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 BRIEF FOR THE PETITIONERS

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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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Petitioners respectfully submit this brief in response to the Court's order of May 2, 2022, which directed supplemental briefing on 8 U.S.C. 1252(f)(1). Section 1252(f)(1) provides that, with one exception not relevant here, "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation" of the provisions of the Immigration and Nationality Act (INA) at 8 U.S.C. 1221-1232. Yet the district court "enjoined and restrained" the Department of Homeland Security (DHS) to use the contiguous-territory-return authority in 8 U.S.C. 1225(b)(2)(C), in order to enforce the court's interpretation of 8 U.S.C. 1225(b)(2)(A). Pet. App. 212a (capitalization and emphasis omitted). As our opening brief observed (at 18 n.3), Section 1252(f)(1) barred that injunction for the same reason it barred the injunction in *Garland* v. *Ale-*

man Gonzalez, No. 20-322 (argued Jan. 11, 2022), which likewise purported to require compliance with INA provisions covered by Section 1252(f)(1).

Section 1252(f)(1) is a jurisdictional limit not subject to forfeiture, and it provides another reason why the lower courts erred in granting injunctive relief in this case. But Section 1252(f)(1) does not limit *this Court's* jurisdiction or pose any obstacle to deciding the questions on which the Court granted a writ of certiorari. The Court should resolve those important questions regardless of how it interprets Section 1252(f)(1).

This Court also ordered briefing on whether Section 1252(f)(1) bars declaratory relief or precluded the district court from invoking the Administrative Procedure Act (APA), 5 U.S.C. 706, to vacate the June 2021 decision of the Secretary of Homeland Security terminating the Migrant Protection Protocols (MPP). Those questions are not presented in this case's current posture: The district court did not grant respondents' request for declaratory relief, and the portion of the court's judgment vacating the June 2021 decision is no longer at issue because the Secretary has rescinded that decision. If this Court reaches those questions, it should hold that Section 1252(f)(1) would not have barred properly crafted declaratory relief, but that it did prohibit vacatur of the June 2021 decision—a universal remedy that the APA did not authorize in any event.

STATEMENT

We begin with the procedural history relevant to the supplemental briefing order. Respondents' operative complaint asked the district court to "[h]old unlawful and set aside" the termination of MPP; "[d]eclare" that the termination "is unlawful"; and "[i]ssue preliminary and permanent injunctive relief" "enjoining [DHS] na-

tionwide from enforcing or implementing the discontinuance of the MPP" and "requiring [DHS] nationwide to enforce or implement the MPP." J.A. 124-125.

The government argued that the APA does not authorize a universal vacatur remedy and that Section 1252(f)(1) deprived the district court of jurisdiction to enter an injunction. D. Ct. Doc. 63, at 48-50 (June 25, 2021); D. Ct. Doc. 70, at 11-15 (July 7, 2021). Section 1252(f) is entitled "Limit on injunctive relief" and provides in relevant part:

> 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 [8 U.S.C. 1221-1232], other than with respect to the application of such provisions to an individual alien against whom proceedings under [those provisions] have been initiated.

8 U.S.C. 1252(f)(1). The covered INA provisions include Section 1225(b)(2)(C)'s contiguous-territory-return authority and Section 1225(b)(2)(A)'s detention provision.

The district court entered judgment for respondents. Pet. App. 364a. The court "vacated" the Secretary's "June 1 Memorandum" and "remanded" to DHS "for further consideration," *id.* at 212a (capitalization and emphasis omitted), rejecting the government's argument that the APA did not authorize it to invalidate agency action nationwide, *id.* at 203a-204a & n.14. The court also rejected the argument that Section 1252(f)(1) barred an injunction. *Id.* at 184a. The court entered a universal injunction that "permanently enjoined and restrained" DHS from enforcing the June 2021 termination decision and mandated that MPP be implemented until Congress appropriates sufficient funds for

universal detention of noncitizens subject to Section 1225 and until DHS "lawfully rescinded [MPP] in compliance with the APA." *Id.* at 212a (capitalization and emphasis omitted).

The government appealed and sought a stay, including based on Section 1252(f)(1). A stay was denied by the district court, the court of appeals, and this Court. Pet. App. 214a-256a. While the appeal was pending, the Secretary also conducted a new process thoroughly reconsidering MPP pursuant to the district court's remand. Gov't Br. 11-12. At the conclusion of that process, the Secretary again terminated MPP in October 2021. *Id.* at 12-13.

