No. 21-954

In the Supreme Court of the United States

JOSEPH R. BIDEN, JR., *ET AL.*,

Petitioners,

v.

STATE OF TEXAS, STATE OF MISSOURI,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF *AMICUS CURIAE* OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF RESPONDENTS

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SUPPLEMENTAL QUESTIONS

By order dated May 2, 2022, this Court requested briefing on three supplemental questions:

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules, Regulations and Orders

Other Authorities

INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute[1] ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases. Of particular relevance here, IRLI filed a merits-stage *amicus* in this action and in *Garland v. Aleman Gonzalez*, No. 20-322 (U.S.), which involves related jurisdictional issues under 8 U.S.C. § 1252(f)(1), the same provision that prompted the Court to request supplemental briefing here. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization.

STATEMENT OF THE CASE

In this action, Texas and Missouri (the "States") sued various federal executive officers (the "Administration") and the United States (collectively with the Administration, the "Petitioners") to challenge the Administration's purported rescission of the Migrant Protection Protocols ("MPP"). A successful program of the prior administration, the MPP requires aliens who both lacked a legal basis to be present in the United

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[1] *Amicus* files this brief with all parties' written or blanket consent and pursuant to this Court's Order dated May 2, 2022. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting the brief.

States and who had passed through Mexico en route to the United States to remain in Mexico pending adjudication of their immigration claims. By removing the opportunity for aliens with weak asylum claims to game the system, remaining in the United States—even absconding—during the administrative processing of those asylum claims, the MPP changed the incentives for economic migrants with weak asylum claims and therefore reduced the flow of aliens at the southern border. By undoing the MPP's success in stemming illegal immigration, the Administration's actions unleashed an unprecedented flood of illegal immigration, placing a disproportionate and uninvited burden on the States. Although the parties did not brief the impact of 8 U. S. C. §1252(f)(1) on the availability of judicial review and relief, the issue arose at oral argument, and the Court's Order dated May 2, 2022, requested supplemental briefing on three questions.

SUMMARY OF ARGUMENT

The Court's first question—whether § 1252(f)(1) imposes any jurisdictional or remedial limitations—is the key question. Because plaintiffs like the States lack a future enforcement proceeding under the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 ("INA") and because they had a pre-INA cause of action under the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), they retain their pre-INA APA cause of action. *See* Section I.A, *infra*. Even if this Court rejects that APA argument, the lack of a future INA proceeding allows plaintiffs like the States to proceed against unlawful administrative action in equity. *See* Section I.B, *infra*.

If the Court finds that § 1252(f)(1) displaced the APA and the APA's waiver of sovereign immunity, the argument under § 1252(f)(1) is not subject to forfeiture because sovereign immunity goes to jurisdiction. *See* Section II.A, *infra*. Unlike the United States and its agencies, however, individual officer defendants like the Administration cannot assert sovereign immunity to bar review of their unlawful actions. *See* Section II.B, *infra*.

If the Court concurs either that § 1252(f)(1) does not bar APA review for plaintiffs like the States or that § 1252(f)(1) does not bar equity review to those with no future INA proceeding in which to challenge the Administration's allegedly unlawful actions, not only this Court but also the District Court have the power and the duty to reach the merits. *See* Section III, *infra*.

ARGUMENT

I. § 1252(F)(1) DOES NOT IMPOSE ANY JURISDICTIONAL OR REMEDIAL LIMITS *FOR THESE PLAINTIFFS*.

By its terms, § 1252(f)(1) applies only to bar certain review and relief with respect to aliens by cabining review with respect to such aliens to the INA proceeding for the individual alien:

> 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 jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and

> Immigrant Responsibility Act of 1996, *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) (emphasis added). "It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231," but the "ban does not extend to individual cases." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999). But the INA's withholding systemic review from aliens does not withhold judicial review or even injunctive relief from *everyone*. Either on the "front end" or the "back end," interested parties other than the "individual alien" covered by 8 U.S.C. § 1252(f)(1) can seek APA review and obtain injunctive relief as long as they have cognizable interests.

A. The INA does not bar the States' APA claims.

On the front end of interpreting what review and relief § 1252(f)(1) actually bars, the States here are not an "individual alien" covered by § 1252(f)(1). That distinction involves at least two relevant differences for the effect of the INA's 1996 amendments on the ongoing viability of the States' APA action.[2] First,

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[2] At the oral argument, the States noted a third difference: "[the] APA challenge is against … rescission of a program that would, in fact, exercise … powers underneath (b)(2)(C)" so that "(f)(1) has … no role to play here." Transcript of Oral Argument at 81, *Biden v. Texas*, No. 21-954 (Apr. 26, 2022). Although Justice Thomas questioned whether the Court "can dispose of [§ 1252(f)(1)] that easily," *id.*, IRLI does not dispute the States' third difference. Instead, IRLI offers the other two differences in

unlike the individual aliens covered by § 1252(f)(1), the States do not have a subsequent INA opportunity to review the allegedly unlawful agency action. Second, non-alien plaintiffs like the States plainly had a right to judicial review before the 1996 INA amendments that added § 1252(f)(1). Both of these differences go to why non-alien plaintiffs like the States retain their right to APA review, while alien plaintiffs like those in *Aleman Gonzalez* do not.

