No. 21-954

IN THE

Supreme Court of the United States

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

—v.—

STATE OF TEXAS, ET AL.,
Respondents.

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

AMICUS OF THE ACLU IN RESPONSE TO THE COURT'S SUPPLEMENTAL BRIEFING ORDER IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution & Statutes

Other Authorities

INTERESTS OF AMICUS CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization with approximately two million members dedicated to the principles of liberty and equality enshrined in the Constitution and the nation's civil rights laws. The ACLU, through its Immigrants' Rights Project ("IRP") and state affiliates, engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of noncitizens.

Amicus has litigated numerous challenges to the government's detention and removal policies, and has a longstanding interest in the issues raised in the Court's supplemental briefing order. The ACLU has significant expertise on 8 U.S.C. § 1252(f)(1), having litigated several cases in this Court that address the provision, as well as all the major cases in the courts of appeals addressing the provision's scope. *See Garland v. Aleman Gonzalez*, No. 20-322 (U.S. argued Jan. 11, 2022); *Nielsen v. Preap*, 139 S. Ct. 954 (2019); *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *see also infra*, n.3 (citing cases).

SUMMARY OF THE ARGUMENT

Amicus ACLU submits this brief in support of neither party to address the Court's Order directing supplemental briefing on the scope of Section 1252(f)(1).

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[1] All parties have consented to the filing of this brief. Amicus affirm that no counsel for any party authored this brief in whole or in part and that no person other than amicus made a monetary contribution to its preparation or submission.

As amicus has explained in *Garland v. Aleman Gonzalez*, No. 20-322, Section 1252(f)(1) is a limit on the relief courts may provide, and not a limit on subject-matter jurisdiction. This is because, as used in the provision, the term "jurisdiction" clearly addresses only the lower courts' power to grant relief, and not its power to adjudicate controversies. The federal government therefore waives any argument based on Section 1252(f)(1) if it fails to raise it. *See* Resp'ts' Br. at 47, *Aleman Gonzalez*, No. 20-322 (U.S. Nov. 22, 2021) (citing, *inter alia*, *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 90 (1998)).

On the merits, Section 1252(f)(1) by its plain terms restricts only claims that enjoin the "*operation*" of the immigration statutes—such as those aimed at invalidating a statute and thereby rendering it inoperative. It does not bar claims that the government has *failed to implement* a statute correctly or lawfully, including claims seeking to ensure that the agency implements the statute as Congress has written it. *See* Resp'ts' Br. at 49–54, *Aleman Gonzalez*, No. 20-322 (U.S. Nov. 22, 2021).

Amicus writes here to address an additional question posed by the Court's Order: whether Section 1252(f)(1) imposes any limitations on the entry of declaratory relief. It does not.[2] The plain language of Section 1252(f)(1) limits only orders that would "enjoin or restrain the operation of" the detention and removal provisions of the Immigration and Nationality Act ("INA"). These are legal terms of art that track the traditional forms of injunctive relief—

[2] Nor does Section 1252(f)(1) bar "set aside" relief under the Administrative Procedure Act. *See* Br. of Amicus Public Citizen. We focus here only on declaratory relief because of space constraints.

injunctions and temporary restraining orders—and do not encompass the distinctive form of declaratory relief. That the provision does not mention "declaratory relief" at all is meaningful. In a neighboring provision of the same enactment, Congress expressly specified "declaratory relief" when it meant to preclude it. Thus, the plain reading of Section 1252(f)(1) as prohibiting only actions for injunctions and restraining orders, and not declaratory relief, is confirmed by the statutory context.

Five Justices of this Court have already concluded that Section 1252(f)(1) does not bar declaratory relief. *See Nielsen*, 139 S. Ct. at 962 (opinion of Alito, J., in which Roberts, C.J. and Kavanaugh, J. joined) (Section 1252(f)(1) did not eliminate "jurisdiction to entertain the plaintiffs' request for declaratory relief"); *Jennings*, 138 S. Ct. at 875 (Breyer, J., joined by Sotomayor, J., dissenting) (a "court could order declaratory relief" regardless of Section 1252(f)(1)). Every circuit court to have addressed the issue has reached the same conclusion, and lower courts have applied this Court's recent precedents on Section 1252(f)(1) without difficulty.[3]

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[3] *See Brito v. Garland*, 22 F.4th 240, 252 (1st Cir. 2021) ("[W]e conclude that declaratory relief remains available under section 1252(f)(1)."); *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 635 (D.C. Cir. 2020) ("[Section 1252(f)] does not proscribe issuance of a declaratory judgment[.]"); *Alli v. Decker*, 650 F.3d 1007, 1013 (3d Cir. 2011) ("[I]t is apparent that the jurisdictional limitations in § 1252(f)(1) do not encompass declaratory relief."); *Rodriguez v. Hayes*, 591 F.3d 1105, 1119 (9th Cir. 2010) ("Section 1252(f) was not meant to bar classwide declaratory relief."). *But see Hamama v. Adducci*, 912 F.3d 869, 880 n.8 (6th Cir. 2018) (noting that "the issue of declaratory relief is not before us," but that "we are skeptical [the noncitizens] would prevail").

