waive that immunity."). Accordingly, sovereign-immunity defenses can be waived, *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 43 (2012) (plurality op.), just as analogous personal-jurisdiction defenses can, *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982).

2. Even if the Court viewed section 1252(f)(1) as a limit on the lower courts' subject-matter jurisdiction, this Court is not obligated to resolve that provision's scope. To be sure, this Court has recognized that questions that go to a court's subject-matter jurisdiction may be raised at any point. *E.g.*, *Ruhrgas*, 526 U.S. at 583-84. But a lack of subject-matter jurisdiction only prohibits this Court from reaching the merits of the questions presented. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007). It does not prohibit this Court from dismissing a case from its discretionary docket due to a party's failure to raise or brief a dispositive issue.

Party-presentation requirements protect both the Court and litigants from the costs associated with a party

sandbagging their jurisdictional arguments. This Court has recognized that the need for finality precludes a party from collaterally challenging subject-matter jurisdiction upon resolution of jurisdictional facts and entry of final judgment. *E.g.*, *Jackson v. Irving Trust Co.*, 311 U.S. 494, 502-03 (1941); *Stoll v. Gottlieb*, 305 U.S. 165, 177 (1938). The same concerns manifest when a petitioner strategically chooses not to challenge multiple jurisdictional rulings by a lower court. If this Court concludes that section 1252(f)(1) restricts the lower courts' subject-matter jurisdiction, it should dismiss the writ of certiorari as improvidently granted rather than reward petitioners' questionable litigation choices.

C. Petitioners have forfeited any argument under section 1252(f)(1) in this Court.

Petitioners manifestly forfeited any argument under section 1252(f)(1). They mentioned it in two nearly identical footnotes only: one in their petition for writ of certiorari, and the other in their opening brief. *See* Pet. 15 n.4; Petitioners' Br. 18 n.3. These are classic examples of forfeiture or abandonment. *See* S. Ct. R. 14.1(a), 24.1(a); *Dolan v. United States*, 560 U.S. 605, 610 (2010); *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *Stone v. Powell*, 428 U.S. 465, 481 & n.15 (1976); *Mazer v. Stein*, 347 U.S. 201, 206 n.5 (1954). These forfeitures prevent petitioners from obtaining relief in this Court based on section 1252(f)(1).

Forfeiture rules exist to prevent the waste of judicial resources that occurred here. Raising an argument in a petition not only enables this Court to decide whether a case is worthy of review, but also gives opposing parties fair notice of the boundaries of their disputes. Likewise, raising an argument in an opening brief provides oppos-

ing parties the opportunity to marshal their best arguments in response, and thus gives the Court the best opportunity to test both sides' arguments before reaching a decision. Petitioners' failure to raise or brief any argument under section 1252(f)(1) caused this Court to invest considerable resources in preparing for oral argument, only to discover that a potentially dispositive issue had not been properly presented. This Court both can and should enforce those forfeitures against petitioners.

III. This Court Has Jurisdiction to Address the Questions Presented, But It Could Appropriately Dismiss the Writ as Improvidently Granted.

This Court has jurisdiction to consider the merits of the questions presented in this case under its capacious certiorari jurisdiction. It should exercise that jurisdiction to affirm the court of appeals for the reasons respondents articulated in their brief on the merits. But if the Court both retains doubts regarding the lower courts' jurisdiction and refuses to effect petitioners' forfeitures, this Court should enjoin petitioners' attempted unlawful rescission of MPP itself; alternatively, it could appropriately dismiss the writ of certiorari as improvidently granted.

A. This Court has jurisdiction over both questions presented.

1. The first question presented is "[w]hether 8 U.S.C. [§] 1225 requires DHS to continue implementing MPP." Pet. (I). This Court has jurisdiction to answer this question, and petitioners do not contest the factfinding or jurisdictional holdings made below.

a. There is no general jurisdictional impediment to this Court answering this question presented. The dis-

trict court undoubtedly had federal-question jurisdiction, as this case arises under the APA and INA. 28 U.S.C. § 1331. Just as straightforwardly, the court of appeals had jurisdiction to review the final judgment of the district court. 28 U.S.C. § 1291.

b. Petitioners made three jurisdictional arguments below that they did not renew before this Court for good reason. *First*, the lower courts found that respondents have standing because Texas would suffer injury through the issuance of driver's licenses and "increased healthcare costs, education costs, and enforcement and correctional costs." Pet. App. 176-77a. The district court's fact-findings are reviewed only for clear error, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021), and petitioners have never attempted to meet that demanding standard. These facts, taken unchallenged, establish respondents' standing. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801-02 (2021); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017).