The court of appeals subsequently agreed with the district court's reasons for finding the Secretary's June decision unlawful and held that his October decision had no legal effect. Gov't Br. 14-15. The court concluded that 5 U.S.C. 706 empowered the district court to "vacate[]" the June decision and render it "void" nationwide. Pet. App. 35a-36a. And the court of appeals further held that Section 1252(f)(1) did not bar the district court's injunction, reasoning that the injunction "undid th[e] restraint" that the Secretary had imposed on "the 'operation' of § 1225(b)(2)(C)" and "restored" "the 'operation' of the statute." *Id.* at 135a.

This Court granted the government's petition for a writ of certiorari, which sought review of the court of appeals' holdings that Section 1225 requires DHS to continue implementing MPP and that the Secretary's October decision had no legal effect. Pet. I. Because the October decision had "supersede[d] and rescind[ed]" the June decision, Pet. App. 263a, the government did not continue challenging the lower courts' vacatur of the June decision. But the government ar-

gued in its petition (at 15 n.4) and opening brief (at 18 n.3) that the lower courts had lacked jurisdiction to grant injunctive relief under Section 1252(f)(1). The government observed that this Court was considering the scope of that provision in *Garland* v. *Aleman Gonzalez*, No. 20-322 (argued Jan. 11, 2022), which was fully briefed before the petition in this case was filed.

ARGUMENT

I. SECTION 1252(f)(1) DEPRIVED THE LOWER COURTS OF JURISDICTION TO GRANT AN INJUNCTION OR VACATUR, BUT WOULD NOT HAVE BARRED PROPERLY CRAFTED DECLARATORY RELIEF

Section 1252(f)(1) provides that, except in a case brought by "an individual [noncitizen]" in removal proceedings, and "[r]egardless of the nature of the action or claim or of the identity of the [plaintiff], no court (other than [this] Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. 1221-1232]." 8 U.S.C. 1252(f)(1). That remedial restriction applies here by its plain terms: The respondent States are not individual noncitizens in removal proceedings, and their suit sought to enjoin or restrain the operation of 8 U.S.C. 1225 by compelling DHS to reinstate MPP. The lower courts thus lacked jurisdiction to grant injunctive relief. Section 1252(f)(1) would not have barred properly crafted declaratory relief, which would not have had the prohibited effect of compelling DHS to alter its operation of Section 1225. But Section 1252(f)(1) did preclude the lower courts from vacating the Secretary's June decision terminating MPP—a universal remedy that was improper in any event.

A. The District Court Lacked Jurisdiction To Enter Injunctive Relief

Section 1252(f)(1) barred the district court's injunction, which "permanently enjoined and restrained" DHS from "implementing or enforcing" the Secretary's June decision regarding operation of the INA's contiguous-territory-return provision. Pet. App. 212a (capitalization and emphasis omitted). The court of appeals deemed Section 1252(f)(1) inapplicable solely on the ground that the injunction purportedly forced the government to comply with Section 1225, rather than "prevent[ing the government] from enforcing" it. *Id.* at 135a. That interpretation is incorrect, as the government has explained in *Garland* v. *Aleman Gonzalez*, No. 20-322. Section 1252(f)(1) equally bars injunctive relief on a claim that "the Executive's action does not comply with the statutory grant of authority." *Nielsen* v. *Preap*, 139 S. Ct. 954, 975 (2019) (Thomas, J., joined by Gorsuch, J., concurring in part and concurring in the judgment).

1. Section 1252(f)(1) provides that lower courts lack jurisdiction to "enjoin" the "operation of" the covered INA provisions "[r]egardless of the nature of the action or claim." 8 U.S.C. 1252(f)(1). Each of the quoted terms and phrases indicates that the jurisdictional bar includes injunctions premised on a conclusion that the agency action to be enjoined violates the relevant provisions of the INA.

