No. 26-426

IN THE

# Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.

*Petitioners,*

v.

D.V.D., ET AL.,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

## BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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## INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a consumer advocacy organization with members in all 50 states. Public Citizen appears on behalf of its members before Congress, administrative agencies, and the courts to advocate for policies that benefit the public. It is often involved in litigation under the Administrative Procedure Act (APA) either challenging or defending agency actions, and it has a strong interest in issues concerning the scope of and limitations on the federal courts' remedial authority in such actions. In particular, Public Citizen has long advanced the view that the APA's judicial review provisions empower courts to set aside unlawful agency action, *see* 5 U.S.C. § 706(2), and that claimed limitations on that authority should be narrowly construed.

This amicus brief addresses the second question posed by this Court's order granting certiorari: whether the district court had authority to enter classwide declaratory relief and APA vacatur under 8 U.S.C. § 1252(f)(1). Public Citizen previously filed briefs addressing closely related issues in *Biden v. Texas*, 597 U.S. 785 (2022), and *United States v. Texas*, 599 U.S. 670 (2023). Public Citizen submits this brief to explain two key points. First, the Court's opinion in *Biden v. Texas* holds that any limitations on the lower courts' remedial authority imposed by § 1252(f)(1) are irrelevant once a case over which the lower courts properly assumed subject-matter jurisdiction reaches this Court, as this Court has authority to issue appropriate classwide injunctive relief even when the

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief.

lower courts do not. Second, section 1252(f)(1) in any event does not limit a district court's authority to issue classwide declaratory relief and to set aside unlawful agency action as provided in 5 U.S.C. § 706(2).

## SUMMARY OF ARGUMENT

In this case, the district court awarded, and the court of appeals affirmed, two forms of relief to the individual named plaintiffs and the plaintiff class: a declaratory judgment that the government's policy of denying procedural protections to non-citizens whom it seeks to remove to countries not named in their removal orders is unlawful, and an order setting aside and vacating the guidance embodying that policy under 5 U.S.C. § 706(2). The government's assertion that the Court should reverse the judgment below because 8 U.S.C. § 1252(f)(1) bars declaratory relief and APA vacatur orders is fundamentally misguided.

Section 1252(f)(1) provides that lower federal courts may not "enjoin or restrain" the operation of relevant portions of the immigration law on a non-individual basis, but it explicitly states that this Court may do so. This Court held in *Biden v. Texas*, 597 U.S. at 798–801, that the statute governs only the forms of relief that lower courts may order; it does not preclude the lower courts from entertaining non-individual claims. Thus, even when a lower court has provided a classwide remedy that section 1252(f)(1) does not allow it to order, *this Court* may review the merits of the lower court's liability and remedial rulings not only as to individual claims, but also as to classwide claims. And if the Court affirms those rulings, it may use the authority that the statute reserves to it to issue classwide injunctive relief. Accordingly, unless the lower courts lacked jurisdiction for other reasons

or erred on the merits in holding that non-citizens were entitled to procedural protections, this Court has authority to and should affirm the relief provided by the lower courts—or expand it to include express injunctive relief—regardless of whether the lower courts had authority to provide the relief awarded.

In any event, section 1252(f)(1) does not bar either declaratory relief or APA vacatur orders. The statute, unlike a nearby subsection of section 1252, says nothing about declaratory relief and limits only injunctive relief: that is, orders that enjoin or restrain federal officials in their implementation of the immigration laws. Declaratory relief is by its nature non-coercive and less intrusive than injunctive relief. It does not by its terms order anyone to do or not do anything, which is the defining characteristic of an order that enjoins or restrains action. This Court's decisions construing section 1252(f) over the course of nearly three decades provide no basis for expanding it to cover awards of declaratory relief.

Orders setting aside, or vacating, agency policies or rules under the APA likewise are distinct from injunctions. They do not command that officials take or refrain from particular actions. They serve only to nullify actions already taken and leave federal officials with the same freedom of action they had in the absence of the vacated policy or rule. Vacatur orders, which this Court and others have consistently characterized as less drastic than injunctions, are inherently non-coercive and not subject to any of the procedural and substantive requirements that control issuance of injunctions. The district court therefore had authority under section 1252(f)(1) to issue both of the forms of relief it provided to the class and that the court of appeals affirmed in this case.

