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 REPLY FOR RESPONDENTS

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ARGUMENT

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

A. Section 1252(f)(1) does not apply to the district court's order.

The district court's order vacates the June Termination and requires petitioners to continue to implement MPP in good faith until they can rescind it consistent with their obligations under the INA and APA. Pet. App. 212a. Neither part of the order "enjoin[s] or restrain[s]" the "operation" of section 1225, so section 1252(f)(1) is no obstacle to that order. *Id.*

1. Section 1252(f)(1) limits the remedies the lower courts may provide, prohibiting them from issuing negative injunctions falling within its scope. Respondents' Supp. Br. 6-7. Petitioners' argument that section 1252(f)(1) precludes both prohibitory and mandatory injunctions removes the statutory term "enjoin" from its context and disregards this Court's admonition that it interprets restraints on federal-court remedial powers narrowly. *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944).

"Enjoin has two basic meanings, each the exact opposite of the other." BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 317 (3d ed. 2011). Petitioners rely on the meaning more common in *British* English and non-legal settings—namely, "to prescribe, to mandate, or to order that something be done." *Id.* In American English, however, the term "enjoin" "is negative in intent" and "means to prohibit, to forbid, or to restrain someone by court order from doing a specific act or behaving in a certain way." *Id.*; *cf.* BRYAN A. GARNER, A DICTIONARY OF MODERN AMERICAN USAGE 250 (1998).

That is, while the term "injunction" can have "broader horizons," in legal usage, the term "enjoin" generally means "don't do it." MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE 196 (1992). The term "enjoin's association with injunction begins and ends with the negative." *Id.*

That is because orders that enjoin a party are only a subset of all injunctive relief. Section 1252 reflects this distinction. Section 1252(f)(1) gives "enjoin" its standard negative meaning, pairing it with "restrain," another term typically associated with prohibitions but not mandates. Respondents' Supp. Br. 6. Where Congress means to restrict both prohibitory *and* mandatory relief, it uses broader language: for example, elsewhere in section 1252, Congress provided that "no court may enter . . . injunctive . . . relief." *See* 8 U.S.C. § 1252(e)(1)(A). Likewise, when Congress means to restrict mandatory injunctions, it does so specifically: elsewhere in IIRIRA, Congress provided that "[n]o cause or claim may be asserted . . . to compel the release, removal, or consideration for release or removal" of certain aliens. Pub. L. No. 104-208, 110 Stat. 3009-599. "Compel" is the term Congress has used elsewhere to describe mandatory relief. *E.g.*, 28 U.S.C. § 1361; 42 U.S.C. §§ 2160a, 7604.

2. Petitioners' authorities (at 6-7) do not require otherwise. Respondents agree with those authorities that the term "enjoin" is susceptible of two meanings—either to prohibit or to require. *See, e.g.*, BLACK'S LAW DICTIONARY 550 (7th ed. 1999) (listing first definition of "enjoin" as to "legally prohibit or restrain by injunction"). This Court has similarly acknowledged both meanings—though it has stated that the term "enjoin" generally "refers to [an] equitable remed[y] that restrict[s] or stop[s] official action to [some] degree[]." *Direct Mktg. Ass'n. v.*

Brohl, 575 U.S. 1, 12-13 (2015). "Restrain" likewise refers to "orders that stop (or perhaps compel) acts." *Id.* at 13. Given two possible meanings of a restraint on lower courts' equitable authority, however, this Court prefers the narrower. *Hecht*, 321 U.S. at 329-30; *see also Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) (describing clear statement rule). That is fatal to petitioners' argument.

3. Petitioners' gestures toward section 1252(f)(1)'s introductory clause miss the thrust of respondents' arguments. Petitioners correctly specify (at 3) that that the (f)(1) restriction applies "[r]egardless of the nature of the action or claim or of the identity of the party or parties bringing the action." But respondents do not argue that the district court's order is not precluded by section 1252(f)(1) because of the identity of the parties or the claims respondents brought. Rather, that section is no bar because: (1) the district court's vacatur relief does not "enjoin" or "restrain" petitioner; (2) the terms "enjoin" and "restrain" do not include mandatory relief, as the district court also ordered; and (3) the district court's mandatory relief does not enjoin "the operation of" section 1225. Respondents' Supp. Br. 3-7. The introductory clause's broad sweep is beside the point.