The court of appeals did not acknowledge, much less grapple with, the plain meaning of the word "enjoin." 8 U.S.C. 1252(f)(1). The court apparently assumed that "enjoin" means merely to prohibit. But "[e]njoin" also means "[t]o require; command; positively direct." *Black's Law Dictionary* 529 (6th ed. 1990). An "[i]njunction" is

"[a] court order prohibiting someone from doing some specified act *or* commanding someone to undo some wrong or injury." *Id.* at 784 (emphasis added). Thus, by depriving lower courts of authority to "enjoin," Section 1252(f)(1) bars not only injunctions that block the operation of the covered INA provisions on constitutional or other grounds, but also injunctions that direct the Executive Branch to adhere to the court's reading of those provisions instead of the Executive Branch's own interpretation and implementation of them.

To the same effect, this Court has explained that the term "enjoin" includes both affirmative and negative commands. In interpreting the adjoining paragraph, which restricts judicial authority to "enjoin the removal of any alien," 8 U.S.C. 1252(f)(2), the Court described an injunction as "a means by which a court tells someone what to do or not to do," *Nken* v. *Holder*, 556 U.S. 418, 428 (2009). The Court further observed that, "[i]n a general sense, every order of a court which commands or forbids is an injunction." *Ibid.* (citation omitted; brackets in original). Similarly, in the context of the Tax Injunction Act, 28 U.S.C. 1341, which provides that "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law," *ibid.*, the Court has suggested that the term "enjoin" may include injunctions requiring rather than forbidding the specified acts. See *Direct Mktg. Ass'n* v. *Brohl*, 575 U.S. 1, 12-13 (2015); see also *Hibbs* v. *Winn*, 542 U.S. 88, 118 (2004) (Kennedy, J., dissenting).

Even if Section 1252(f)(1) were limited to negative commands, the relief entered below would still be barred. Section 1252(f)(1) prohibits orders that restrain "the operation of" the covered provisions. 8 U.S.C. 1252(f)(1). The term "operation," in this context, means execution,

enforcement, or implementation. *E.g.*, *Webster's Third New International Dictionary of the English Language* 1581 (1993) ("method or manner of functioning"); see *Make the Road N.Y.* v. *Wolf*, 962 F.3d 612, 647 (D.C. Cir. 2020) (Rao, J., dissenting) ("injunctions run against an officer, not statutory text"). Section 1252(f)(1) therefore prohibits injunctions that restrain the Executive Branch's implementation of the immigration laws, whether the basis for the suit is that the agency has misinterpreted the relevant provisions or acted arbitrarily and capriciously. The court of appeals reasoned that DHS "refuses to apply" the discretionary contiguous-territory-return authority. Pet. App. 135a. But that is just another way of saying that the court disagreed with the Secretary's decision to operate the contiguous-territory-return authority in a non-programmatic manner, just as DHS had done before MPP began in 2019.

Finally, the court of appeals' distinction between claims that "seek[] to prevent" the government from enforcing a covered provision and those that "require[]" it to "apply" a covered provision, Pet. App. 135a, is incompatible with Section 1252(f)(1)'s instruction that the jurisdictional bar applies "[*r*]*egardless* of the nature of the action or claim," 8 U.S.C. 1252(f)(1) (emphasis added); see *Preap*, 139 S. Ct. at 975 (Thomas, J.). By making the inquiry turn on the nature of the claim at issue, the court of appeals' interpretation effectively deletes the "regardless" clause.

2. The court of appeals' reasoning—essentially, that the injunction would not impermissibly enjoin the operation of the relevant statute but rather enjoin a policy not authorized by the statute—is also "circular" because it presumes that respondents are correct on the merits. *Preap*, 139 S. Ct. at 975 (Thomas, J.).

Rather than dispute Justice Thomas's interpretation of Section 1252(f)(1) in *Preap*, the court of appeals sought to distinguish that case by asserting that the *Preap* plaintiffs "were seeking to prevent DHS from enforcing [Section] 1226(c)." Pet. App. 135a. That is incorrect. Like respondents here, the plaintiffs in *Preap* "dispute[d] the extent of the statutory authority that the Government claim[ed]," and sought an injunction compelling the government to conform its operations to the plaintiffs' understanding of the statute. 139 S. Ct. at 962 (plurality opinion); see *id.* at 961 (majority opinion). The only apparent difference between the injunction in this case and the one that Justice Thomas found impermissible in *Preap* is that the court of appeals believed that respondents were correct about the meaning of the INA whereas the *Preap* plaintiffs were not. But if Section 1252(f)(1)'s bar on injunctive relief applied only when the plaintiff failed on the merits—and therefore had no entitlement to *any* relief—then that bar would be a nullity.