First, because non-alien plaintiffs like the States lack an alternate remedy, the APA provides review: "Agency action made reviewable by statute and *final agency action for which there is no other adequate remedy in a court* are subject to judicial review." 5 U.S.C. § 704 (emphasis added). By contrast, the "individual alien" had his or her APA claim displaced by the special statutory review, 5 U.S.C. § 703, under the INA's 1996 amendments.

Second, given that parties like the States had a pre-1996 right of review, the 1996 INA amendments cannot be read expansively because repeals by implication are disfavored. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (requiring "clear and manifest" legislative intent to repeal the prior authority). Indeed, "this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975). Moreover, the APA recognizes a difference between systemic actions like the

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this section in the event that the Court decides to address the scope of § 1252(f)(1).

purported rescission of the MPP and the application of the immigration process to any individual alien:

> If there is in fact some specific order or regulation, applying some particular measure across the board to all individual classification terminations and withdrawal revocations, and if that order or regulation is final, and has become ripe for review …, it can of course be challenged under the APA by a person adversely affected[.]

Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 890 n.2 (1990). Under the APA, § 1252(f)(1) does not provide a "clear and manifest" indication of congressional intent to terminate systemic APA review by plaintiffs with no future INA proceeding in which to challenge an INA administrative action.

Indeed, the relative order of the APA's and INA's enactment provides further assurance that the States retain their APA cause of action. Although the APA—as enacted—did not override any pre-APA statute that *expressly or impliedly* denied review, 5 U.S.C. §702 ("[n]othing herein … confers authority to grant relief if any other statute that grants consent to suit expressly *or impliedly* forbids the relief which is sought") (emphasis added), post-APA statutes must deny review *expressly*. 5 U.S.C. § 559 ("[s]ubsequent statute may not be held to supersede or modify this subchapter …, except to the extent that it does so expressly"); *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999). The leading *implied-preclusion* authorities concern *pre-APA* statutes. *See, e.g.*, *Block v. Community Nutrition Inst.,* 467 U.S. 340 (1984) (Agricultural Marketing Agreement Act of 1937); *FCC*

v. ITT World Commc'ns, Inc., 466 U.S. 463, 469 (1984) (Communications Act of 1934). Like implied preclusion, these decisions have no bearing on the preclusion of review under *post-APA* statutes like INA and its 1996 amendments.

As *post-APA* statutes, for INA and its subsequent amendments to preclude APA review, they would need to do so *expressly,* but they do not. Accordingly, someone with Article III standing and an APA claim within the INA's zone of interests would keep the APA claim that they already had. 5 U.S.C. § 559. For alien plaintiffs like those in *Aleman Gonzalez*, § 1252(f)(1) provides "clear and manifest" legislative intent to displace APA review with the INA's special statutory review. For non-alien plaintiffs like the States, that is simply not true.

The arguments for the APA's ongoing viability here rely on the plain language of the relevant statutes and this Court's decisions. Because Congress knows this Court's important decisions, *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.,* 470 U.S. 116, 128 (1985), this Court can assume that Congress would have been express in displacing APA review by aggrieved parties like the States that have no future INA proceeding in which to challenge the unlawful actions of an administrative agency.

Because the full range of APA review is available to non-alien plaintiffs like the States with no future INA proceeding in which to challenge INA procedures, this Court need not consider the separate availability of injunctive or declaratory relief, apart from the APA. *See* 5 U.S.C. § 706. By contrast, individual aliens like the ones in *Aleman Gonzalez* lack an APA cause of

action for the reasons stated above and cannot obtain declaratory relief because they lack the underlying case or controversy required for pre-enforcement declaratory relief. *See* 28 U.S.C. § 2201(a). Congress has plenary authority to channel aliens' claims to the INA proceedings available to individual aliens like the ones in *Aleman Gonzalez*, and those statutes define the extent of Due Process for aliens seeking admission to the United States. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application"); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned") (interior quotation marks omitted). Petitioners are simply wrong to suggest that the arguments in *Aleman Gonzalez* control here.[3]

B. The INA does not bar the States' equitable claims.

On the back end, even if this Court finds that 8 U.S.C. § 1252(f)(1) displaces APA review for all plaintiffs, without regard to whether the plaintiff has an INA claim for relief, plaintiffs *without future INA review* would have judicial review in equity. Review is available to parties who lack any future alternate remedy for judicial review of unlawful agency action. *Leedom v. Kyne,* 358 U.S. 184, 188-90 (1958). The extraordinary relief available to the States under *Kyne* is unavailable where—as in *Aleman Gonzalez*—review is available in future enforcement proceedings:

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[3] *See* Pets.' Br. at 18 n.3.

> The cases before us today are entirely different from *Kyne* because FISA expressly provides MCorp with a meaningful and adequate opportunity for judicial review of the validity of the source of strength regulation. If and when the Board finds that MCorp has violated that regulation, MCorp will have, in the Court of Appeals, an unquestioned right to review of both the regulation and its application.

