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 United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF OF INDIANA AND SEVENTEEN OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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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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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Alaska, Arizona, Arkansas, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Utah, Virginia, and West Virginia respectfully submit this supplemental brief as *amici curiae* in support of respondents, the States of Texas and Missouri. Because States suffer the brunt of the costs of unlawful immigration, yet cannot unilaterally enforce immigration laws, they depend on federal judicial authority to review and remedy executive agency departures from immigration statutes. *Amici* States respectfully request that the Court affirm the judgment below.

SUMMARY OF THE ARGUMENT

Section 1252(f)(1) is a narrow restriction on the authority of lower federal courts—but not the Supreme Court—to enjoin or restrain the operation of Sections 1221 to 1232 of the Immigration and Nationality Act. As a textual matter, unlike other provisions in Section 1252 that expressly prohibit court *review*, Section 1252(f)(1) merely limits a *remedy*. Particularly given that it preserves the authority of *this* Court to issue all forms of relief, Section 1252(f)(1) cannot reasonably be understood to strip lower federal courts of any subject-matter jurisdiction.

Regardless, Section 1252(f)(1) has no bearing on the most critical relief issued in this case. In part, the district court's injunction precludes the United States

from granting parole en masse to applicants for admission because it lacks detention capacity. That portion of the injunction in effect enforces the case-by-case review for "urgent humanitarian reasons" or a "significant public benefit" required by Section 1182(d)(5)(A), which in turn lies beyond the remedy restrictions of Section 1252(f)(1).

Nor does Section 1252(f)(1) limit the courts' authority to grant *other* relief, such as declaratory relief or remedies available under the Administrative Procedure Act. Moreover, the requested injunction in this case does not "enjoin or restrain the operation of" any provision of the INA because it merely requires compliance with the INA's plain terms.

Putting aside the statute's restriction on lower courts' remedial authority, Section 1252(f)(1) could not be clearer in leaving in place *this* Court's authority to grant an injunction. The Court can and should do so because the equities clearly favor injunctive relief in this case where the United States has refused to comply with the requirements of the APA when taking broad administrative action and has sought to avert judicial review at every turn.

Nothing in Section 1252(f)(1) prevented the lower courts from reviewing the government's decision to terminate MPP—and its process in doing so—and granting appropriate relief. Nor does this provision or any other legal doctrine prevent the Court from likewise reviewing the United States' actions in this case and granting or affirming the injunction.

ARGUMENT

I. Section 1252(f)(1) Does Not Preclude Judicial Review of the MPP Rescission, and It Manifestly Permits *This* Court to Issue Injunctions

A. Section 1252(f)(1) does not strip the lower courts of subject-matter jurisdiction

1. Section 1252(f)(1) provides that "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"—which includes Sections 1221 to 1232—"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). The plain text thus limits the equitable remedies available in some cases in lower courts; it manifestly does not strip lower courts of subject-matter jurisdiction to adjudicate all class-wide disputes over the meaning and application of Sections 1221 to 1232.

In short, this is not a limit on lower courts' "power to hear cases." *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 560 (2017); *see also, e.g.*, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160–61 (2010) ("'Jurisdiction' refers to a court's adjudicatory authority. Accordingly, the term 'jurisdictional' properly applies only to prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) implicating that authority." (cleaned up)).

The statute's use of the term "jurisdiction" is limited to a particular sort of remedy (injunctions) in particular courts (lower courts) in particular cases (those not brought by individual aliens seeking to restrain their own detention or deportation).

Indeed, in *Reno v. American-Arab Anti-Discrimination Committee* (*AADC*), the Court, in rejecting the proposition that 1252(f) functioned as a jurisdictional *grant*, observed that, "[b]y its plain terms, and even by its title, [§ 1252(f)] is nothing more or less than a limit on injunctive relief. It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221–1231, but specifies that this ban does not extend to individual cases." 525 U.S. 471, 481–82 (1999); *see also Nken v. Holder*, 556 U.S. 418, 431 (2009) (explaining Section 1252(f) "restricted the availability of injunctive relief"); *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) ("Section 1252(f)(1) thus 'prohibits federal courts from granting classwide relief against the operation of §§ 1221–123[2]." (quoting *AADC*, 525 U.S. at 481)).

