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; STATE OF MISSOURI,
Respondents.

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

SUPPLEMENTAL BRIEF FOR AMERICA FIRST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

GENE P. HAMILTON
Counsel of Record
Vice-President and General Counsel
REED D. RUBINSTEIN
America First Legal Foundation
300 Independence Ave. SE
Washington, DC 20003
(202) 964-3721
gene.hamilton@aflegal.org

Counsel for *Amicus Curiae*

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 *AMICUS CURIAE*

America First Legal Foundation (America First Legal or AFL) is a nonprofit organization dedicated to promoting the rule of law in the United States by preventing executive overreach, ensuring due process and equal protection for every American citizen, and encouraging understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.

America First Legal has a substantial interest in this case. Ensuring compliance with our immigration laws, protecting national sovereignty, and promoting the rule of law are core institutional interests at the heart of the organization's mission. Members of AFL's Board of Directors and its staff served in various capacities during the Trump Administration, most prominently in the homeland security and immigration policy areas, obtaining unique knowledge and experience regarding the issues presented in this case. AFL has a significant interest in highlighting the effectiveness of the Migrant Protection Protocols (MPP) using the federal government's own publicly-available statistics and information.[1]

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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. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

1. 8 U.S.C. § 1252(f)(1) does not impose any jurisdictional or remedial limitations on the entry of injunctive relief, declaratory relief, or relief under 5 U.S.C. § 706. First, read in context, § 1252, including subsection (f)(1), applies only to cases brought by aliens arising out of removal orders, not to Texas's claims here. Second, the plain text provides that no court (other than the Supreme Court) has jurisdiction or authority "to enjoin or restrain the operation of the provisions of part IV of this subchapter [8 U.S.C. §§ 1221–1231]." Texas does not seek to enjoin or restrain "the operation of part IV," but to force the government to faithfully execute it.

2. The Court need not reach forfeiture.

3. The Court has jurisdiction to consider the merits.

ARGUMENT

I. Section 1252(f)(1) is Limited to Removal Orders.

In 1996, when Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), 110 Stat. 3009–546, it crafted a system for weeding out patently meritless claims and expeditiously removing the aliens making such claims from the country. *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S.Ct. 1959, 1963 (2020). Accordingly, section 1252 sharply circumscribed the availability of judicial review for aliens seeking to challenge expedited removal. Section 1252(f)(1) must be read in this context. It strips jurisdiction over

aliens' challenges to removal orders—not over Texas' efforts to make the executive branch enforce the law.

A. The Statutory Context.

Section 1252 must be construed "as a symmetrical and coherent regulatory scheme," and the Court must "fit, if possible, all parts into an harmonious whole." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted); *see also Yates v. United States*, 574 U.S. 528, 537 (2015); *Utility Air Regulatory Group v. EPA,* 573 U.S. 302, 320 (2014). Titles, captions, and headings help resolve doubt about statutory meaning. *Yates,* 574 U.S. at 539 (Ginsburg, J.); *id.* at 552 (Alito, J., concurring). Section 1252 is a perfect example of a statute where this is particularly so.

Section 1252 is titled "Judicial review of orders of removal." From there, text follows the title. Subsection 1252(a), titled "Applicable provisions", defines the jurisdiction-stripping provision's ambit. Subsection (a)(1), titled "General orders of removal," limits judicial review of final orders of removal for individual aliens. 8 U.S.C. § 1252(a)(1).

Subsection (a)(2) is titled "Matters not subject to judicial review." Subsection (a)(2)(A) is titled "Review relating to section 1225(b)(1)." This subsection concerns judicial review over aliens subject to expedited removal under 8 U.S.C. § 1225(b)(1). In subsection (a)(2)(A)(i), jurisdiction is stripped over individual determinations or "any other cause or claim arising from or relating to the implementation or operation of an order of removal[.]" In subsection (a)(2)(A)(ii), jurisdiction is stripped over the

Attorney's General's "decision to invoke" the removal provisions of subsection 1225(b)(1). In subsection (a)(2)(A)(iii), jurisdiction is stripped over "the application of such section to individual aliens." In subsection (a)(2)(A)(iv), jurisdiction is stripped (subject to subsection (1252(e)) over "procedures and policies adopted by the Attorney General to implement the provisions of [8 U.S.C. § 1225(b)(1)]." This last provision does not swallow the whole; the only textually coherent reading prohibits challenges to orders of removal based on the Attorney General's policies and procedures implementing section 1225(b)(1). *See Yates*, 574 U.S. at 537-39; *Brown & Williamson*, 529 U.S. at 135-37 (analyzing the FDCA).