## ARGUMENT

### I. Section 1252(f)(1) does not bar this Court from providing classwide relief of any form in this case.

The government's argument that this Court must reverse the decision of the court of appeals because 8 U.S.C. § 1252(f)(1) bars lower courts from issuing orders that "enjoin or restrain" the operation of specified immigration laws fails at the outset because that provision specifically provides that *this Court* may issue such orders. Accordingly, even if the government were correct that the relief affirmed by the First Circuit fell within the statutory bar on injunctions and restraining orders, *but see infra* 11–26, *this Court* would still have authority to grant that same relief so long as the lower courts had subject-matter jurisdiction and were correct in their rulings on the merits about the lawfulness of the government's "third country" removal policies.

For exactly this reason, the Court in *Biden v. Texas* rejected the government's reliance on section 1252(f)(1) and held that the statute does not prevent "*this* Court" from "reach[ing] the merits of an appeal, where the lower court entered a form of relief barred by that provision." 597 U.S. at 798. Rather, even where the lower courts grant relief that plainly violates section 1252(f)(1), *see Biden*, 597 U.S. at 797, this Court retains authority to review the lower courts' merits determinations and to grant the same relief if it determines that the lower courts correctly found that the circumstances warrant such relief. *See id.* at 801. Under *Biden*, therefore, section 1252(f)(1) does not prevent this Court from considering the

merits of respondents' claims and providing any form of relief that those claims may warrant.

*Biden*'s holding flows directly from the language of section 1252(f)(1). The statute provides:

> 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.

Section 1252(f)(1) does not on its face deprive district courts of subject-matter jurisdiction that they otherwise possess over any type of action. Rather, it assumes the existence of an "action" brought by a "party or parties" and limits only the power of lower courts entertaining such an action to issue a specific form of relief: an order "enjoin[ing] or restrain[ing] the operation" of part IV of subchapter II of the Immigration and Nationality Act, which deals with inspection, apprehension, examination, exclusion, and removal of aliens. Moreover, it places no limits on relief to individual plaintiffs, but bars injunctive orders only insofar as they are not limited to "an individual alien." And even while limiting class relief, it does not otherwise preclude courts from entertaining class actions—unlike another subsection of section 1252, which bars class actions in proceedings for judicial review of orders removing excludable aliens under section 1225(b), *see* 8 U.S.C.

§ 1252(e)(1)(B). Similarly, the text of section 1252(f)(1) differs from other subdivisions of section 1252 in that it lacks language suggesting that it addresses "jurisdiction to hear any cause or claim," *id.* § 1252(g), or indicating that agency actions within its scope are not "subject to judicial review," *id.* § 1252(a)(2). And, critically, section 1252(f)(1) provides that this Court *may* "enjoin or restrain" the operation of the specified provisions of the Act on a classwide basis—which could only occur in appellate proceedings in an action brought in the lower courts seeking such relief.

These features of the statute led this Court in *Biden* to hold that "the text" of section 1252(f)(1) "makes … clear" that the provision does nothing more than "withdraw[] a district court's 'jurisdiction or authority' to grant a particular form of relief"; "[i]t does not deprive the lower courts of all subject matter jurisdiction over claims brought under sections 1221 through 1232 of the INA." 597 U.S. at 798. The Court explained that while it "deprives courts of the power to issue a specific category of remedies," the statute "bears no indication that lower courts lack power to hear any claim brought under sections 1221 through 1232." *Id*. Both the words of the provision and its title ("Limit on injunctive relief"), the Court concluded, make "clear the narrowness of its scope." *Id*. And the Court observed that the structure of the statute, in which other subdivisions contain languagem absent from section 1252(f)(1), limiting the courts' jurisdiction or the availability of judicial review, "confirms" that section 1252(f)(1) is a "carefully worded provision" that only limits certain remedial powers of the lower courts. *Id.* at 799–800.

Further, the *Biden* majority pointed out that "the parenthetical explicitly preserving this Court's power

to enter injunctive relief" "leaves no doubt" that lower courts have "subject matter jurisdiction to adjudicate … non-individual claims under sections 1221 through 1232"; otherwise, "no such claims could ever arrive at this Court, rendering the provision's specific carveout for Supreme Court injunctive relief nugatory." *Id.* at 799. By specifically allowing this Court to provide classwide injunctive relief, *Biden* reasons, "Congress took pains" to provide that section 1252(f)'s limit on injunctive relief has no "consequence for the jurisdiction of this Court." *Id.*

Accordingly, the Court held that, where 1252(f)(1) bars a lower court from entering classwide injunctive relief, this Court may, in appellate proceedings, review the merits of claims seeking such relief. *See id.* at 800–01. And it follows that, if the Court determines that those claims have merit and warrant classwide injunctive relief, this Court may provide that remedy using the "power to enter injunctive relief" that section 1252(f)(1) "explicitly preserv[es]." *Id.* at 799.