4. Finally, petitioners insist (at 10) that adopting the lower courts' interpretation of section 1252(f)(1) would "requir[e] the government to comply with a single district court's misinterpretation of the immigration laws." But every litigant can be bound by even a single district court's injunction. And petitioners may always seek a stay of such an injunction—as they did in 2020 by obtaining a stay in this Court of an injunction against the implementation of MPP. *Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020).

B. Section 1252(f)(1) is remedial, not jurisdictional.

Regardless of section 1252(f)(1)'s scope, it 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*"); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018). As section 1252(f)(1) "plainly serves as a limit on injunctive relief," *AADC*, 525 U.S. at 487, it is therefore a remedial limit and not a jurisdictional one.

Petitioners (at 20) and respondents (at 8) agree that Congress must speak unambiguously to give a statutory limitation jurisdictional consequences. *E.g.*, *Boechler, P.C. v. Commissioner*, -- S. Ct. --, No. 20-1472, 2022 WL 1177496, at *3 (U.S. Apr. 21, 2022). An especially clear statement is necessary here because this Court "begin[s] with the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986).

Petitioners suggest (at 7, 19) that Congress unambiguously limited the federal courts' jurisdiction through section 1252(f)(1) by using the term "jurisdiction." Petitioners are mistaken. "The word 'jurisdiction'" often "says nothing about whether a federal court has subject-matter jurisdiction to adjudicate claims." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 163-64 (2010); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998). For decades, this Court has recognized that it is "unreasonable" to read any reference to "jurisdiction" as "jurisdictional, rather than as merely specifying the remedial powers of the court." *Steel Co.*, 523 U.S. at 90 (emphasis omitted). When Congress intends to remove the

lower courts' subject-matter jurisdiction, it does so unambiguously, consistent with this Court's guidance.[1] For example, section 1252(a)(2) is entitled "[m]atters not subject to judicial review" and states that "no court shall have jurisdiction to review" specified claims and decisions. By contrast, section 1252(f) is labeled a "[l]imit on injunctive relief," and section 1252(f)(1) expressly addresses types of relief—orders that "enjoin or restrain the operation" of part of the INA. Read in context, section 1252(f)(1) is a remedial limitation—but at a minimum it does not unambiguously speak in jurisdictional terms.

II. Petitioners Can and Did Forfeit Any Argument Under Section 1252(f)(1).

Petitioners err regarding forfeiture in at least four ways. *First*, and fundamentally, a remedial objection is always subject to forfeiture. *Second*, even if section 1252(f)(1) were jurisdictional, it may still be forfeited because it sounds in personal jurisdiction. *Third*, petitioners cannot avoid forfeiture through a footnote referring to their arguments in another case. *Finally*, petitioners may not rely on forfeited arguments regarding the geographic scope of the district court's order.

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[1] Petitioners recast (at 20) section 1252(f)(1) as unambiguous in part by saying it "expressly states that no court 'shall have jurisdiction or authority' to grant the specified relief." That summary omits Congress's preservation of this Court's injunctive powers, which itself suggests that section 1252(f)(1) does not limit the lower courts' subject-matter jurisdiction. *See generally* Respondents' Supp. Br. 10.

A. Petitioners do not dispute that remedial limitations are subject to forfeiture.

As respondents' supplemental brief explained (at 13), section 1252(f)(1) is subject to forfeiture because it is a non-jurisdictional limitation on remedies. Petitioners do not dispute that remedial limitations may be forfeited, *see, e.g.*, *Hoffman v. Blaski*, 363 U.S. 335, 343 (1960), and they even concede (at 20) that "limits on relief ordinarily are not jurisdictional." Limits on relief may be forfeited just as any number of non-jurisdictional limitations may be—even those this Court has deemed "mandatory." *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 16 (2017).

Petitioners try (at 19) to avoid the conclusion that *this* remedial limitation is forfeitable by insisting that section 1252(f)(1) speaks to "a court's *power*." But that is a non-sequitur. Limitations on remedies always narrow a court's ability to provide a kind of relief. That does not render them jurisdictional—let alone subject-matter jurisdictional.