Second, the lower courts correctly concluded that the June Termination was final agency action. Pet. App. 180a-82a; Pet. App. 15a-19a. Petitioners again did not challenge that holding, again for good reason: the June Termination was final agency action because it "mark[ed] the consummation of the agency's decisionmaking process"—that is, to terminate MPP—and it was not "merely tentative or interlocutory [in] nature." *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 597 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). It unequivocally and finally terminated MPP absent the district court's vacatur. Pet. App. 359a. Even petitioners characterize the October Memoranda as a

second attempt to terminate MPP—not the continuation of their first attempt. Petitioners' Br. 37-42.

Likewise, "the action [was] one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178. Specifically, it directed "DHS personnel, effective immediately, to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives issued to carry out MPP." Pet. App. 182a. Multiple courts of appeals have concluded that "where agency action withdraws an entity's previously-held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action." *Texas v. EEOC*, 933 F.3d 433, 442 & n.18 (5th Cir. 2019) (quoting *Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 56 (D.C. Cir. 2016) (collecting cases)). Petitioners did not dispute that conclusion in their briefs before this Court.

Third, petitioners expressly disclaimed any challenge to the Fifth Circuit's conclusion that this case is not moot. Reply Br. 21. That decision was well-founded for the reasons respondents have already explained. Respondents' Br. 38-39.

2. This Court has jurisdiction to consider the second question presented—"[w]hether the court of appeals erred by concluding that the Secretary's new decision terminating MPP had no legal effect," Pet. (I)—for the same reasons that it has jurisdiction to consider the first question presented.

The only additional complication to this Court's review of the second question presented is that the October Memoranda were created and brought to the Fifth Circuit's attention only after the close of briefing in that court. Strictly speaking, this is not a jurisdictional defect,

as the Court may grant a petition "before or after rendition of judgment or decree" so long as there is a *case* in the Fifth Circuit. 28 U.S.C. § 1254(1). This Court has interpreted that power extremely broadly—indeed, the leading treatise on this Court's practice describes that power as effectively "both discretionary and unlimited in scope." STEPHEN M. SHAPIRO, SUPREME COURT PRACTICE 79 (10th ed. 2013) (citing *Forsyth v. Hammond*, 166 U.S. 506, 513 (1897)). Given the breadth with which this Court has understood its certiorari jurisdiction, this Court has jurisdiction over the second question presented as well.

B. If the Court doubts the lower courts' jurisdiction, it should enjoin MPP's unlawful rescission.

If this Court agrees either that section 1252(f)(1) is a remedial or personal-jurisdictional limitation, it should exercise its jurisdiction to enforce petitioners' forfeiture of that issue and affirm the district court for the reasons respondents articulated in their brief. But if the Court harbors doubts regarding the lower courts' jurisdiction, it may nonetheless enter an injunction identical to the district court's injunction.

Section 1252(f)(1) does not prohibit injunctions issued by this Court—it contemplates them. *See* 8 U.S.C. 1252(f)(1) ("[N]o 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"). And the All Writs Act, 28 U.S.C. § 1651(a), empowers the Court to enter injunctive relief. *E.g.*, *Turner Broad. Sys., Inc. v. F.C.C.*, 507 U.S. 1301, 1301 (1993) (Rehnquist, J., in chambers); *accord F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 604 (1966).

This Court has generally considered requests for injunctive relief in the context of a motion for an injunction pending appeal. *E.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers). But if Congress has made this Court the only available forum for injunctions enforcing certain INA sections, this Court should consider the factors it has directed the district courts to consider when entering injunctive relief. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Such a rule would be consistent not only with the presumption of judicial review, but with section 1252(f)(1)'s legislative history, which states that the provision "do[es] not preclude challenges to the new procedures [established in this legislation], but the procedures will remain in force while such lawsuits are pending." H.R. Rep. No. 104-469, at 161.