Notably, the district court order under review in *Biden* had expressly provided injunctive relief barred by section 1252(f)(1) even though the plaintiffs had also sought the less drastic remedy of declaratory relief. *See id.* at 800. Despite what the majority acknowledged was an order that "violated" section 1252(f)(1), *id.* at 797, the Court held that the lower courts' merits rulings were properly before it. The Court's opinion relies on the Court's earlier decision in *Nielsen v. Preap*, 586 U.S. 392 (2019), which had reached the merits in a "virtually identical situation" in which "the plaintiffs sought declaratory as well as injunctive relief in their complaint, and … the District Court awarded only the latter." *Biden*, 597 U.S. at 800. The opinion approvingly cites the *Nielsen*

plurality's reasoning that the district court's apparent violation of section 1252(f)(1) was "irrelevant because the District Court had jurisdiction to entertain the plaintiffs' request for declaratory relief." *Id*. (quoting 586 U.S. at 402 (opinion of Alito, J.)).

Thus, *Biden* establishes that this Court may reach the merits of the claims underlying an injunction that violates the explicit prohibition of section 1252(f)(1) where the plaintiffs also sought declaratory relief that the district court did not provide. It follows that section 1252(f)(1) also does not bar this Court from deciding the merits in a case where the lower courts *declined* to order an injunction and instead provided the lesser remedy of classwide declaratory relief (as well as individual relief that section 1252(f)(1) does not limit at all). *Biden* further establishes that, once the Court addresses the merits, it may exercise its own authority to provide the appropriate remedy without regard to the constraints section 1252(f)(1) imposes on lower courts, even if that remedy "enjoin[s] or restrain[s] the operation" of the immigration laws. In short, it makes no difference to the proper outcome in this Court whether the classwide relief provided by the judgments of the lower courts falls within the scope of section 1252(f)(1).

Another aspect of the Court's holding in *Biden* underscores this point. Although *Biden* approvingly references the statement in *Preap*'s lead opinion that the district court had jurisdiction to consider a claim for declaratory relief, it also added a footnote stating that it did not need to reach questions that it had directed the parties to brief about whether section 1252(f)(1) bars district courts from providing classwide declaratory relief or vacating agency actions under the APA. *See* 597 U.S. at 801 n.4. Thus, the

Court determined that it had jurisdiction to decide the merits of the case without regard to whether the lower courts had authority to issue *any* of the forms of classwide relief that the plaintiffs had sought below—jurisdiction that the Court then proceeded to exercise. *See id.* at 801–14. In *Biden*, the Court reversed the lower courts' holdings on the merits of the plaintiffs' claims. But if the Court has jurisdiction to reverse a determination that plaintiffs have valid claims on the merits, it also necessarily has jurisdiction to affirm on the merits. And if it does so, it can and should grant any appropriate relief that it has jurisdiction to provide under section 1252(f)(1).

*Biden*'s holding that this Court can address the merits of challenges to the operation of the immigration laws regardless of whether the lower courts had authority to grant any of the *classwide* relief sought by the challengers makes sense, especially in a case like this one, where the declaratory relief ordered by the district court ran to the individual named plaintiffs as well as to the class as a whole. Regardless of its application to claims for relief on behalf of the class, section 1252(f)(1) clearly did not bar the lower courts from providing relief of any kind to the individual named plaintiffs based on the claims they asserted on their own behalf (which were the same as those they sought to assert on behalf of the class). *See Garland v. Aleman Gonzalez*, 596 U.S. 543, 550 (2022) ("[Section 1252(f)(1)] does not preclude a court from entering injunctive relief on behalf of a particular alien."). Had the lower courts granted only such individual relief, and the case reached this Court, there would be no doubt either of the Court's power to affirm on the merits (absent some other jurisdictional bar) or of its ability to go on to

exercise its own expressly reserved jurisdiction under section 1252(f)(1) to extend the same relief to the entire class by issuing an injunction.

The Court does not lose that authority if the lower courts, in addition to or instead of granting relief *permitted* by section 1252(f)(1), issue an injunction *barred* by that provision. *Biden* expressly so holds, and there is nothing unusual about that holding. Indeed, the Court has long recognized in other contexts that even where a lower court had no authority to dispose of a case in the manner it did, this Court must still affirm if it possesses the authority that the lower court lacked and if the proper exercise of that authority supports the judgment below. For example, in *Rodriquez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477 (1989), the Fifth Circuit had purported to determine that an earlier Supreme Court decision was no longer binding precedent—a determination this Court held the court of appeals had no authority to make. See *id.* at 484. Nonetheless, this Court, exercising its own authority, overruled its precedent and affirmed the judgment. *See id.* at 486. Likewise here, if no other statute deprives the lower courts of subject-matter jurisdiction, and if they correctly ruled that a non-citizen subject to a removal order is entitled to notice and a reasonable opportunity to contest removal to a "third country" not designated in the removal order, this Court can and should affirm the judgments below—regardless of whether the *lower* courts had authority under section 1252(f)(1) to grant the classwide relief they ordered.

