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.

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

SUPPLEMENTAL REPLY BRIEF FOR THE PETITIONERS

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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The court of appeals held unlawful the border-management practices of every Administration over the last quarter century; affirmed an injunction compelling the Executive Branch to negotiate with Mexico on an ongoing basis to maintain indefinitely the discretionary Migrant Protection Protocols (MPP); and held that Secretary Mayorkas's October 2021 decision terminating MPP had no legal effect. This Court granted certiorari to review those extraordinary holdings, and the parties agree that 8 U.S.C. 1252(f)(1) does not limit its jurisdiction to do so. Indeed, respondents join the government in urging the Court to resolve "the merits of the questions presented." Supp. Br. 16. The Court should accordingly "order[] the dissolution" of the judgment below because it is wrong on the merits, no matter how

the Court interprets Section 1252(f)(1). *Nielsen* v. *Preap*, 139 S. Ct. 954, 962 (2019) (plurality opinion) (reversing injunction without determining whether Section 1252(f)(1) precluded the lower courts from granting coercive relief); see *id.* at 976 (Thomas, J.).

Section 1252(f)(1) simply provides another reason why the lower courts erred: It barred the district court's injunction for the same reasons it barred the injunction in *Garland* v. *Aleman Gonzalez*, No. 20-322 (argued Jan. 11, 2022). Respondents' contrary arguments largely repeat those made by the *Aleman Gonzalez* respondents and fail for the same reasons. And respondents' assertion that Section 1252(f)(1) is not truly jurisdictional contradicts the statute's plain text.

There is no merit to respondents' alternative suggestion (at 20-23) that the case be dismissed as improvidently granted. As the government explained at the certiorari stage, only this Court can correct the lower courts' unprecedented interpretation of 8 U.S.C. 1225, reject the court of appeals' erroneous holding that the Secretary's October 2021 decision had no legal effect, and vacate the deeply flawed injunction. Nothing about the Court's consideration of Section 1252(f)(1) warrants leaving in place the extraordinary *permanent* injunction, which severely intrudes on the Executive Branch's authority to conduct foreign relations and manage the border. To the contrary, Section 1252(f)(1) provides still further reason to vacate that injunction.

I. SECTION 1252(f)(1) DEPRIVED THE LOWER COURTS OF JURISDICTION TO GRANT AN INJUNCTION OR VACATUR

The district court exceeded its jurisdiction by granting an injunction and vacatur. The parties agree, however, that Section 1252(f)(1) did not bar respondents'

request for a declaratory judgment. Resp. Supp. Br. 11-12; Gov't Supp. Br. 11-14.

A. The District Court Lacked Jurisdiction To Enter Injunctive Relief

1. Section 1252(f)(1) deprives lower courts of jurisdiction to "enjoin or restrain" the "operation of" specified Immigration and Nationality Act (INA) provisions "[r]egardless of the nature of the action or claim." 8 U.S.C. 1252(f)(1). By its terms, that limitation jurisdictionally barred the district court from "permanently enjoin[ing] and restrain[ing]" the operation of the contiguous-territory-return authority conferred on the Department of Homeland Security (DHS) in 8 U.S.C. 1225(b)(2)(C). Pet. App. 212a (capitalization and emphasis omitted).

Respondents contend that "[t]o 'enjoin' is to 'forbid' or 'prohibit.'" Supp. Br. 3 (quoting *Webster's Third New International Dictionary of the English Language* 754 (2002) (*Webster's*)). Even if that were true, Section 1252(f)(1) would still apply, because respondents' suit seeks to forbid the Executive Branch's "operation" of the covered provisions in favor of respondents' proposal for implementing them. 8 U.S.C. 1252(f)(1). In any event, respondents' own source states that the term "enjoin" also means "to direct, prescribe, or impose by order." *Webster's* 754.

Respondents argue (at 6) that "enjoin" should be read in light of its companion term, "restrain," which they assert has only a negative meaning. Again, respondents' source shows that restrain can also have a positive meaning. See *Direct Mktg. Ass'n* v. *Brohl*, 575 U.S. 1, 13 (2015) ("restrain" "captures only those orders that stop (or perhaps *compel*) [the specified] acts") (emphasis added). Thus, even assuming Congress used two

different terms to say approximately the same thing, neither is limited to negative meanings. And under the "associated-words canon" on which respondents rely, "[t]he common quality suggested by a listing should be its most general quality—the least common denominator." Antonin Scalia & Bryan A. Garner, *Reading Law* 196 (2012). The least common denominator of "enjoin" and "restrain" is coercion. Taken together, the terms encompass coercive relief that compels or prohibits the Executive Branch's operation of the covered provisions.