Subsection (a)(2)(B) is titled "Denials of discretionary relief." The Court has summarized this subsection as providing "that a noncitizen may not bring a factual challenge to orders denying discretionary relief, including cancellation of removal, voluntary departure, adjustment of status, certain inadmissibility waivers, and other determinations 'made discretionary by statute.'" *Nasrallah v. Barr*, 140 S. Ct. 1683, 1694 (2020) quoting § 1252(a)(2)(B) and *Kucana v. Holder*, 558 U.S. 233, 248 (2010). Subsection (a)(2)(C) is titled "Orders against criminal aliens" and, unsurprisingly, strips jurisdiction over any final order of removal against a criminal alien. Subsection (a)(2)(D) is titled "Judicial review of legal claims." This is a safe harbor providing for review of constitutional claims or questions of law raised by an alien on a petition for review to the court of appeals. Subsection (a)(3), titled "Treatment of certain decisions," limits an

alien's right to appeal from the decision of an immigration judge. Subsection (a)(4), titled "Claims under the United Nations Convention", channels an alien's appellate rights to the court of appeals regarding any potential claims for protection under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment.

Underneath it all is subsection (a)(5), titled "Exclusive means of review." It provides "Notwithstanding any other provision of law (statutory or nonstatutory) . . . a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review *of an order of removal entered or issued under any provision of this chapter*[.]" *Id.* (emphasis added).

Section 1252's other subsections are similar.

Subsection 1252(b) is titled "Requirements for review of orders of removal" and its subject matter follows. For example, subsection 1252(b)(3), titled "Service", contains subsection (b)(3)(C) titled "Alien's brief." See also *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907 (2020) (explaining that a subsection of 1252(b) "is certainly not a bar where, as here, the parties are not challenging any removal proceedings").

Subsection 1252(c) is titled "Requirements for petition" and deals with a petition for review or for habeas corpus "of an order of removal".

Subsection 1252(d) titled "Review of final orders" provides in subsection (d)(1) that a court may review

"a final order of removal" only if "the alien has exhausted all administrative remedies[.]"

Subsection 1252(e) is titled "Judicial review of orders under section 1225(B)(1)" and pertains to expedited removal. Subsection (e)(1)(A) limits the entry of relief in "any action pertaining to an order to exclude an alien." Subsection (e)(3) is titled "Challenges on validity of the system." Subsection (e)(3)(A), titled "In general", provides that there is limited judicial review of "determinations under [8 U.S.C. § 1225(b)] and its implementation" in the United States District Court for the District of Columbia. Again, the only contextually coherent construction of this section is that it applies to *aliens* challenging expedited removal.

Finally, subsection 1252(g) explains that it provides the exclusive avenue to jurisdiction for any court to hear "any cause or claim by or on behalf of any alien" that arises "from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." This nicely encapsulates the statute as a whole: it provides a detailed set of limitations and restrictions on the judiciary's superintendence of removal proceedings. But these proceedings are individualized adjudications of aliens' admissibility or removability. They feature aliens as the parties in interest ("by or on behalf of any alien"). And they are trigged by proceedings in which the federal government initiates, adjudicates, and issues removal orders.

Section 1252 therefore makes sense as a "harmonious whole" only within the broader context

of challenges by aliens to orders of removal. *Compare Brown & Williamson Tobacco Corp.*, 529 U.S. at 133–34. Texas is not suing on behalf of aliens challenging actual or impending orders of removal, and therefore, § 1252 does not apply. The "entirety of the text and structure of § 1252 indicates that it operates only on denials of relief for individual aliens." *Texas v. Biden,* 20 F.4th 928, 977 (5th Cir.), cert. granted, 142 S. Ct. 1098 (2022).

B. Subsection 1252(f)(1) Does Not Limit Relief in This Case.

Subsection 1252(f) is titled "Limit on injunctive relief." It provides:

> (1) In general
>
> 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.

Subsection (f)(1) eliminates the courts' power over aliens' attempts to use an "action or claim" to do a particular thing: "to enjoin or restrain the operation of the provisions of [8 U.S.C. §§ 1221–1231]." In *Garland v. Aleman Gonzalez*, No. 20-322, the respondents argue that it should be possible to bring any claim that does not seek to enjoin a

Congressional enactment under 8 U.S.C. §§ 1221–1231. But they miss the fact that subsection (f)(1) prohibits courts from enjoining or restraining *the operation of* these laws, that is, removal orders.

At oral argument in this case as well as in *Gonzalez*, the Government responded to questions with an aggressive claim: that if the matter in litigation at all affects the immigration powers of 8 U.S.C. §§ 1221–1231, then section 1252(f)(1) denies a court jurisdiction to issue injunctive relief. It recognizes no limiting principle. Among other things, this interpretation would create perverse incentives for the Attorney General to sprinkle citations to 8 U.S.C. §§ 1221–1231 into unrelated matters to insulate an action from review. Surely even the Government would admit (f)(1) cannot go so far.

But the moment the Government concedes that there is some place for a court to second-guess the application of a sought injunction to the "operation of" 8 U.S.C. §§ 1221–1231, it has opened the door to the courts reviewing whether a particular action is actually part of the statutes' "operation." This is precisely what the Government does *not* want.