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

Petitioners suggest (at 20) that section 1252(f)(1)'s use of the term "jurisdiction" ends the forfeiture inquiry. It does not. Because "jurisdiction" is a term with many meanings, *Steel Co.*, 523 U.S. at 90, petitioners must also show that section 1252(f)(1) speaks to a form of jurisdiction that cannot be forfeited, *see Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999). Petitioners try to do so (at 19) by attempting to describe section 1252(f)(1) as a subject-matter jurisdictional limitation. That attempt fails.

As an initial matter, "the word 'jurisdiction' does not in every context connote subject-matter jurisdiction."

Rockwell Int'l Corp. v. United States, 549 U.S. 457, 467 (2007). A subject-matter jurisdictional limitation restricts a court's "power to adjudicate a case." *United States v. Cotton*, 535 U.S. 625, 630 (2002). Section 1252(f)(1) does not limit the lower courts' ability to adjudicate cases under the INA: as petitioners concede (at 11-14), lower courts may adjudicate these cases on the merits and, at a minimum, issue declaratory relief. Section 1252(f)(1) therefore does not limit the lower courts' subject-matter jurisdiction.

Instead, as respondents' supplemental brief explained (at 13-14), if section 1252(f)(1) is jurisdictional, it is a partial withdrawal of the United States' sovereign-immunity waiver—that is, it sounds in personal jurisdiction. Like other personal-jurisdiction defenses, the United States can waive or forfeit its sovereign immunity. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). Petitioners ignore this possibility altogether, even though a lack of personal jurisdiction undoubtedly destroys "a court's *power*," Petitioners' Supp. Br. 19, to bind parties to a judgment.

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

Petitioners forfeited any argument under section 1252(f)(1) by mentioning that section only in a footnote in their petition for certiorari and a footnote in their brief on the merits.

Petitioners first claim (at 21) that there is "[n]o basis" to conclude they forfeited "the issue" because they mentioned section 1252(f)(1) "briefly in footnotes." They know better. Under this Court's well-worn presentation and preservation rules, a party who merely "advert[s] to [an argument] in a footnote" has "plainly [failed to] raise

the issue" to the Court. *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 34 n.10 (1961) (citing a prior version of Rule 14); *accord* Respondents' Supp. Br. 15 (collecting cases). The federal government has faulted its litigation opponents before this Court for "forfeiting any argument . . . by adverting to it only . . . in a footnote of [an] opening appellate brief." Reply Brief, No. 12-167, *United States v. Davila*, 2012 WL 6184846, at *10 (U.S. Dec. 11, 2012).[2] They may, and should, be held to the same rule, which they have violated twice.

But even overlooking this Court's decades-old preservation practices, petitioners' footnotes failed to argue anything about section 1252(f)(1) in particular. Petitioners' cert-stage footnote stated only that "the lower courts lacked jurisdiction to grant injunctive relief under 8 U.S.C. 1252(f)(1)," without further explanation. Pet. 15 n.4. Petitioners then stated that "[t]his Court is considering the scope of Section 1252(f)(1) in *Garland v. Aleman Gonzalez*, No. 20-322," and noted that "oral argument [was] scheduled for Jan. 11, 2022." *Id.* They made no further attempt to "press[]" any argument under section 1252(f)(1) once this Court granted review, *contra* Petitioners' Supp. Br. 20, instead merely updating their footnote to reflect that *Gonzalez* had, in fact, been argued in January, Petitioners' Br. 18 n.3. This is not an argument—it is, at most, a reference.

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[2] *See also* S. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); STEPHEN M. SHAPIRO, SUPREME COURT PRACTICE 726 (10th ed. 2013) (even when raised in a petition, an issue is "considered abandoned" if not "reiterated and argued in the brief on the merits").

Petitioners assert (at 21) that they preserved an argument under section 1252(f)(1) by "brief[ing] the[ir] argument" in a different case. Respondents are unaware of any circumstance under which this Court has deemed a party to have preserved and presented an argument by making reference to *another* case. With good reason: allowing as much would prejudice parties in both cases, effectively granting petitioners additional space and time to make their arguments while holding their opponents to this Court's standard rules. Petitioners provide no basis for this Court to conclude they are entitled to such special advantages.