Critically, the term "'jurisdiction . . . is a word of many, too many, meanings,'" and "it is commonplace for the term to be used as" a reference to something other than subject-matter jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (providing examples). Accordingly, rather than focus on the isolated word "jurisdiction," the Court examines a statute's context and operative effect to determine whether it affects the power to adjudicate. In *Steel Company*, for instance, the Court held that a

statute purporting to confer "jurisdiction . . . to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement," 42 U.S.C. § 11046(c), "merely specif[ied] the remedial *powers* of the court, viz., to enforce the violated requirement and impose civil penalties." 523 U.S. at 90. It was "unreasonable" to read that provision as "jurisdictional" in the sense that it went to the court's subject-matter jurisdiction. *Id.*; *see also Reed Elsevier*, 559 U.S. at 164 ("The word 'jurisdiction,' as used here, thus says nothing about whether a federal court has subject-matter jurisdiction to adjudicate claims for infringement of unregistered works.")

Merely by using the term "jurisdiction" to limit a particular remedy in a subset of cases, Section 1252(f)(1) does not deprive lower courts of "statutory . . . power to adjudicate [a] case." *Steel Co.*, 523 U.S. at 89 (emphasis omitted).

2. The structural context of Section 1252(f)(1) confirms that it is a limit on equitable authority, not a limitation on subject-matter jurisdiction. Throughout Section 1252, Congress expressly stripped courts of subject-matter jurisdiction to review certain classes of cases and partially stripped them of jurisdiction by expressly limiting their review to certain determinations. But Section 1252(f)(1) is different and limits only remedial relief, not the ability to review a case.

Unlike Section 1252(f)(1), three other provisions of Section 1252 plainly strip federal courts of the power to adjudicate types of cases, irrespective of the relief

sought. Section 1252(a)(2) details "[m]atters not subject to judicial review" and provides that "no court shall have jurisdiction *to review*" (for example) "any individual determination" or "entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title." 8 U.S.C. § 1252(a)(2). Similarly, Section 1252(e) says (for example) that "*[j]udicial review* of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of (A) whether the petitioner is an alien, (B) whether the petitioner was ordered removed under such section, and (C) whether the petitioner can prove by a preponderance of the evidence" admissibility. *Id.* § 1252(e)(2). And Section 1252(g) likewise clearly expresses what it means by "[e]xclusive jurisdiction": "no court shall have jurisdiction *to hear any cause or claim* by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." *Id.*

It is obvious what Congress meant by those words—"no court shall have jurisdiction to review," "judicial review . . . shall be limited to determinations of," "[t]here shall be no review of," and "no court shall have jurisdiction to hear any cause or claim . . . arising from"—and courts have accordingly found themselves stripped of jurisdiction to review those cases. *See, e.g.*, *AADC*, 525 U.S. at 492 (concluding Section 1252(g) deprived courts of jurisdiction); *Dep't of*

Homeland Security v. Thuraissigiam, 140 S. Ct. 1959, 1966, 1981–83 (upholding Section 1252(e)(2) against constitutional challenge and explaining Section 1252(a)(2)'s bar on judicial review).

In contrast, Section 1252(f)(1) does not limit federal court review over any type of case or issue but merely restricts lower courts' power to issue injunctive relief that reaches beyond an individual alien.

3. The policy underlying Section 1252(f)(1) confirms what text and structure establish: The statute does not strip lower courts of subject-matter jurisdiction but merely reserves for *this* Court the exclusive power to enjoin or restrain operation of Sections 1221 to 1232 in certain cases. As the Court has previously explained, "[w]hen Congress passed [the Illegal Immigration Reform and Immigrant Responsibility Act of 1996], it 'repealed the old judicial-review scheme set forth in [8 U.S.C.] § 1105a and instituted a new (and significantly more restrictive) one in 8 U.S.C. § 1252.'" *Nken*, 556 U.S. at 424 (quoting *AADC,* 525 U.S. at 475). IIRIRA "streamline[d] rules and procedures in the Immigration and Nationality Act to make it easier to deny admission to inadmissible aliens and easier to remove deportable aliens from the United States." H.R. Rep. No. 104-469, pt. 1, at 157 (1996). Congress therefore "limit[ed] the authority of Federal courts other than the Supreme Court to enjoin the operation of the new removal procedures established in this legislation." *Id.* at 161. Congress did not want a "single

district court or courts of appeals . . . to enjoin procedures established by Congress to reform the process of removing illegal aliens from the U.S." *Id.*