3. Justice Thomas's interpretation of Section 1252(f)(1) finds additional support in the history and purpose of that provision and related judicial-review provisions of the INA. Congress adopted Section 1252(f)(1) as part of an overhaul of judicial review of immigration proceedings in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, sec. 306(a)(2), § 242(f), 110 Stat. 3009-611. As this Court has observed, IIRIRA "substantially limited the availability of judicial review." *Nken*, 556 U.S. at 424. And "many provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme of the legislation." *Reno* v.

American-Arab Anti-Discrimination Comm., 525 U.S. 471, 486 (1999) (*AADC*) (emphasis omitted); see *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1966 (2020) (same).

Adopting the court of appeals' interpretation of Section 1252(f)(1) would undermine IIRIRA's carefully designed system for limiting and channeling judicial review and authorize judicial micromanagement of immigration enforcement. Under that interpretation, Section 1252(f)(1) would not prevent States, advocacy organizations, or classes of individuals from bringing programmatic challenges to the Executive Branch's implementation of the relevant provisions of the INA and obtaining injunctions requiring the government to comply with a single district court's misinterpretation of the immigration laws.

The history of MPP demonstrates the pernicious consequences of the combination of the court of appeals' interpretation of Section 1252(f)(1) and lower courts' recent willingness to grant universal relief. In 2020, the government was required to obtain a stay from this Court of a disruptive nationwide injunction against MPP entered by a district court that had ignored the government's invocation of Section 1252(f)(1). See *Wolf* v. *Innovation Law Lab*, 140 S. Ct. 1564 (2020). And now that the Secretary has rescinded MPP based on a conclusion that it burdens U.S. foreign relations, detracts from other policy initiatives, and imposed unjustifiable humanitarian harms, a different district court has entered nationwide relief preventing effectuation of the rescission for nearly nine months. Those dueling nationwide injunctions vividly illustrate the severe intrusions on the "Executive's discretion," *AADC*, 525 U.S. at 486, that Section 1252(f)(1) was intended to prevent.

B. Section 1252(f)(1) Would Not Bar A Properly Crafted Declaratory Judgment In This Case

Although the district court did not address respondents' request for a declaratory judgment that the Secretary's termination of MPP was unlawful, Section 1252(f)(1) generally does not preclude declaratory relief that adheres to the proper scope for such relief and does not circumvent Section 1252(f)(1)'s limitations: A declaratory judgment "declare[s] the rights and other legal relations" of the parties, 28 U.S.C. 2201(a), but does not coerce compliance or "interdict[] the operation" of the challenged statute or administrative action, *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 155 (1963).

1. The plurality opinion in *Preap* stated that Section 1252(f)(1) had not deprived the district court in that case of "jurisdiction to entertain the plaintiffs' request for declaratory relief." 139 S. Ct. at 962 (opinion of Alito, J.). Three Justices in *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), similarly concluded that "a court could order declaratory relief" notwithstanding Section 1252(f)(1). *Id.* at 875 (Breyer, J., dissenting). In this case, the government did not argue below that the district court lacked jurisdiction to grant declaratory relief. And the statutory text and structure indicate that a properly crafted declaratory judgment would not have been precluded by Section 1252(f)(1).

Section 1252(f) is entitled "[l]imit on injunctive relief," and it withdraws authority "to enjoin or restrain" the operation of the covered INA provisions. 8 U.S.C. 1252(f)(1). By contrast, the neighboring remedial restriction in Section 1252(e)(1)(A)—enacted by IIRIRA at the same time—is more broadly entitled "[l]imitations on relief," and it provides that "no court may * * * enter *declaratory*, injunctive, or other equitable relief

in any action pertaining to" the INA's expedited-removal provision (8 U.S.C. 1225(b)(1)), 8 U.S.C. 1252(e)(1)(A) (emphasis added).