Remarkably, the government does not even mention *Biden*'s holding, let alone seek to distinguish it or argue that it should be overruled. The

government's lone citation to *Biden* is on a page of its brief addressing another issue, for the boilerplate proposition that the executive branch, rather than the judiciary, has authority over the conduct of foreign policy. *See* U.S. Br. 39 (citing *Biden*, 597 U.S. at 805–06). The government's silence speaks volumes. *Biden*'s holding makes the question whether section 1252(f)(1) applies to declaratory judgments and APA vacatur orders irrelevant to the proper outcome of this case, and the government has offered no reason for the Court not to follow that holding here.

## II. Section 1252(f)(1) does not preclude lower courts from providing the relief ordered in this case.

Section 1252(f)(1)'s prohibition on lower court orders that "enjoin or restrain the operation of" certain immigration statutes does not apply to the forms of relief awarded by the lower courts: declaratory relief and the setting aside, or vacatur, of an agency policy statement under the APA. "By its plain terms, and even by its title, [section 1252(f)(1)] is nothing more or less than a limit on injunctive relief." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999). As *Biden* put it, it is a "narrow[]" provision that denies district courts authority to enter only a "particular form of relief," 597 U.S. at 798—namely, "injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions," *Aleman Gonzalez*, 596 at 550. Because declaratory judgments and vacatur orders under the APA are not injunctions that order officials to take or not to take any action, they fall outside section 1252(f)(1)'s scope.

### A. Section 1252(f)(1) does not apply to declaratory relief.

**1.** Section 1252(f)(1)'s plain language does not support the government's argument that it bars not only injunctions and other orders that explicitly restrain federal officials, but also orders that provide declaratory relief. This Court has long recognized that declaratory relief is meaningfully different from and is a "milder alternative to the injunction remedy." *Steffel v. Thompson*, 415 U.S. 452, 467 (1974) (citation omitted). Despite the well-recognized distinction between these forms of relief, section 1252(f)(1) refers only to orders that "enjoin" or "restrain" government officials; it does not mention declaratory orders. And, as this Court emphasized in *Biden*, the title of subsection (f) is "Limit on injunctive relief." *See* 597 U.S. at 800. By contrast, another subdivision of section 1252, more broadly entitled "Limitations on relief," specifically bars courts from providing "declaratory" as well as "injunctive" and "other equitable relief" with respect to a narrower category of immigration proceedings. 8 U.S.C. § 1252(e)(1).

This Court has long held that "[w]here 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." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted); *accord Mullin v. Al Otro Lado*, 609 U.S. 258, 270 (2026). Congress's choice not to refer to declaratory judgments in section 1252(f)(1) while specifically barring them in section 1252(e)(1) is a strong indication that it did not intend to preclude lower courts from issuing them in the proceedings governed by (f)(1).

Accordingly, members of this Court have repeatedly expressed the view that section 1252(f)(1)'s language does not reach declaratory judgments. In *Preap*, the lead opinion on behalf of three Justices stated, as its reason for not addressing whether section 1252(f)(1) barred an injunction issued by the district court, that the statute did not divest the district court of "jurisdiction to entertain the plaintiff's request for declaratory relief." 586 U.S. at 402 (opinion of Alito, J.). In *Aleman Gonzalez*, two members of the current Court, together with then-Justice Breyer, joined a dissenting opinion that observed that the majority "rightly does not embrace the Government's … suggestion … that § 1252(f)(1) bars even classwide declaratory relief," and explained in a footnote the reasons that position is "difficult to square … with the statute Congress enacted." 596 U.S. at 571–72 & n.9 (Sotomayor, J., dissenting). And in *Biden*, the Court's opinion approvingly cited *Preap*'s reasoning, including its premise that section 1252(f)(1) does not bar declaratory relief. *See* 597 U.S. at 800. Federal courts of appeals have stated the same view. *See Make the Road N.Y. v. Wolf*, 962 F.3d 612, 635 (D.C. Cir. 2020) ("Section 1252(f) prohibits only injunctions against 'the operation of the provisions of part IV of this subchapter' as amended …. It does not proscribe issuance of a declaratory judgment[.]").