D. Petitioners have forfeited any attack on the geographic scope of the district court's order.

Apparently ignoring the import of this Court's supplemental briefing order, petitioners attempt (at 15-18) to smuggle in another brand-new objection—this time to the district court order's geographic scope. They acknowledge (at 21) that they have not previously raised this argument in this Court. It is likewise forfeited, *supra* Part II.C, and is in any event meritless.

1. Petitioners now insist (at 18) that vacatur "plainly 'enjoin[s] or restrain[s]' the 'operation'" of section 1225. Petitioners asserted the opposite in district court, where they argued that vacatur of the June Termination alone would not require them to continue MPP. Pet. App. 211a.

Petitioners' argument below at least relied on one correct premise: vacatur under the APA is a form of relief distinct from an injunction. Indeed, as petitioners acknowledged in the district court, this Court has held that vacatur is "a less drastic remedy" than injunctive relief. ECF No. 93 at 8 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010)). In this sense,

vacatur is similar to a declaratory judgment, which petitioners acknowledge (at 11) a district court could properly enter. *Steffel v. Thompson*, 415 U.S. 452, 466 (1974) (describing declaratory relief as "an alternative to the strong medicine of the injunction"). Petitioners are wrong to equate the two remedies here.

2. Moreover, petitioners' objection to vacatur relies heavily on an argument never raised in the Fifth Circuit: namely, that the district court's vacatur order improperly provided nationwide relief. Petitioners' Supp. Br. 14-18. Petitioners likewise failed to raise this argument in their petition or merits briefing before this Court. Nor is the geographic scope of the district court's vacatur order fairly included within the questions on which this Court granted certiorari or requested supplemental briefing. This Court should ignore petitioners' attempt to insert yet another issue into this case that they have now unequivocally forfeited in two separate courts.

3. The district court properly granted nationwide relief in any event. Petitioners acknowledged below that vacatur alone—of any geographic scope—would not have required them to continue MPP. Pet. App. 211a. The district court therefore found an injunction necessary, and further found that that "a geographically limited injunction would likely be ineffective" to remedy the asserted harm to respondents "because aliens would be free to move among [S]tates." Pet. App. 212a (cleaned up). That court therefore entered "the narrowest injunction possible that afford[s] [respondents] full relief on their claims." *Id.* at 212a. Petitioners *still* do not challenge the factual findings underlying this ruling—let alone show, as they must, that those findings are clearly erroneous. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321,

2349 (2021). Petitioners' forfeited challenge to the geographic scope of the district court's relief is entirely without merit.

III. The Parties Agree that This Court Possesses Jurisdiction.

Finally, the parties agree that this Court has jurisdiction in this case. Petitioners' Supp. Br. 21-23; Respondents' Supp. Br. 18-20. Petitioners concede (at 22) that "[s]ection 1252(f)(1) expressly preserves *this Court's* jurisdiction to grant the relief" respondents requested, and they concede further that "if [s]ection 1252(f)(1) compelled the lower courts to deny relief altogether, it would not prevent this Court from reviewing that denial and resolving respondents' claims on the merits." As respondents have already explained (at 19-20), this Court should enter that relief even if it concludes that section 1252(f)(1) is both jurisdictional and not forfeitable.

Alternatively, the Court could appropriately dismiss the petition as improvidently granted. Petitioners' various filings underscore why such a dismissal would be appropriate: for example, the day before argument, petitioners acknowledged in a letter to this Court that the October Memoranda contain multiple substantive errors, Letter from the Solicitor General Noting Statistical Corrections 1 (Apr. 25, 2022), and petitioners now admit that they consciously forewent multiple jurisdictional challenges in "the lower courts," Petitioners' Supp Br. 23. And they continue to raise arguments outside the questions presented in this case. *Id.* at 14-19. This Court has dismissed a writ for less. *E.g.*, *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109-10 (2001) (per curiam).

CONCLUSION

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

Respectfully submitted.

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May 2022