Here, the facts as found by the district court are no longer in dispute. And as both the district court and court of appeals concluded, respondents have demonstrated each of the *eBay* factors. Pet. App. 131a-134a, 209a-211a. Thus, even if this Court believes that the lower courts lacked jurisdiction due to section 1252(f)(1), it should enter an injunction identical to the order entered by the district court and affirmed by the court of appeals.

C. Alternatively, the Court could appropriately dismiss the writ as improvidently granted.

Alternatively, the Court could dismiss the writ as improvidently granted. Petitioners' litigation tactics have created a vehicle problem impeding this Court's resolution of the first question, and the parties agree that the merits of the second should be addressed to the district court. Tr. 67:13-16; 115:25-116:9. This Court would ordinarily deny review under such circumstances, and it may do so here notwithstanding its grant of certiorari.

1. The effects of section 1252(f)(1) on the lower courts' ability to enter an injunction—and the effects of petitioners' forfeiture on that limitation—are antecedent vehicle problems which could prevent this Court from ruling on the merits of the first question presented. This Court could, consistent with the requirements of party presentation and its traditional practice, refuse to reach the merits of the first question presented because of these problems. *E.g.*, *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 28 (1993) (per curiam).

2. Both sides now agree that the merits of the October Memoranda are not before the Court at this time; certiorari was therefore improvidently granted regarding the second question presented.

That the merits of the October Memoranda are not before this Court is a function of petitioners' litigation decisions. Petitioners chose to create and raise the Memoranda long after final judgment—indeed, after the close of briefing before the Fifth Circuit. That court expressly disclaimed any holding as to the merits of the Memoranda, Pet. App. 53a, concluding only that the Memoranda did not deprive the court of appeals of jurisdiction. Pet. App. 33a-53a.

Petitioners have not challenged the court of appeals' two jurisdictional holdings regarding the Memoranda. Petitioners failed to raise any argument regarding finality in their opening brief and affirmatively disclaimed "challenging the court of appeals' ruling on mootness." Reply Br. 21. And they agree that the merits of the Memoranda are not before this Court. Tr. 67:13-16. That leaves those Memoranda with no place before this Court at all.

Petitioners' litigation decisions have left them to argue awkwardly that "the injunction remains effective only because of its Section 1225 condition." Reply Br. 21. Thus, they say, "[i]f this Court abrogates that condition, there will be no further barrier to the Secretary's putting his October 29 decision into effect." *Id.*

Petitioners are wrong, and their arguments on this score amount to a motion for relief under Federal Rule of Civil Procedure 60(b)(5) in all but name and venue. An injunction does not disappear merely because a party bound by that injunction asserts the injunction's requirements have been satisfied: that is why Rule 60(b)(5) permits a district court to reopen a judgment because it has been satisfied. *Agostini v. Felton*, 521 U.S. 203, 215 (1997). *Contra* Reply Br. 21.

The district court's injunction requires petitioners to "implement MPP *in good faith* until such a time as it has been lawfully rescinded in compliance with the APA." Pet. App. 212a. To hold that even the APA condition is satisfied would necessarily require this Court to reach the merits of whether the October Memoranda comport with the APA's requirements. But petitioners admit that they "didn't ask this Court to review the substance of the October 29 Memorandum, in recognition that the lower courts haven't considered that issue." Tr. at 67:13-16. As they must. In their reply (at 23), they expressly refused to provide the administrative record for the October Memoranda. And upholding the October Memoranda on the merits without an administrative record would contradict bedrock principles of administrative law. Respondents' Br. 47.

3. This Court could appropriately dismiss the writ of certiorari as improvidently granted. This Court has repeatedly admonished that is a Court of "review"—not of

"first view." *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2056 (2019). And it has instructed that "[i]n our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). The parties have yet to litigate, and the lower courts yet to resolve, the legality or effect of the October Memoranda. Absent that resolution, this Court is being asked to consider without context, without the administrative record, and in the first instance the legal sufficiency or effect of those Memoranda. It should not do so.

CONCLUSION

The court of appeals' judgment should be affirmed. Alternatively, this Court should either enjoin petitioners as described above or dismiss the writ as improvidently granted.

Respectfully submitted.

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May 2022