Board of Governors of the Federal Reserve System v. MCorp Financial, 502 U.S. 32, 43-44 (1991). The decisions in *Kyne* and *MCorp* thus require differential treatment of the *Aleman Gonzalez* plaintiffs and the State plaintiffs here.

For plaintiffs like the States, no future INA action provides an opportunity for judicial review of the allegedly unlawful agency action. Thus, *Kyne* allows review in equity, and *MCorp* poses no barrier to that review.

By contrast, the *Aleman Gonzalez* plaintiffs can challenge any allegedly unlawful agency action in their own INA proceedings, as § 1252(f)(1) requires. Thus, *MCorp* would limit the safety valve that *Kyne* otherwise provides to plaintiffs with no other avenue for judicial review.

II. ALTHOUGH NOT PRESENT HERE, TRUE JURISDICTIONAL BARS ARE NOT SUBJECT TO FORFEITURE.

Because § 1252(f)(1) poses no jurisdictional bar here, *see* Section I, *supra*, this Court has no occasion to decide whether the particular jurisdictional issue here is subject to forfeiture. If this Court determines

that § 1252(f)(1) poses a jurisdictional bar to review under the APA, that bar is not waivable because it goes to the United States' sovereign immunity. Under that scenario, *Kyne*'s exception to § 1252(f)(1) would apply, and the Administration has forfeited its chance to challenge the non-APA equitable basis for suit.

A. If § 1252(f)(1) were jurisdictional here, the APA bar would not be forfeitable.

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Although that "immunity is jurisdictional in nature," *id.*, the APA waives sovereign immunity. 5 U.S.C. § 702. If the 1996 INA amendments displaced the APA's 1976 waiver of sovereign immunity, that displacement would present a jurisdictional bar to claims against a party that can claim sovereign immunity. Indeed, sovereign immunity is one of the few jurisdictional bases for challenging a court's authority that can be raised in a collateral proceeding. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 153 n.6 (2009). If Petitioners could raise sovereign immunity collaterally in a future proceeding, there seems to be little sound basis on which to apply forfeiture or waiver to sovereign immunity in this proceeding. As indicated, however, § 1252(f)(1) does not displace the APA's waiver of sovereign immunity for anyone but the aliens who are subject to § 1252(f)(1). *See* Section I.A, *supra*.

B. If § 1252(f)(1) were jurisdictional here, any challenge to review in equity would be forfeited.

When an officer of the federal government breaks federal law, his or her actions are not immune under

the officer-suit pleading fiction of *Ex parte Young*, 209 U.S. 123, 160 (1908): "suits against government officers seeking prospective equitable relief are not barred by the doctrine of sovereign immunity." A.B.A. Section of Admin. Law & Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 46 (2002). Moreover, the "inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim[.]" *Verizon Md. Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 638 (2002). Nothing jurisdictional bars this Court's consideration of the merits issue of the extent to which the federal officer defendants' actions violate federal law.

III. LIKE THE DISTRICT COURT, THIS COURT HAS JURISDICTION OVER THE MERITS.

Because § 1252(f)(1) imposes no jurisdictional bar to the States' challenge, this Court has no reason to avoid reaching the important issues presented here. *See* Sections I-II, *supra*. Indeed, federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them" by reaching the merits. *Colorado River Water Conserv. Dist. v. U.S.,* 424 U.S. 800, 817 (1976). And the issues presented here are extraordinarily important.

Like the apocryphal child who murders his parents than seeks the court's mercy as an orphan, *Glossip v. Gross*, 576 U.S. 863, 898 (2015) (Scalia, J., concurring), the Administration seeks unlawfully to void the MPP's successful solution to the crisis at the southern border, then to use the resulting influx of illegal aliens to claim that resource constraints justify indefinite future INA violations. The Administration's

excuse was not only avoidable but also self-inflicted. This Court must recognize that the federal district courts have the authority both under the APA and in equity to enjoin a federal agency from engineering violations of the law on a massive scale.

Although the suit is captioned between the States and the Administration, the Administration's dispute is with the INA and the APA. Enacted by Congress, those two laws *conditionally* delegate to the Executive Branch matters that the Constitution entrusts to the Legislative Branch. *See* U.S. CONST. §§ 1, 8, cl. 4. This case thus requires the Judiciary to referee a dispute between the other two branches of the federal government. Whether denominated as arbitrary and capricious, not in accordance with the law, or even unclean hands, the Administration's actions implicate the Judiciary's power and duty to enforce the laws of Congress against administrative malfeasance first by vacating unlawful agency action and then remedially by compelling the defendants to minimize prospective administrative lawbreaking and to maximize compliance with the governing statutes as much as possible given resource constraints.

CONCLUSION

With respect to jurisdiction, this Court should determine that the District Court and thus this Court have jurisdiction over the merits. With respect to the merits, the decision of the Fifth Circuit should be affirmed.

May 5, 2022

Respectfully submitted,

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