Thus, should it find Section 1252(f)(1)'s bars on certain relief relevant to this case at all, the Court should hold that they do not apply to declaratory relief.

ARGUMENT

I. The Plain Text of Section 1252(f)(1) Limits Only Injunctions and Temporary Restraining Orders, and Does Not Bar Declaratory Relief.

Section 1252(f)(1) directs that:

> no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. §§ 1221–1231] . . . 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).

The plain text limits only orders that "enjoin or restrain" the operation of Sections 1221–1231—legal terms of art that track the two types of injunctive relief provided under the Hobbs Administrative Orders Review Act, 28 U.S.C. § 2341 *et seq.*, and the Federal Rules of Civil Procedure. *See* Hobbs Act, 28 U.S.C. § 2349(a) & (b) (setting out, respectively, the power of the court of appeals to enjoin and temporarily restrain an agency order); Fed. R. Civ. P. 65 (providing for "injunctions and restraining orders"); *see also Arevalo v. Ashcroft*, 344 F.3d 1, 7 (1st Cir. 2003) ("This distinction between 'enjoin' and 'restrain' mirrors an identical distinction expressly

made in the Hobbs Act, 28 U.S.C. § 2349(a) & (b)—a statute that [8 U.S.C. § 1252](a)(1) explicitly incorporates.").

The statute precludes these forms of *injunctive* relief, but does not go further to preclude "*declaratory relief*"—a distinct form of relief made available by Congress separately in the Declaratory Relief Act, 28 U.S.C. § 2201, and which this Court has recognized, "is not ultimately coercive." *Steffel v. Thompson*, 415 U.S. 452, 471 (1974). "Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction." *Id.* at 466; *see generally id.* at 466–467, 471 (emphasizing differences between injunctive and declaratory relief). "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Section 1252(f)(1) does not, either by its words or by "a necessary and inescapable inference," bar declaratory relief.

The federal government has nonetheless argued that Section 1252(f)(1)'s reference to orders that "restrain" the operation of the statute should be read broadly to include any form of relief that in any way limits how the Executive can implement the statute, including declaratory relief. *See, e.g.*, *Alli*, 650 F.3d at 1011. But, it 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 each borrowed word in the body of learning from which it was taken." *FAA v. Cooper*, 566 U.S. 284, 292 (2012) (cleaned up). Therefore, whether declaratory relief might be described in some loose way as restraining the

operation of the statute is beside the point; "enjoin or restrain" are legal "terms of art," distinct from the legal term of art of "declaratory relief," and the Court should read them as such. That is what every court of appeals to have addressed this issue has done when interpreting Section 1252(f)(1). *See Alli*, 650 F.3d at 1013 ("We therefore read 'Limit on injunctive relief' to mean what it says, and we conclude that 'restrain' refers to one or more forms of temporary injunctive relief, such as a temporary restraining order or preliminary injunction."); *see also Brito*, 22 F.4th at 251; *Rodriguez*, 591 F.3d at 1119; *Arevalo*, 344 F.3d at 7.

Indeed, this Court has already rejected a similar argument about Section 1252(f). In *Nken v. Holder*, the Court narrowly interpreted the term "enjoin" in Section 1252(f)(2) to exclude stays of removal, even though a stay may have a similar effect as an injunction on the operation of the removal system. 556 U.S. 418, 428–29 (2009). "Whether such a stay might technically be called an injunction is beside the point: that is not the label by which it is generally known. The sun may be a star, but 'starry sky' does not refer to a bright summer day." *Id.* at 430. It would be even more of a stretch to read declaratory relief into the phrase "enjoin or restrain." It simply is "not the label by which it is generally known." *Id.*

What's more, reading the term "restrain" as the federal government proposes—to encompass *any* form of relief that limits how the Executive implements a statute—would create superfluity problems. Injunctions by definition limit Executive implementation of the statute. But that would render the accompanying term "enjoin" within the same statutory provision entirely superfluous. Notably,

"[t]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *City of Chicago v. Fulton*, 141 S. Ct. 585, 591 (2021) (cleaned up).

II. This Reading of Section (f)(1) is Confirmed by the Statutory Structure.

Reading Section 1252(f)(1) not to bar declaratory relief is also supported by the fact that in a neighboring provision of the very same statute, Congress explicitly precluded declaratory relief for other types of claims. In the contemporaneously enacted Section 1252(e),[4] Congress prohibited a court from entering "declaratory, injunctive, or other equitable relief." That provision, which pertains to judicial review of expedited removal orders, states in relevant part:

> Limitations on relief
>
> Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—
>
> (A) enter *declaratory*, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection . . . .

8 U.S.C. § 1252 (e)(1)(A) (emphasis added).

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[4] *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104–208, § 306, 110 Stat. 3009, 3009–610 to 3009–612 (1996).

Whereas Section 1252(e)(1) explicitly prohibits courts from awarding "*declaratory*, injunctive, or other equitable relief," the adjacent Section 1252(f)(1) uses only the terms "enjoin or restrain" but makes no mention of declaratory relief. Likewise, Section 1252(e)(1) is titled "Limitations on relief," whereas Section 1252(f)(1) is narrowly titled "Limit on *Injunctive* Relief." (emphasis added). *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999) ("By its plain terms, and even by its title, [Section 1252(f)] is nothing more or less than a limit on injunctive relief.").