In the same vein, respondents contend (at 4 n.1) that 8 U.S.C. 1252(f)(2) uses the term "enjoin" in a purely negative sense by directing that "no court shall enjoin the removal of any alien." Again, that is wrong: Section 1252(f)(2) would also bar an injunction compelling removal of a particular noncitizen. See *Nken* v. *Holder*, 556 U.S. 418, 428 (2009) (interpreting Section 1252(f)(2) and observing that an injunction "is a means by which a court tells someone what to do or not to do").

Finally, respondents argue that only the "clearest command" will displace the lower courts' equitable authority. Supp. Br. 7 (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 705 (1979)). But the federal courts' equitable power "is subject to express and implied statutory limitations," and the text of Section 1252(f)(1) must be given "its fairest reading." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327, 329 (2015).

2. Respondents' interpretation of Section 1252(f)(1)'s remedial limitation is "circular," *Preap*, 139 S. Ct. at 975 (Thomas, J.), because it depends on the merits of respondents' claim (at 4) that the Secretary's implementation of the discretionary "may return" authority in 8 U.S.C. 1225(b)(2)(C) is "unlawful administrative action." "Many claims seeking to enjoin or restrain the

operation of the relevant statutes will allege that the Executive's action does not comply with the statutory grant of authority, but the text clearly bars jurisdiction to enter an injunction '[r]egardless of the nature of the action or claim.'" *Preap*, 139 S. Ct. at 975 (Thomas, J.).

Respondents' efforts to distinguish *Preap* and *Aleman Gonzalez* illustrate the point. Respondents contend (at 5) that the relief in those cases "is different in kind" from the relief requested here. But the plaintiffs in those cases likewise sought to require the government to comply with their interpretations of the INA, which the plaintiffs asserted entitled them to bond hearings. See Gov't Supp. Br. 9 (discussing *Preap*); Pet. App. at 3a, *Aleman Gonzalez*, *supra* (No. 20-322). Respondents simply disagree (at 5-6) with those plaintiffs' interpretation of the INA on the merits.

3. Respondents do not deny that their interpretation would authorize disruptive programmatic challenges to the INA's operation. Instead, they suggest (at 7) that Congress *intended* that district courts micromanage the immigration system on a nationwide basis. But that ignores IIRIRA's "theme" of "protecting the Executive's discretion from the courts." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999).

B. The District Court Lacked Jurisdiction To Vacate The Secretary's Decision

The district court's authority to vacate the Secretary's June decision under the Administrative Procedure Act (APA) is not presented here since that decision has been superseded by his October decision. Gov't Supp. Br. 14-15. But respondents' half-hearted defense (at 10-11) of that remedy is wrong: Vacatur was both barred by Section 1252(f)(1) and unauthorized by 5 U.S.C. 706.

1. Respondents contend (at 11) that vacatur is "distinct from injunctive relief" and thus not precluded by Section 1252(f)(1). Although vacatur of an agency decision can be a "less drastic remedy" than an injunction in some respects, *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 165 (2010), vacatur is still coercive. Because vacatur prohibits the agency from giving effect to its decision, a district court "enjoin[s] or restrain[s] the operation of" the covered INA provisions when it vacates an agency decision implementing them. 8 U.S.C. 1252(f)(1). And contrary to respondents' assertion (at 12) that Section 1252(f)(1) "refers to injunctive relief alone," the statute bars lower-court orders that would "enjoin or restrain" DHS's operation of the covered INA provisions, no matter how those orders are labeled.

The district court was clear that its vacatur would have a compulsory, nationwide reach. The court described vacatur as "a veto-like power that enables the judiciary to formally revoke an agency's" action. Pet. App. 204a n.14 (citation omitted). That leaves no doubt that the vacatur enjoined and restrained the Secretary's June decision.

Respondents wrongly suggest (at 11) that the government views vacatur as merely hortatory, claiming the government "asserted that vacating the June Termination would not require [DHS] to reimplement MPP," *id.* at 3 (citing Pet. App. 211a). That misrepresents the record. The government observed that MPP had preserved line-level immigration officers' discretion not to return individual noncitizens to Mexico, and thus "[r]einstating MPP would not *require* DHS to return anyone to Mexico." D. Ct. Doc. 63, at 9 (June 25, 2021); see Pet. App. 159a. The government never suggested that vacatur of the June decision terminating

MPP would leave DHS free to continue implementing that termination as a programmatic matter.