Yet in reserving for this Court the power to issue injunctive relief in some cases, Congress did not purport to confer on this Court original jurisdiction over the subject matter. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). Instead, it assumed that lower courts would adjudicate disputes affecting more than one individual alien and limited the remedies they could confer, in effect deferring injunctive relief until this Court finally and conclusively determined the merits of a case under the relevant sections of the code. Indeed, lower-court jurisdiction over such disputes is *necessary* to give effect to Section 1252(f)(1)'s reservation of this Court's power to issue injunctive relief. If lower courts lacked jurisdiction to adjudicate such cases, none could ever lawfully come before the Court—a scenario plainly rejected by the plain statutory text.

B. Section 1252(f)(1) does not limit the relief awarded by the lower courts in this case

Not only is Section 1252(f)(1) not a jurisdiction-stripping provision, but it also does not bar the relief awarded below for three textual reasons: First, Section 1252(f)(1) does not apply to critical relief concerning the scope of parole authority under Section 1182(d)(5)(A). Second, Section 1252(f)(1) does not bar declaratory relief or relief under the APA. Third, the district court's judgment does not "enjoin or restrain

the operation" of any provision of the INA but instead compels the Biden Administration to ensure operation of Congress's statutory scheme.

1. Section 1252(f)(1) applies only to relief concerning "the provisions of *part IV of this subchapter*," *i.e.*, Sections 1221 to 1232. But a critical component of the district court's injunction concerns Section 1182(d)(5)(A), which the government cites for its purported authority to parole en masse aliens who are not clearly admissible.

Again, Section 1182(d)(5)(A) allows the Secretary of DHS to "parole" aliens "into the United States temporarily . . . only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). But the United States paroles asylum applicants not on a case-by-case basis for permissible reasons but en masse under the theory that its own insufficient detention capacity and resources somehow qualify as an "urgent humanitarian reason" or "significant public benefit" justifying parole. Pet. Br. 36.

The district court was aware that the United States uses such broad-based parole as an alternative to MPP and mandatory detention. Pet. App. 156a, 169a. Accordingly, when crafting injunctive relief, the district court, among other things, prohibited DHS from "releasing any aliens *because of* a lack of detention resources." Pet. App. 212a. This is an unmistakable reference to DHS's misuse of its Section

1182(d)(5)(A) parole authority, which is textually unaffected by Section 1252(f)(1).

The prohibition against misuse of parole authority may be the most critical aspect of the district court's injunction. Regardless of the other components, if the United States cannot parole asylum applicants en masse pending their hearings, it must either expand detention capacity or, more likely, restore use of MPP. Any restraint on the authority of courts to issue an injunction relating to the contiguous-territory-return provision, 8 U.S.C. § 1225(b)(2)(C), does not imply mandatory tolerance for en masse parole.

2. Section 1252(f)(1) also does not preclude district courts from issuing declaratory relief or APA "set aside" relief.

First, Section 1252(f)(1) applies only to orders "enjoin[ing] or restrain[ing]." A court granting declaratory relief merely "declare[s] the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201; *see Make the Road N.Y. v. Wolf*, 962 F.3d 612, 635 (D.C. Cir. 2020) ("[Section 1252(f)] does not proscribe issuance of a declaratory judgment."); *see also Jennings* 138 S. Ct. at 851 (suggesting declaratory relief might be available notwithstanding Section 1252(f)).

Second, Section 1252(f)(1) does not include a clear statement foreclosing APA relief, so the command that a court "shall" "set aside" unlawful agency action remains intact. 5 U.S.C. § 706. The APA provides that

a "[s]ubsequent statute may not be held to supersede or modify . . . chapter 7 . . . except to the extent that it does so expressly." 5 U.S.C. § 559; *see also, e.g.*, *Citizens for Responsibility & Ethics v. Fed. Elec. Comm'n*, 993 F.3d 880, 889 (D.C. Cir. 2021) ("[Federal Election Campaign Act] cannot alter the APA's limitation on judicial review unless it does so expressly.").