Moreover, a typical declaratory judgment pronouncing an agency action unlawful does not, by its nature, "enjoin or restrain" the operation of the statute that authorized the agency action. 8 U.S.C. 1252(f)(1). Both of those terms indicate that a court may not *compel* the government to operate the covered provisions in a particular way. See *Black's Law Dictionary* 529 ("[e]njoin" means to "require," "command," or "positively direct"); *id.* at 1314 ("[r]estrain" means to "limit" or "put compulsion upon"). But a declaratory judgment does not do that; the remedy is "totally noncoercive," *Kennedy*, 372 U.S. at 155, and merely "declare[s]" the parties' "rights and other legal relations," 28 U.S.C. 2201(a). See *Steffel* v. *Thompson*, 415 U.S. 452, 471 (1974) ("Though [a declaratory judgment] may be persuasive, it is not ultimately coercive.") (citation omitted). That difference between declaratory judgments and injunctions is why the two remedies require "different considerations" and why a declaratory judgment may be appropriate even if an injunction is not. *Id.* at 469.

Interpreting Section 1252(f)(1) to preclude injunctions, but not properly crafted declaratory judgments, also accords with the statutory purpose of limiting systemic disruptions until this Court can definitely resolve a legal challenge. When a lower court enters a declaratory judgment but not a preliminary or permanent injunction, "the Government [remains] free to continue to apply" the challenged statute or administrative action pending further district-court proceedings and appellate review. *Kennedy*, 372 U.S. at 155. That was precisely Congress's plan for Section 1252(f)(1), which

was enacted not to entirely "preclude challenges" to covered immigration procedures, but to ensure that "the procedures will remain in force while such lawsuits are pending." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 161 (1996).[1]

2. Although Section 1252(f)(1) does not categorically withdraw lower courts' jurisdiction to enter declaratory judgments, those judgments may, in certain circumstances not present here, effectively function to "enjoin or restrain" the operation of the covered provisions. 8 U.S.C. 1252(f)(1). In those circumstances, Section 1252(f)(1) *would* bar a district court from issuing declaratory relief. Cf. *California* v. *Grace Brethren Church*, 457 U.S. 393, 408 (1982).

For instance, the government has repeatedly invoked Section 1252(f)(1) when noncitizens sought class-wide declaratory relief. See, *e.g.*, *Alli* v. *Decker*, 650 F.3d 1007, 1011-1016 (3d Cir. 2011) (approving class-wide declaratory relief over the government's opposition); Pet. App. at 84a, *Aleman Gonzalez*, *supra* (No. 20-322) (district court decision rejecting government's argument against class-wide declaratory relief); see also Oral Arg. Tr. at 14-16, *Aleman Gonzalez*, *supra*.

If such relief were permissible, "every single member of the class" could, and potentially would, "immediately seek an injunction grounded on the authority of the declaratory judgment"—even before appellate pro-

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[1] If a district court treated a nominal declaratory judgment like an injunction by threatening the government with contempt for non-acquiescence, that judgment would impermissibly "enjoin or restrain" the operation of the INA and would be barred under Section 1252(f)(1). Cf. *Calderon Jimenez* v. *McAleenan*, No. 18-cv-10225, D. Ct. Doc. 295, at 1 (D. Mass. June 28, 2019) (stating that "any violation of" the court's construction of the law "could constitute civil and/or criminal contempt").

ceedings had concluded. *Alli*, 650 F.3d at 1020 n.2 (Fuentes, J., dissenting). And Section 1252(f)(1) would not itself preclude follow-on injunctions sought by "an individual alien" in removal "proceedings." 8 U.S.C. 1252(f)(1). Thus, permitting class-wide declaratory relief would contravene Section 1252(f)(1) by allowing the lower courts to grant what would in "practical effect" be "a class-wide injunction." *Hamama* v. *Adducci*, 912 F.3d 869, 880 n.8 (6th Cir. 2018), cert. denied, 141 S. Ct. 188 (2020).

No similar concern is present here, however: Respondents are not noncitizens in removal proceedings, and Section 1252(f)(1) would thus bar them from converting a declaratory judgment into coercive relief in the lower courts. A properly crafted declaratory judgment would not require the government to alter its implementation of the INA pending further review and accordingly would not "enjoin or restrain" the operation of the relevant statutory provisions. 8 U.S.C. 1252(f)(1).

C. The District Court's Universal Vacatur Remedy Was Not Authorized By 5 U.S.C. 706 And Was Barred By Section 1252(f)(1)

This Court ordered supplemental briefing on whether Section 1252(f)(1) limits relief under 5 U.S.C. 706. The district court invoked Section 706(2) to vacate the Secretary's June decision terminating MPP. Pet. App. 212a; see *id.* at 203a-209a. This Court need not decide whether the district court erred by granting that relief because the vacatur no longer has practical effect in light of the Secretary's October decision. But if the Court reaches the issue, that remedy was barred because universal vacatur is not authorized by Section 706 in the first place and because the vacatur "enjoin[ed] or

restrain[ed]" the operation of covered provisions of the INA in violation of 8 U.S.C. 1252(f)(1).