This reading of the statute is firmly grounded in the Court's long recognition of the substantial differences between declaratory and injunctive relief. Injunctive relief has a directly coercive effect on named government officials who are ordered to do or not to do something. By contrast to the explicit restraint that an injunction imposes on named defendants, a declaratory judgment may state that

doing something under particular conditions violates the law, or that specific actions are legally required for a course of conduct to conform to the law. A declaratory judgment does not directly order anyone to refrain from violating the law or to take the additional steps needed to conform to the law, and a defendant may not be held to be in contempt for failing to act in accordance with a court's declaration. *See Steffel*, 415 U.S. at 467–70. Declaratory relief is thus "milder," *id.* at 467, and "less intrusive," *id.* at 469, than injunctive relief. Consequently, it may be ordered in circumstances where the prerequisites to injunctive relief, including irreparable injury, are not present. *See id.* at 471–72. In short, "Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction." *Winter v. NRDC,* 555 U.S. 7, 33 (2008) (quoting *Steffel*, 415 U.S. at 466).

For this reason, a bar on injunctive relief does not ordinarily strip the courts of authority to issue declaratory relief; rather, the Declaratory Judgment Act embodies "Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate." *Steffel*, 415 U.S. at 471. The Court in *Steffel* noted an exception to this principle limited to certain cases involving considerations of federalism: "[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." *Id.* at 472. But "[b]ecause section 1252(f)(1) concerns federal courts' ability to enjoin the operation of *federal* law, it does not implicate [these] federalism concerns." *Brito v. Garland*, 22 F.4th 240, 252 (1st Cir. 2021). Even if

that exception extended beyond cases implicating federalism, it would not apply here because section 1252(f)(1) does not reflect concerns "militat[ing] altogether against … intervention in a class of adjudications." *Steffel*, 415 U.S. at 472. Rather, as *Biden* explains (and as discussed more fully above), the statute assumes that classwide adjudication of cases involving operation of the statutes subject to section 1252(f)(1)'s remedial limitations is permissible. Reading the statute consistently with its plain language to permit lower courts to provide the milder remedy of declaratory relief in such cases while barring injunctions is thus consistent with more general jurisprudential principles governing the relationship between the two forms of relief.

**2.** The government's brief is premised on the view that the statute's prohibition on orders that "restrain" as well as "enjoin" operation of immigration laws implies that it extends beyond injunctions, far enough to cover declaratory relief. That view disregards the significance that this Court's prior decisions have given to subsection (f)'s title, which plainly indicates its application to "injunctive relief," *See Biden*, 597 U.S. at 798; *Nken v. Holder*, 556 U.S. 418, 430 (2009); *Reno*, 525 U.S. at 481, suggesting that both orders "enjoining" and orders "restraining" actions are "injunctive relief."

That meaning is consistent with usage in other statutes that couple "enjoin" and "restrain" in describing forms of coercive injunctive relief. The Hobbs Act, for example, refers both to orders "enjoining" agency actions and to "injunction[s] restraining" such actions. *See* 28 U.S.C. § 2349(a) & (b); *see also id.* § 2351 (authorizing district courts to "enforce" certain agency orders and to "enjoin and

restrain" persons violating them). Using both terms may serve to emphasize that the statute covers both positive and negative injunctions, *see Aleman Gonzalez*, 596 U.S. at 548–49, and/or that it applies both to coercive orders explicitly denominated "injunctions" and those called "restraining orders," *see* Fed. R. Civ. P. 65. Nothing about the statutory language suggests that the Court should strain to ascribe an unusual meaning to the terms in order to expand the statute's coverage beyond injunctions to include declaratory judgments, which of their own force neither "enjoin" nor "restrain" action. *Cf. Al Otro Lado*, 609 U.S. at 275 ("At any rate, if forced to choose between an interpretation that entails some redundancy and one that contradicts what words usually mean, we would choose the former.").

Nonetheless, the government insists that this Court's decision in *Aleman Gonzalez* requires a broader application of section 1252(f)(1) because it lists a number of synonyms for "restrain," including "check, hold back, or prevent," that, in the government's view, could also describe the effect of a declaratory judgment. Pet. Br. 27 (quoting *Aleman Gonzalez*, 596 U.S. at 549). According to the government, *Aleman Gonzalez* thus "interpreted 'restrain' to turn on an order's *effect*, not its *form*." *Id*. at 26 (citing *Aleman Gonzalez*, 596 U.S. at 548–49).