"[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) (internal quotation marks omitted). This is "particularly true" where, as here, the "subsections . . . were enacted as part of a unified overhaul of judicial review procedures." *Nken*, 556 U.S. at 430–31. Indeed, this Court used the same reasoning in *Nken* to conclude that the term "enjoin" in Section 1252(f)(2) does not encompass judicial stays. The Court looked to the statute as a whole, and in particular the explicit inclusion of the term "stay" within an another provision in Section 1252 to reach its conclusion. *Id.* at 430–32; *see also Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1070–71 (2020) (similarly looking to Section 1252 as a whole in analyzing statutory term within that section).

Moreover, interpreting Section 1252(f)(1) to bar declaratory in addition to injunctive relief would render inoperable other language in Section 1252(f)(1) itself. The statute bars only lower courts, not *this*

Court, from "enjoining or restraining" the operation of the detention and removal provision. This Court's ability to provide such relief necessarily depends on the ability of district courts to issue *some* form of relief. *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 [8 U.S.C. §§ 1221–1231]. . . ." (emphasis added)). But this Court has only limited original jurisdiction. *See* U.S. Const., art. III, § 2. If Section 1252(f)(1) bars district courts from granting even declaratory relief, it is unclear how this Court would ever have an opportunity to grant injunctive relief as contemplated by Section 1252(f)(1).

As Professor Neuman has argued:

> Assuming that section 1252(f)(1) is interpreted as barring the district court from affording either declaratory or injunctive relief . . . prior to the Supreme Court's authorization, it is difficult to see how the district court could acquire jurisdiction . . . in the first place. There would therefore be no case or controversy in the lower court . . . over which the Supreme Court could exercise appellate jurisdiction.

Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 Tex. L. Rev. 1661, 1686 (2000). If district courts cannot even issue declaratory relief, the statute's exception for this Court would become meaningless. "[This Court's] practice, however, is to 'give effect, if possible, to every clause and word of a statute.'" *Advocate Health Care Network v. Stapleton*,

137 S. Ct. 1652, 1659 (2017) (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)).

The federal government has previously argued that the omission of "declaratory relief" in Section 1252(f)(1) is of no consequence, relying on cases where this Court, in construing the Tax Injunction and Johnson Acts, 28 U.S.C. §§ 1341 and 1342, has determined that declaratory relief is unavailable under statutes that expressly prohibit injunctive relief. *See, e.g.*, Tr. of Oral Argument at 15–16, *Garland v. Aleman Gonzalez*, No. 20-322 (U.S.) at 15–16; *see also, e.g.*, *California v. Grace Brethren Church*, 457 U.S. 393, 407–09 (1982) (construing Tax Injunction Act). However, both the Tax Injunction and Johnson Acts contain a term—"suspend"—that is absent from Section 1252(f)(1), and that the Court construed to encompass declaratory relief. *See* 28 U.S.C. §§ 1341, 1342 (providing that districts courts may not "enjoin, *suspend*, or restrain" the assessment or collection of state taxes or rate-making orders (emphasis added); *see also Grace Brethren Church*, 457 U.S. at 408 (holding that the Tax Injunction Act prohibits both declaratory and injunctive relief because declaratory relief "may in every practical sense operate to *suspend* collection of state taxes until the litigation has ended" (emphasis added)). And unlike the immigration provisions at issue here, neither Act precludes both declaratory and injunctive relief in one provision, but only injunctive relief in another. *Compare* 28 U.S.C. §§ 1341, 1342 *with* 8 U.S.C. § 1252(e) & (f).

In addition, both cases involve federalism concerns that are not present here. *See Grace Brethren Church*, 457 U.S. at 411 (noting that "Congress' intent in enacting the Tax Injunction Act was to prevent

federal-court interference with the assessment and collection of state taxes"); *Brooks v. Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1054 (9th Cir. 1991) (noting intent of Johnson Act to "completely withdraw[] rate cases from federal jurisdiction"); *Tennyson v. Gas Serv. Co.*, 506 F.2d 1135, 1137–39 (10th Cir. 1974). As this Court has noted, "[t]he only occasions where this Court has . . . found that a preclusion of injunctive relief inevitably led to a denial of declaratory relief have been cases in which principles of federalism militated altogether against federal intervention in a class of adjudications." *Steffel*, 415 U.S. at 472; *id.* at 462 ("When . . . considerations of equity, comity, and federalism have little vitality, the propriety of granting federal declaratory relief may properly be considered independently of a request for injunctive relief."). Because Section 1252(f)(1) concerns federal courts' ability to enjoin the operation of *federal* law, it does not implicate federalism concerns. *Accord Brito*, 22 F.4th at 251; *Alli*, 650 F.3d at 1014–15.

CONCLUSION

The plain language of Section 1252(f)(1) bars only injunctive relief—and not declaratory relief. Thus, should the Court address this issue, it should hold that the provision does not apply to declaratory judgments.

Respectfully submitted,

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