2. Respondents also fail to justify the district court's assertion that 5 U.S.C. 706(2) authorized a nationwide vacatur in the first place. This Court specifically did not decide that question in *Monsanto*. See 561 U.S. at 156. Although amicus Public Citizen defends (at 3-7) the district court's view of Section 706(2), it offers no persuasive rebuttal to the multiple problems identified by Justices of this Court, courts of appeals, and commentators with reading that provision to authorize universal remedies. See Gov't Supp. Br. 15-18. The APA provides that the "form of proceeding for judicial review" here must be a recognized "form of legal action," 5 U.S.C. 703, and the lower courts, respondents, and amici have identified no traditional form of legal action for nationwide vacatur of agency action.

II. SECTION 1252(f)(1)'S JURISDICTIONAL LIMIT IS NOT FORFEITABLE, AND IN ANY EVENT WAS NOT FORFEITED HERE

A. Respondents are wrong to assert that Section 1252(f)(1) is "a non-jurisdictional remedial limitation" that is "subject to forfeiture." Supp. Br. 13; see *id.* at 8-10. Respondents observe (at 8) that this Court "treats provisions as jurisdictional only if Congress clearly indicates." But Section 1252(f)(1) *does* clearly indicate that its remedial limitation is "jurisdiction[al]." 8 U.S.C. 1252(f)(1); see *Miranda* v. *Garland*, No. 20-1828, 2022 WL 1493822, at *8-*9 (4th Cir. May 12, 2022). To nevertheless treat that limitation as non-jurisdictional would flout Congress's express direction and impair the "readily administrable bright line" that this Court has consistently applied to identify jurisdictional rules. *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 516 (2006).

Respondents identify no case where this Court has declined to give effect to jurisdiction-stripping language like that in Section 1252(f)(1) based on "twentieth-century usages" or statutory "structure." Supp. Br. 9-10. Nor is there any merit to respondents' premise that Congress cannot make a remedial limitation jurisdictional. This Court recently described an analogous statute—one providing that "[t]he Tax Court shall have no jurisdiction * * * to enjoin any action or proceeding unless a timely appeal has been filed," 26 U.S.C. 6330(e)(1)—as supplying the sort of "clear statement" that "plainly conditions the [court's] jurisdiction," even though it applies only to "a particular remedy (an injunction)," and not to "the underlying merits proceeding itself." *Boechler, P.C.* v. *Commissioner*, No. 20-1472 (Apr. 21, 2022), slip op. 7.

Respondents err in asserting (at 10) that treating Section 1252(f)(1) as a jurisdictional limit would impermissibly expand "this Court's original jurisdiction" by "requir[ing] litigants to raise certain challenges in this Court in the first instance." Section 1252(f)(1) deprives the lower courts of jurisdiction to enter certain relief, but does not prevent them from hearing covered challenges altogether, and here would not have prevented them from considering respondents' claims and granting properly crafted declaratory relief. Gov't Supp. Br. 11-13, 22. This Court's review of the lower courts' decisions—including any grant of the relief that Section 1252(f)(1) expressly authorizes in this Court—is thus a valid exercise of appellate jurisdiction because "it revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Ortiz* v. *United States*, 138 S. Ct. 2165, 2173 (2018) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 175 (1803)).

B. Respondents next say (at 13-14) that, "[e]ven if" Section 1252(f)(1) is "jurisdictional," it is "best understood as a limitation on the United States' waiver of sovereign immunity," and "sovereign-immunity defenses can be waived." But Section 1252(f)(1) "plainly" imposes a nonforfeitable jurisdictional limit. *Boechler*, slip op. 7. In any event, the United States' sovereign immunity "cannot be waived by officials" conducting litigation. *United States* v. *United States Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940); see *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133-134 (2008). Instead, waiver must be "authorized by some act of Congress." *Minnesota* v. *United States*, 305 U.S. 382, 387, 388-389 (1939). Respondents' citations (at 14) are inapposite because they involved *state* sovereign immunity, which a State "may waive at [its] pleasure," including through its officials' litigation conduct. *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-676 (1999) (citation omitted).