The government's argument puts words in the Court's mouth that are not in its opinion. *Aleman Gonzalez* did note that the Court had previously "suggested" that the word "restrain" may *sometimes* include orders that "inhibit" actions while at other times being limited to "orders that stop (or perhaps compel)" specific acts. 596 U.S. at 549. But the Court neither adopted the broader view nor said anything

about an order's form being irrelevant. Instead, what it said was this: "Putting the[ statutory] terms together, § 1252(f)(1) generally prohibits lower courts from entering *injunctions* that *order* federal officials *to take or to refrain from taking actions* to enforce, implement, or otherwise carry out the specified statutory provisions." *Id.* at 550 (emphasis added). The Court went on to observe that it had "already" construed section 1252(f)(1) in *Reno* to "prohibit[] federal courts from granting classwide injunctive relief." *Id.* (quoting *Reno*, 525 U.S. at 481–82). *Aleman Gonzalez* thus reinforces the conclusion that a declaratory judgment falls outside section 1252(f)(1) because it does not "order federal officials to take or to refrain from taking actions" and thus does not of its own force "check, hold back, or prevent" a "course of action." *Id.* at 549–50.

*Aleman Gonzalez*'s holding is fully consistent with the Court's earlier ruling in *Nken*, 556 U.S. at 428–29, which held that section 1252(f)'s limits on "injunctions" apply only to "coercive order[s] against the Government," not to non-coercive orders that may "have the practical effect of preventing some action." While the government complains that a declaratory judgment that addresses the lawfulness of its conduct is "coercive," Pet. Br. 26–27, it uses that term to mean something other than the meaning this Court's opinions give it: enforceable through contempt. *See Steffel*, 415 U.S. at 471 ("Though [a declaratory judgment] may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt."); *see also Black's Law Dictionary* 1544 (11th ed. 2019) (defining "coercive relief" as "[j]udicial relief, either legal or equitable, in the form of a personal command to the defendant that is

enforceable by physical restraint"). Instead, the government calls the declaratory judgment in this case "coercive" because it could later serve as a basis for an award of injunctive relief for an individual class member whom the government sought to remove in a manner declared unlawful. Pet. Br. 27. The government's argument, however, only serves to emphasize that the declaratory judgment is *not* in itself coercive. And the government's assertion that such a "follow-on" injunction would "accomplish in two steps … what Congress has forbidden [lower courts] to do in one," *id.* at 27–28, is flatly wrong: Congress has *not* forbidden injunctive relief for individual plaintiffs. The injunction the government describes would accomplish in two steps what the statute expressly *permits* a court to do in one.

The government's argument, moreover, proves far too much. First, even a purely individual injunction, if affirmed in a precedential opinion of a court of appeals, would entitle any other similarly situated person in the same circuit to obtain the same relief. Congress could not have intended the term "restrain" to encompass that kind of effect given that 1252(f)(1) expressly permits individual injunctions. Second, the government's theory would seem to leave no room for legal issues to be resolved on a classwide basis in a way that would benefit class members other than the named plaintiffs. That view directly contradicts *Biden*'s holding that section 1252(f)(1) must be read to permit the lower courts to adjudicate "non-individual claims" in some fashion that could lead to a grant of classwide injunctive relief by this Court. *See* 597 U.S. at 799. Absent the availability of some form of classwide remedy, it is difficult to see how lower courts

could adjudicate the non-individual claims that this Court has held the statute preserves.

### B. Section 1252(f)(1) poses no barrier to entry of relief under 5 U.S.C. § 706.

**1.** The relief authorized by section 706(2) is not an injunction; it is an order vacating—that is, "hold[ing] unlawful and set[ting] aside"—agency action. *See Black's Law Dictionary* 1648 (11th ed. 2019) (defining "set aside" as "to annul or vacate"). Whereas an injunction is an "extraordinary" equitable remedy as to which a court has considerable discretion, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982), "setting aside" is a statutory remedy under the APA that is normally available when agency action is unlawful. *Long Island Power Auth. v. FERC*, 27 F.4th 705, 717 (D.C. Cir. 2022). Indeed, the APA mandates that the reviewing court "shall … hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2); *see Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (stating that "shall" "normally creates an obligation impervious to judicial discretion"). Although the APA elsewhere grants courts discretion to withhold the remedy otherwise required by section 706, *see* 5 U.S.C. § 702, exercise of that discretion is appropriate only in carefully defined circumstances. *See Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 151 (D.C. Cir. 1993).[2]

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[2] *See also* Richard Murphy, 33 *Federal Practice and Procedure* (Wright & Miller) § 8381 (2d ed. & Apr. 2022 update) ("Generally speaking, where a petitioner persuades a reviewing court that an agency's action is defective due to errors of fact, law,

(*Footnote continued*)