Accordingly, lower courts have recognized, both explicitly and implicitly, that APA remedies remain available notwithstanding Section 1252(f). In *Grace v. Barr*, for example, the court expressly held that Section 1252(f)(1) "places no restriction on the district court's authority to enjoin *agency action* found to be unlawful." 965 F.3d 883, 907 (D.C. Cir. 2020). Thus, Section 1252(f)(1) does not limit the courts' ability to grant relief under the APA.

3. Finally, injunctive relief granted by lower courts in this case does not "enjoin or restrain the operation" of Section 1225.

The words "enjoin or restrain" indicate some measure of restriction. But the injunction issued by the district court requires the United State to *enforce* the law as written, not *halt* enforcement. *See* Pet. App. 212a. This is precisely why the Fifth Circuit rejected the 1252(f) argument, *id.* at 135a–36a, and other courts have read the statutory text (and this Court's opinions) the same way. *See, e.g.*, *Brito v. Garland*, 22 F.4th 240, 249 (1st Cir. 2021) (reading *Jennings* to mean "an injunction against conduct not authorized

by a statute does not enjoin the operation of the statute, while an injunction against conduct authorized by a statute but independently barred by the Constitution does enjoin operation of the statute"). *Cf. Hamama v. Adducci*, 946 F.3d 875, 878 (6th Cir. 2020) (rejecting plaintiff's argument that district court's injunction simply "implemented" immigration law because the court "ordered detainees released, created new time limits on detention, and adopted new standards that the government had to meet to continue detention," which exceeded the statute's terms).

II. The Court Itself Can and Should Enjoin the Rescission of MPP

Regardless whether Section 1252(f)(1) precludes some portion of the district court's injunction, the Court can and should exercise its own authority to enjoin the Biden Administration's unlawful rescission of MPP. By its plain text, the statute authorizes the Court to issue nationwide injunctive relief even where a provision within Sections 1221 to 1232 is involved. 8 U.S.C. § 1252(f)(1).

The equities here tip heavily in favor of injunctive relief. The States must rely on Congress and the Executive Branch to protect their sovereign interests with respect to illegal immigration. *See Arizona v. United States*, 567 U.S. 387, 394–97 (2012). The Biden Administration's refusal to heed Congress's command to prevent entry by asylum seekers who lack a clear right to admission, *see* 8 U.S.C. § 1225(b)(2), saddles States with significant additional costs for

healthcare, education, and law enforcement, not to mention human trafficking, drug smuggling, and other criminal activity. *See, e.g.*, *Indiana Health Coverage Program Policy Manual*, Ind. Family & Soc. Servs. Admin., www.in.gov/fssa/ompp/files/Medicaid_PM_2400.pdf (last visited May 7, 2022) (Medicaid eligibility for paroled aliens); *SNAP/TANF Program Policy Manual*, Ind. Family & Soc. Servs. Admin., www.in.gov/fssa/dfr/files/2400.pdf (last visited May 7, 2022) (food-assistance program eligibility for paroled aliens); Feijun Luo et al., State-Level Economic Costs of Opioid Use Disorder and Fatal Opioid Overdose—United States, 2017, Ctrs. For Disease Control & Prevention (Apr. 16, 2021), www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7015a1-H.pdf (estimating the state-level costs of opioid use disorder and fatal opioid overdose during 2017).

Meanwhile, the Executive Branch has not only abdicated its responsibility to implement immigration laws, but also has undertaken unorthodox efforts to avoid the APA's requirements and preclude judicial review of its decision. The Administration's evasive conduct in this litigation—and similar conduct on other cases pending before the Court, *see, e.g.*, *Arizona v. San Franscisco*, No. 20-1775 (U.S.); *West Virginia v. EPA*, No. 20-1530 (U.S.)—underscore the need for this Court either to affirm or issue afresh nationwide injunctive relief requiring the Biden Administration to adhere to immigration law by restoring MPP.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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