C. Respondents are further incorrect to assert (at 15) that the government forfeited its Section 1252(f)(1) objection here. This case was unusual: At the time of the petition for a writ of certiorari, the scope of Section 1252(f)(1) was fully briefed in *Aleman Gonzalez*. The government's briefs thus properly noted that this Court's resolution of *Aleman Gonzalez* might establish another error in the injunction here.

Respondents hardly lacked "fair notice" of that argument. Contra Supp. Br. 15. The court of appeals addressed Section 1252(f)(1), and the government raised that provision in its petition and opening brief. By responding on the merits at the certiorari stage, Br. in Opp. 34 n.1, and failing to assert forfeiture then or in their merits brief, respondents have "forfeited [their]

forfeiture argument." *Solomon* v. *Vilsack*, 763 F.3d 1, 13 (D.C. Cir. 2014).

III. SECTION 1252(f)(1) DOES NOT LIMIT THIS COURT'S JURISDICTION TO DECIDE THE QUESTIONS PRESENTED

The parties agree that Section 1252(f)(1) does not affect this Court's jurisdiction to resolve the questions presented. Gov't Supp. Br. 21-23; Resp. Supp. Br. 16-20. In particular, the parties agree that Section 1252(f)(1) would not have prevented the lower courts from considering respondents' request for declaratory relief, and that it would not preclude this Court from considering whether to grant declaratory relief or an injunction. Gov't Supp. Br. 22; Resp. Supp. Br. 11-12, 19-20. The Court should therefore resolve the questions on which it granted certiorari, regardless of whether Section 1252(f)(1) barred the injunction and vacatur below.

Respondents' suggestion (at 20-23) that the Court dismiss the writ of certiorari as improvidently granted is meritless. Respondents assert that Section 1252(f)(1) creates "antecedent vehicle problems which could prevent this Court from ruling on the merits of the first question presented." Supp. Br. 21; see *id.* at 14-15. That is wrong: Because Section 1252(f)(1) does not constrain this Court, the Court may properly resolve the first question presented even though the district court lacked authority to issue an injunction. Indeed, respondents themselves urge resolution of the merits (at 19-20) in asking the Court to "enter an injunction." And even if Section 1252(f)(1) did somehow complicate consideration of the merits, the correct response would not be to leave the flawed decisions below in place; instead, it would be to vacate those jurisdictionally barred judgments and remand to allow the lower courts to consider

the October 2021 decision on a clean slate and with clarity about the limits of their remedial jurisdiction.

As to the second question presented, respondents' request for dismissal has nothing to do with Section 1252(f)(1). Instead, respondents assert (at 2) that the Court should dismiss because "both parties agreed at oral argument" that the merits of that question "should be addressed first by the district court." That seriously distorts both the government's position and the posture of this case.

The government explained at argument, as it has throughout this case, that the district court should consider in the first instance any claims that the Secretary's October 2021 decision is arbitrary and capricious. 4/26/22 Tr. 67-68; see Cert. Reply Br. 10; Merits Reply Br. 23. The problem is that the district court *cannot* presently consider that issue because the court of appeals has held that the October decision had no legal effect. Under the court of appeals' ruling, DHS's only option would be to "restart its rulemaking process," issue *yet another* decision, and then "attempt to get [Federal Rule of Civil Procedure] 60(b) relief from the district court." Pet. App. 126a n.19; see Cert. Reply Br. 10-11. That is the holding that this Court granted certiorari to review, and only this Court can correct it.

In their brief in opposition, respondents argued (at 16) that "the Fifth Circuit's holding that the October Memoranda had no present 'legal effect' was indisputably correct" and (at 21) that DHS was required to "reconsider" MPP and issue yet another decision if it wished to terminate the program. But respondents' brief on the merits largely abandoned any defense of the court of appeals' reasoning. And respondents now execute an eleventh-hour about-face, contending (at 23)

that the Fifth Circuit did not resolve the "effect of the October Memoranda." That contention cannot be squared with the court of appeals' decision, which will bind the district court and prevent consideration of the October decision altogether unless this Court reverses or vacates.

Respondents also repeat (at 22) their argument that the government is required to seek relief from the injunction's APA condition under Rule 60(b). That contention is irrelevant because the merits of the October decision—as distinct from the threshold issue of whether it has legal effect—are not at issue here. In any event, respondents are wrong. They still have not identified *any* authority requiring (rather than authorizing) the government to seek Rule 60(b) relief—or any first-principles justification for compelling an agency to seek preclearance from a district court in an unfavorable Rule 60(b) posture before implementing a presumptively valid new decision.

* * * * *

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

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