Thus, as the D.C. Circuit has stated, when a reviewing court determines that agency regulations are unlawful, "[t]he ordinary practice is to vacate." *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (citing 5 U.S.C. § 706(2)).[3] And when a court has fulfilled its "obligation to 'set aside' [an] unlawful regulation," injunctive relief is ordinarily unnecessary, *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1222 (D.C. Cir. 2012)—indeed, it is "anomalous." *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012). *Reynolds*, for example, vacated a district court's injunction against the agency and held that the proper remedy was vacatur of the regulation at issue. 696 F.3d at 1222.[4]

This Court, too, has distinguished the APA remedy from the remedy of an injunction. Thus, in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), this

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or policy, the court should vacate that action and remand to the agency for further proceedings. Along these lines, § 706(2) of the Administrative Procedure Act … instructs courts to 'hold unlawful and set aside' agency action that falls short of the various listed review standards. This approach enables a reviewing court to correct error but, critically, also avoids judicial encroachment on agency discretion." (footnotes omitted)).

[3] In recent years, the government has advanced the argument that section 706(2)'s command that court's "set aside" unlawful agency actions does not mean that courts may "vacate" such actions. The government's brief in this case notes that that remains the government's position, but indicates that the government is waiving that argument in this case and that it believes it would be "inappropriate" for this Court to address it. Pet. Br. 29 n.5. Thus, this Court should assume the lower courts' general authority to issue vacatur orders and consider only whether section 1252(f)(1) bars such relief.

[4] Although part of *Reynolds*'s merits analysis was later overruled, *see Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014), that later decision had no effect on the remedial analysis.

Court described the set-aside remedy of section 706(2) as "less drastic" than the "drastic and extraordinary remedy" of an injunction. *Id.* at 165–66 ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. If a less drastic remedy (such as partial or complete vacatur of [the agency's] deregulation decision) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted." (citation omitted)).

Further, the standard for issuing an injunction is meaningfully different from the standard for setting aside agency action under section 706(2). "The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Weinberger*, 456 U.S. at 312 (citing cases). No such findings are necessary to set aside agency action under the APA. Rather, the standard for setting aside final agency action is that the reviewing court has "found [the action] to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," among other possibilities. 5 U.S.C. § 706(2); *e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 8 (2020) (stating "we conclude that the Acting Secretary did violate the APA, and that the rescission must be vacated").

**2.** The government argues that vacatur "enjoin[s] or restrain[s]" the operation of the INA. *See* Pet. Br. 29–30. But the consequences of an order vacating an agency action are significantly different from those of an order (like the preliminary injunction entered by the district court in this case) "enjoin[ing] or restrain[ing] the operation of" the specified INA provisions. 8 U.S.C. § 1252(f)(1). Although an order

setting aside an agency action nullifies it, the order (unlike an injunction) neither compels nor prohibits further action on pain of contempt sanctions. *See Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (holding that a judgment declaring agency action unlawful is not enforceable by contempt).

Put another way, an order vacating an agency rule does not "tell[] someone what to do or not to do," *Aleman Gonzalez*, 596 U.S. at 549 (quoting *Nken*, 556 U.S. at 428, and does not "prevent" the agency "from *doing* something," *id*. (emphasis added) (quoting *Webster's Third New International Dictionary* 1936 (1993)). Rather, it nullifies a source of authority on which the agency might otherwise rely to justify a course of action, without directly barring the course of action itself, which the agency may engage in if otherwise lawful. That is, the court's order setting aside an agency regulation or order operates to render that regulation or order a nullity; its object is not the ongoing "actions of officials or other persons" who implement the agency's governing statutes. *Id*.

By contrast, in *Aleman Gonzalez*, the Court explained that injunctions requiring the agency to provide bond hearings for a class "enjoin or restrain the operation" of section 1231(a)(6) of the INA "because they require officials to take actions that (in the Government's view) are not required by § 1231(a)(6) and to refrain from actions that (again in the Government's view) are allowed by § 1231(a)(6). Those injunctions thus interfere with the Government's efforts to operate § 1231(a)(6)." *Aleman Gonzalez*, 596 U.S. at 551. An order vacating an agency regulation, policy, or guideline does not similarly compel the agency to take or refrain from

taking any action authorized by or prohibited by its authority under the INA. To be sure, the legal reasoning a court used to vacate an agency action might indicate that some future agency action or course of action would be unlawful for the same reason, but neither the reasoning nor the vacatur would directly enjoin or restrain such action.