Statutory language and context drive the conclusion that subsection (f)(1) applies against aliens seeking to enjoin 8 U.S.C. §§ 1221–1231 or government actions implementing them—namely, removal orders. This allows (f)(1) to have a broader reach (eliminating more judicial power) than the respondents in *Gonzalez* propose. But because language and context limit subsection (f)(1) to first, aliens bringing actions arising out of their individual processing or removal; and second, the situation in

which the specified laws in 8 U.S.C. §§ 1221–1231 or their implementation is at issue, it insulates less government conduct than the Government proposes in *Aleman Gonzalez*.

II. Subsection 1252(f)(1) Does Not Apply to Texas's APA Claims.

Subsection 1252(f)(1) does not apply here because Texas is not objecting to a removal order but is instead objecting to the federal government's violations of the Administrative Procedure Act (APA). In fact, Texas does not seek to thwart the operation of 8 U.S.C. §§ 1221–1231, nor to enjoin them. It sued to ensure the faithful execution of the enforcement of these statutes.

Judicial review is presumptively available under the APA except to the extent that statutes explicitly preclude it. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). "[T]here is a 'well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action,' and we will accordingly find an intent to preclude such review only if presented with 'clear and convincing evidence." *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 63–64 (1993) (citations omitted); *see also Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020).

"It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some

administrative officer or board." S.Rep. No. 752, 79th Cong., 1st Sess., 26 (1945) cited in *Bowen v. Michigan Acad. of Fam. Physicians*, 476 U.S. 667, 671 (1986). Accordingly, the government bears a "heavy burden" to show Congress denied Texas APA review. *See Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 486 (2015).

This heavy burden makes sense because the APA serves a fundamental role in the administrative machinery of the modern American state. The Constitution carefully checks and balances the powers of the federal government. But the role of executive administration grew exponentially in the twentieth century. The APA was the response to this growth, providing a new set of checks and balances on executive action. See, e.g., CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN 31 (2020) ("In the APA compromise, Congress created procedural safeguards to reduce the risk of executive abuse"); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1558 (1996). ("[The APA] was the bill of rights for the new regulatory state."). This structural set of safeguards on the administrative state's operations should not be lightly cast aside. Even were one to sympathize with critics of contemporary administrative law who argue for more checks on administrative power, *see*, *e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014), the answer in this case only becomes easier: a fortiori, the APA should be enforced rigorously, and government claims that a given statute exempts administrative action from this check should be reviewed skeptically.

Subsection 1252(f)(1) does not contain "clear and convincing" evidence that Congress intended to deny *Texas* APA review of executive branch action. The only language in the subsection that could possibly suggest APA review is unavailable is the phrase: "Regardless of the action or claim." This makes clear that one cannot evade the rest of the statute's provisions by creative framing. But this clause does not stand on its own. The action or claim which (f)(1) addresses is simply to "enjoin or restrain the operation of" 8 U.S.C. §§ 1221–1231. An APA challenge brought against regulatory action cannot restrain the operation of a statute.[2] Subsection 1252(f)(1) must be read to fit within § 1252's context, and the Congressional intent to protect the removal system from procedural obstruction by aliens seeking to prevent removal. *Thuraissigiam*, 140 S. Ct. at 1963.

III. It Is Unnecessary to Address Forfeiture.

While forfeiture is a major argument in the *Aleman Gonzalez* case pending before the Court, it is not an issue in the present case. In this case, it is of little moment if the issue is jurisdictional, and hence not subject to forfeiture, as the Government argues in *Aleman Gonzalez*. As demonstrated above, § 1252(f)(1) does not apply here.

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[2] This is qualified with one exception: if an *alien* brings a pre-enforcement suit to enjoin any removal order, the remedy of an injunction would be unavailable even if it included an APA challenge.

IV. This Court Has Jurisdiction.

There is federal court jurisdiction under 28 U.S.C. § 1331 to enforce the Administrative Procedure Act, 5 U.S.C. § 706. This Court has jurisdiction under 28 U.S.C. § 1254.

CONCLUSION

This Court has jurisdiction and need not address forfeiture because 8 U.S.C. § 1252(f)(1) does not apply to suits like the one Texas brings here. Texas's suit is not brought by or on behalf of an alien, it does not arise out of an individual immigration enforcement proceeding, and it does not seek to enjoin the implementation of the immigration statutes. Instead, Texas's suit seeks the enforcement of them. And because this is an APA case and subsection 1252(f)(1) fails to provide clear and convincing evidence Congress intended to deny Texas APA review of its claims arising from the Government's failure to faithfully enforce the law, this case should be decided on the merits.

The Court should affirm the decision below.

Respectfully submitted,

GENE P. HAMILTON
Counsel of Record
Vice-President and General Counsel
REED D. RUBINSTEIN
America First Legal Foundation
300 Independence Ave. SE
Washington, DC 20003
(202) 964-3721
gene.hamilton@aflegal.org

Counsel for *Amicus Curiae*

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