1. The district court's vacatur of the Secretary's June decision ceased to have any practical effect when the Secretary issued his October decision, which "supersede[d] and rescind[ed] the June 1 memorandum." Pet. App. 263a-264a. In light of the October decision, the government no longer needs relief from the portion of the judgment below vacating the June decision: Even if this Court determined that vacatur was improper, that holding would not restore the June decision, which has already been independently superseded. For that reason, the government's petition for a writ of certiorari did not seek review of that aspect of the court of appeals' judgment, and the question whether vacatur of the June decision was permissible is not presented here.

2. If this Court does consider how Section 1252(f)(1) applies to the relief available under the APA, it should begin by addressing the proper scope of that relief. Section 706 provides that "[t]he reviewing court shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). The decisions below read that provision to authorize the district court to "vacate[]" the Secretary's decision terminating MPP and render it "void," preventing the Secretary from implementing his decision anywhere in the Nation. Pet. App. 35a-36a; see *id.* at 203a n.14. Some other lower courts have adopted a similar interpretation of Section 706(2). See, *e.g.*, *National Mining Ass'n* v. *U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1410 (D.C. Cir. 1998). But as the government has long argued, that interpretation is wrong: "Nothing in the language" of Section 706 authorizes

courts "to exercise such far-reaching power" by "setting aside" a regulation "for the entire country." *Virginia Soc'y for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 394 (4th Cir. 2001), overruled on other grounds by *The Real Truth About Abortion, Inc.* v. *FEC*, 681 F.3d 544 (4th Cir. 2012).[2]

First, Section 706(2) does not define the relief available in an APA action, much less authorize courts to nullify an agency action nationwide. The nature and scope of remedies available in an APA action are determined "not in section 706, but in section 703." John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 Yale J. on Reg. Bull. 37, 37 (2020) (Harrison). Under 5 U.S.C. 703, some cases are governed by a "special statutory review proceeding" that authorizes the reviewing court to act directly upon the challenged agency action in the way an appellate court acts upon a lower court's judgment. An example is the Hobbs Act, which authorizes courts of appeals to directly review certain agency actions, and which *does* authorize reviewing courts to "suspend (in whole or in part)" the action under review. 28 U.S.C. 2342; see Harrison 39-40.

Where no special review proceeding applies, however, Section 703 provides that "[t]he form of proceeding" under the APA is not direct appellate-type review of the agency's action, but instead a traditional "form of

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[2] See, *e.g.*, Memorandum from Attorney General Jefferson B. Sessions, *Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* 7-8 (Sept. 13, 2018), https://go.usa.gov/xuwNn ("universal vacatur is not contemplated by the APA") (capitalization altered; emphasis omitted); Gov't Br. at 49-50, *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367 (2020) (No. 19-431); Gov't Br. at 40-47, *Summers* v. *Earth Island Inst.*, 555 U.S. 488 (2009) (No. 07-463).

legal action," such as "actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus." 5 U.S.C. 703. Section 703 also provides that agency action is "subject to judicial review in civil or criminal proceedings for judicial enforcement." *Ibid.* Those forms of review do not authorize universal vacatur of agency action. It would make no sense for a court to purport to vacate an agency regulation in a civil or criminal enforcement proceeding or a habeas action. Harrison 45-46. And as Members of this Court have recognized, universal injunctions extending beyond what is necessary to redress the injuries to the parties before the court are "inconsistent with longstanding limits on equitable relief and the power of Article III courts." *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring); see *DHS* v. *New York*, 140 S. Ct. 599, 599-601 (2020) (Gorsuch, J., concurring in the grant of stay).

Accordingly, the "set aside" language in 5 U.S.C. 706(2) speaks to the court's decisional process, not the appropriate relief. It directs the court to disregard—that is, set to the side—unlawful "agency action, findings, and conclusions" in resolving the case before it, whether that case is an enforcement action, habeas petition, or request for declaratory or injunctive relief. *Ibid.* That understanding accords with contemporaneous usage, which recognized that a court may "set[] aside" an unconstitutional statute in deciding a case even though no one would suggest that a court can vacate a statute. *E.g.*, Act of Aug. 24, 1937, ch. 754, § 3, 50 Stat. 752-753; see Harrison 43-44 (discussing other examples).