That an order setting aside or vacating an action is distinct from one enjoining or restraining a party is confirmed by the "common understanding of judges," who are the decisionmakers "to whom [section 706] is addressed." *Comcast Corp. v. FCC*, 579 F.3d 1, 10 (D.C. Cir. 2009) (Randolph, J., concurring) ("'Set aside' means vacate, according to the dictionaries and the common understanding of judges, to whom the provision is addressed."). Tellingly, the APA adopts judicial usage by incorporating a term commonly used to describe the action that an appellate court takes with respect to an order or judgment improperly entered by a lower court. In such circumstances, the appellate tribunal "sets aside," or vacates, the lower court's action. Indeed, those terms are typically used to describe an appellate court's vacatur of an injunction improperly issued by a lower court.[5] But no one would say that, in such circumstances, the appellate court has issued an injunction or restraining order against the lower court, let alone that it has enjoined or restrained the operation of a law. The use

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[5] *See*, *e.g.*, *FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1211–12 (9th Cir. 2019) (stating the standard for "set[ting] aside" a preliminary injunction); *N.M. Dep't of Game & Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236, 1240 (10th Cir. 2017) ("vacat[ing] the district court's entry of a preliminary injunction"); *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1136 (11th Cir. 2005) ("vacat[ing]" a district court injunction).

of the same language to describe the ordinary remedy in APA cases signifies that, under the APA, courts function as "appellate tribunal[s]" in applying the APA's standard of review and set-aside remedy to agency action. *N. Air Cargo*, 674 F.3d at 861.

To be sure, injunctive relief that goes beyond setting aside an unlawful agency action may be available in an APA action when the requirements for issuance of such relief are satisfied. The APA expressly contemplates that, in some circumstances, an "injunctive decree" may be available, 5 U.S.C. § 702; it also provides for the issuance of preliminary equitable relief when necessary "to prevent irreparable injury," *id.* § 705, and allows orders to "compel" agency action in appropriate circumstances, *id.* § 706(1). Injunctive relief under the APA, however, is subject to traditional equitable constraints, *see*, *e.g.*, *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C. Cir. 2006), including those governing the issuance of preliminary and permanent injunctions, *see Winter*, 555 U.S. at 20. That the APA addresses the relief of setting aside agency action separately, and using different terms, from its references to injunctive decrees, orders granting preliminary relief to prevent irreparable injury, and orders compelling agency action underscores that the set-aside remedy is distinct from orders enjoining agency action. The Hobbs Act, which governs review of certain agency orders under APA standards, likewise expressly distinguishes between court orders "setting aside" agency actions and those "enjoining" and

"restrain[ing]" agency actions. 28 U.S.C. §§ 2349(a) & (b).[6]

Another APA provision, 5 U.S.C. § 559, further reinforces that an order setting aside unlawful agency action under section 706(2) of the APA does not "enjoin or restrain" the operation of the immigration laws and, therefore, that the plain language of section 1252(f)(1) does not encompass such orders. Section

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[6] In its brief in *United States v. Texas*, but not in its brief in this case, the government relied on *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289 (1975), to support its argument that "enjoin or restrain" includes vacatur orders. *See* Pet. Br. 46, No. 22-58 (filed Sept. 12, 2022). Specifically, the government argued that in *Aberdeen & Rockfish*, this Court exercised jurisdiction over appeals from orders of vacatur based on a statute providing for appellate jurisdiction over injunctions. That argument, which the government has apparently thought better of, substantially overstated the point: In *Aberdeen & Rockfish*, the Court considered appellate jurisdiction under a statute that authorized a 3-judge court to grant "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission" (ICC). 422 U.S. at 307. In that context, the Court found no "jurisdictional difference *in ICC cases* between 'injunctions' and orders 'setting aside' ICC determinations." *Id.* at 308 n.11 (emphasis added). The facts of the case illustrated the basis for the conclusion: Although the appellees claimed "that since the court below declined to restrain collection of the increased rates, its order was not an injunction but a declaratory judgment," the district court had "directed the ICC to perform certain acts" and its "order was plainly cast in injunctive terms." *Id.* at 307. Specifically, "[t]he order 'directs' the ICC to reopen [the rate proceeding] and to conduct further proceedings which 'must' include preparation of an impact statement dealing with enumerated issues." *Id.* The district court too viewed the relief as injunctive: "In declining to restrain collection of the rates, the court said it was declining to grant 'to plaintiffs additional injunctive relief.'" *Id.*

559 provides that a "[s]ubsequent statute may not be held to supersede or modify … chapter 7 [of title 5] … except to the extent that it does so expressly." Chapter 7 includes section 706, and section 1252(f)(1) was enacted decades after the APA. But section 1252(f)(1) contains no express indication of intent to limit or modify the remedial authority granted by section 706. Accordingly, section 559, together with the more general strong presumption that judicial review of agency action is available, *see*, *e.g.*, *Regents*, 591 U.S. at 16–17, forecloses any argument that section 1252(f)(1) impliedly limits APA relief.

## CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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