Second, even if Section 706(2)'s "set aside" language did describe a remedy, it would not suggest that courts

should "set aside" an unlawful agency action universally, as opposed to as applied to the specific parties before the court. 5 U.S.C. 706(2). As Chief Judge Sutton recently observed, Section 706 did not "upset the bedrock practice of case-by-case judgments with respect to the parties in each case or create a new and far-reaching power" allowing every district judge to nullify agency action nationwide. *Arizona* v. *Biden*, 31 F.4th 469, 484 (6th Cir. 2022) (Sutton, C.J., concurring). The APA incorporates traditional limitations on equitable relief, including the principle that relief must not extend "beyond the parties to the case," *Hawaii*, 138 S. Ct. at 2427 (Thomas, J., concurring), by providing that the APA's authorization of judicial review does not affect "the power or duty of the court to * * * deny relief on any other appropriate legal or equitable ground," 5 U.S.C. 702(1). A contrary conclusion would be inconsistent with principles of equity and Article III, and would replicate all of the now-familiar problems of nationwide injunctions, including forum-shopping, conflicting court orders, and "rushed, high-stakes, low-information decisions." *New York*, 140 S. Ct. at 600-601 (Gorsuch, J.).

3. In any event, whatever the scope of the relief available under Section 706 in other contexts, Section 1252(f)(1) deprived the district court of jurisdiction to vacate the Secretary's June decision. For the reasons explained in Part I.A, *supra*, where (as here) a court purports to issue a "veto-like" vacatur that "formally revoke[s]" an agency action to implement a covered INA provision, Pet. App. 204a n.14 (citation omitted), the court plainly "enjoin[s] or restrain[s]" the "operation" of that provision, 8 U.S.C. 1252(f)(1). See also, *e.g.*, p. 12, *supra* (dictionary definitions of "enjoin" and "restrain"); *Make the Road*, 962 F.3d at 644 (Rao, J., dis-

senting) ("[S]ection 1252(f) further confirms that courts cannot engage in preenforcement review of the legal validity of" an agency action implementing a covered provision.).

The INA and the APA both make clear that the APA's remedial authorities give way to the specific remedial limitations in Section 1252(f)(1). The INA makes those limitations applicable "[r]egardless of the nature of the action or claim or of the identity of the [plaintiff]," and it expressly withdraws "jurisdiction" to enter the prohibited remedies. 8 U.S.C. 1252(f)(1). The APA is not "an independent grant of subject-matter jurisdiction." *Califano* v. *Sanders*, 430 U.S. 99, 105 (1977). And the APA itself reinforces remedial limitations like those in Section 1252(f)(1) by expressly providing that "[n]othing" in the APA right of review "affects other limitations on judicial review" or the "duty of the court to * * * deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702(1).

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

A. Section 1252(f)(1) explicitly limits the "jurisdiction or authority" of the lower courts. 8 U.S.C. 1252(f)(1). Because jurisdictional limitations speak to "a court's *power*," a jurisdictional defect "can never be forfeited or waived." *United States* v. *Cotton*, 535 U.S. 625, 630 (2002) (emphasis added). Thus, "if the record discloses that the lower court was without jurisdiction," this Court "will notice the defect, although the parties make no contention concerning it." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (citation omitted). As the Court has explained, it has "the duty" to "see to it that the jurisdiction of the [lower courts],

which is defined and limited by statute, is not exceeded." *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908).

The fact that Section 1252(f)(1) strips courts of jurisdiction to grant a particular form of relief, rather than to hear a particular type of case, does not alter that analysis. Although limits on relief ordinarily are not jurisdictional, Congress "is free to attach the conditions that go with the jurisdictional label"—including exemption from forfeiture—to whatever requirements it chooses. *Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011). Congress unambiguously did so in Section 1252(f)(1), which expressly states that no court "shall have jurisdiction or authority" to grant the specified relief. 8 U.S.C. 1252(f)(1). That limitation "is jurisdictional * * * because explicit statutory language makes it so." *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1318 (2017); see, *e.g.*, *Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457, 468 (2007); Gov't Reply Br. at 1-2, *Aleman Gonzalez*, *supra* (No. 20-322) (explaining that Section 1252(f)(1) is not subject to forfeiture and this Court has authority to decide the Section 1252(f)(1) question it added in *Aleman Gonzalez* even though the government had not raised Section 1252(f)(1) in the petition for a writ of certiorari).

B. In any event, the government did not forfeit its Section 1252(f)(1) argument here. The government pressed that argument in the district court, D. Ct. Doc. 63, at 48-49; D. Ct. Doc. 70, at 15; in the court of appeals, Gov't C.A. Br. 37-40; in its stay application to this Court, No. 21A21 Stay Appl. 19-20; in its petition for a writ of certiorari, Pet. 15 n.4; and in its opening brief and oral argument in this Court, Gov't Br. 18 n.3; Oral Arg. Tr. 5.

The government addressed the issue only briefly in footnotes in its petition and merits brief because of the Court's pending consideration of *Aleman Gonzalez*, *supra* (No. 20-322), where the government had already fully briefed the argument that it has advanced throughout this case: Section 1252(f)(1) precludes injunctive relief purporting to enforce the covered provisions of the INA. See Gov't Br. at 16-25, *Aleman Gonzalez*, *supra*; Gov't Reply Br. at 2-8, *Aleman Gonzalez*, *supra*. And the government did not further discuss the applicability of that jurisdictional bar to a vacatur under the APA because, as explained above, it did not challenge that aspect of the district court's judgment in this Court in light of the Secretary's October decision. See p. 15, *supra*. No basis exists to reject Section 1252(f)(1)'s applicability here on grounds of forfeiture.

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

Section 1252(f)(1) does not affect this Court's jurisdiction to decide the questions on which it granted a writ of certiorari. The Court should resolve those issues even if it agrees that Section 1252(f)(1) deprived the district court of jurisdiction to enter an injunction or vacate the June decision.

A. Under 28 U.S.C. 1254, this Court's certiorari jurisdiction extends to "[c]ases in the courts of appeals." The Court thus unquestionably has jurisdiction to review the court of appeals' decision. Of course, when a court of appeals decides a case over which the federal courts have no jurisdiction—because, for example, no statute grants subject-matter jurisdiction—this Court's jurisdiction is limited to "correcting the error of the lower court in entertaining the suit." *Arizonans for*

Official English v. *Arizona*, 520 U.S. 43, 73 (1997) (citation omitted). In such cases, this Court has no greater jurisdiction to decide the merits than the lower courts. But that principle does not apply here for two independent reasons.

First, Section 1252(f)(1) is an unusual jurisdictional provision that does not deprive the lower courts of all jurisdiction over a case, but instead merely denies jurisdiction to enter particular forms of *relief*. Here, the lower courts lacked jurisdiction to grant injunctive relief or vacatur, but had jurisdiction to reach the merits in considering respondents' request (J.A. 124) for declaratory relief. See Part I.B, *supra*. Accordingly, this Court likewise has authority to reach the merits.

The plurality in *Preap* endorsed precisely that logic. The district court there had entered an injunction that was arguably barred by Section 1252(f)(1). 139 S. Ct. at 962. But the plurality explained that it was "irrelevant" whether the court "had jurisdiction to enter such an injunction" because the court "had jurisdiction to entertain the plaintiffs' request for declaratory relief." *Ibid.* The Court therefore proceeded to decide the merits and reverse the injunction on other grounds. *Ibid.*; see *id.* at 963-972.

Second, this Court would have jurisdiction to reach the merits even if Section 1252(f)(1) precluded the district court from granting declaratory or injunctive relief or vacatur, because Section 1252(f)(1) expressly preserves *this Court's* jurisdiction to grant the relief that the lower courts cannot. Accordingly, even if Section 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.

B. Although this Court could in theory vacate the judgment below without reaching the merits on the ground that Section 1252(f)(1) deprived the lower courts of jurisdiction to grant injunctive relief or vacatur, it should not limit its analysis to that issue. The government would welcome relief from the judgment, but the lower courts would presumably simply rely on the same rationale to grant declaratory relief, and the case would immediately return to this Court presenting the same merits questions. The Court should resolve those questions now.

CONCLUSION

For the foregoing reasons and those provided in the government's opening and reply briefs, the judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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