No. 22-58

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

STATE OF TEXAS AND STATE OF LOUISIANA
Respondents.

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

BRIEF OF STATE OF FLORIDA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

This case asks, among other things, whether the executive branch can deprioritize immigration enforcement against aliens convicted of serious crimes, contrary to Congress's express mandate to prioritize exactly those aliens. Florida is a plaintiff in another case raising the same question, the disposition of which will likely be controlled by the Court's resolution of this case. *See Alabama v. Mayorkas*, No. 4:22-cv-418 (N.D. Ala. filed Apr. 4, 2022). Also at issue in this case is the authority of federal courts to remedy the executive branch's unlawful immigration policies. The Court's resolution of that issue will affect the remedies available to Florida in other challenges to the executive branch's unlawful immigration practices. *See Florida v. United States*, No. 3:21-cv-1066 (N.D. Fla. filed Sept. 28, 2021).

Florida spends approximately $132 million a year incarcerating roughly 7,000 criminal aliens. *See* Exhibit 2: Declaration of Lavitta Stanford at 2, *Florida v. United States*, No. 3:21-cv-1066 (N.D. Fla. filed Oct. 3, 2022), ECF No. 85-2. And studies suggest that 82% of state prisoners are arrested again within ten years of being released. *See* Leonardo Antenangeli & Matthew R. Durose, *Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period (2008–2018)*, U.S. Dep't of Just. Bureau of Just. Stat. (Sept. 8, 2021), https://tinyurl.com/223j4vuk. To mitigate the risk of further criminal activity by removable criminal aliens, Congress has mandated that the Department of Homeland Security arrest aliens with certain criminal convictions upon their release from custody and detain them pending removal from the United States.

8 U.S.C. § 1226(c); *see also Demore v. Kim*, 538 U.S. 510, 513 (2003) (discussing Congress's "justifiabl[e] concern[] that deportable criminal aliens who are not detained continue to engage in crime").

Yet DHS has directed immigration officials to dispense with the statutory categories Congress created in favor of a set of enforcement guidelines that are more to its taste, which purport to prioritize for apprehension and removal three vague categories of aliens that nowhere appear in the statute. *See* U.S. Br. 3. As a result, DHS has authorized immigration officials to violate their duty to arrest criminal aliens when Florida releases them from state custody, which forces Florida to expend resources on supervised release and policing recidivism for criminal aliens who should be in federal custody and removed from the United States. DHS thus seeks to unlawfully shift to Florida and other states the costs of addressing crime by criminal aliens.

SUMMARY OF ARGUMENT

1. The executive branch enjoys discretion in enforcing immigration laws, but its discretion is not unlimited. It is Congress that establishes immigration policy. *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977). And it is also Congress, not the Executive, that has ultimate power to establish immigration-enforcement priorities. "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985). Congress did exactly that in 8 U.S.C. § 1226(c), which provides that DHS "shall take into custody any

alien who" has been convicted of certain crimes "when the alien is released." The text and history of that provision show that Section 1226 imposes on DHS a mandatory duty to arrest and remove certain criminal aliens.

In 1988, as part of the Anti-Drug Abuse Act, Congress directed the Department of Justice to "take into custody" all aliens with aggravated-felony convictions upon completion of their sentences. Pub. L. No. 100-690, sec. 7343(a)(4), § 242(a)(2), 102 Stat. 4181, 4470 (1988) (then codified at 8 U.S.C. § 1252(a)(2) (1988)). The Department of Justice understood those words to impose a nondiscretionary duty to arrest and remove aliens within its scope. *See* Whether the DOJ Criminal Division May Make Promises Not to Deport a Criminal Defendant or Witness, U.S. Dep't of Just., I.N.S. Gen. Couns. Op. No. 93-80 (1993), 1993 WL 1504027, at *3.

Over the next decade, Congress became increasingly concerned with criminal activity by removable aliens and the executive branch's failure to address the problem. *See Demore*, 538 U.S. at 518. In 1996, Congress expanded the class of criminal aliens subject to mandatory arrest and removal by enacting the current version of 8 U.S.C. § 1226(c). Notably, the statute retained the same mandatory language as the 1988 enactment but expanded the class of crimes covered so that it was no longer limited to just aggravated felonies.

Like its almost identically worded predecessor, Section 1226(c) imposes a nondiscretionary duty to arrest, detain, and remove aliens convicted of crimes covered by the statute. Yet DHS issued a September

2021 memorandum outlining enforcement guidelines in which it directed immigration officials to prioritize only aliens who pose a threat to national security, who recently entered the United States, or who meet nebulous criteria for qualifying as a "threat to public safety." J.A. 113–16. Under those guidelines, even if an alien has a criminal conviction triggering mandatory arrest and removal under Section 1226(c), immigration officials must consider a number of extra-statutory factors before deciding to arrest and remove the alien, such as: "the gravity of the offense"; "the nature and degree of harm caused"; the alien's "prior criminal record"; the alien's age; the length of time the alien has been in the United States; and rehabilitation evidence, including the amount of time since the alien committed the offense. J.A. 114–15. That memorandum cannot be squared with Section 1226(c)'s plain text or this Court's decision in *Nielsen v. Preap*, 139 S. Ct. 954 (2019), which make clear that DHS's obligation turns on whether an alien meets the criteria Congress established in Section 1226(c)(1), *see id.* at 965–66, not executive discretion. And it is doubly wrong considering Section 1226's history and development, which reflect that Section 1226(c) imposes a mandatory duty on DHS to arrest and remove criminal aliens.

2. Because the guidelines conflict with Section 1226(c), the district court correctly vacated them under the Administrative Procedure Act. The United States argues that the APA does not authorize vacatur of unlawful agency actions. But that argument contradicts the text and structure of the APA, which instructs courts to "hold unlawful and set aside" un-

lawful agency action. 5 U.S.C. § 706(2). In administrative law, the concept of "setting aside" has for decades been considered the equivalent of nullifying or canceling.

Nor can DHS insulate the guidelines from vacatur by invoking 8 U.S.C. § 1252(f)(1), which bars lower courts from "enjoin[ing] or restrain[ing]" the operation of provisions of the INA. By its own terms, Section 1252(f)(1) prevents lower courts only from entering injunctive or similar relief that directly orders government officials to take or refrain from taking specific action. Vacating the guidelines does not order government officials to do anything—it simply nullifies the guidelines.

ARGUMENT

I. SECTION 1226(C) IMPOSES A MANDATORY DUTY ON DHS TO ARREST AND REMOVE CRIMINAL ALIENS.

Congress has plenary authority to "expel aliens or classes of aliens" and to impose on the executive branch the "duty of . . . arresting . . . and causing their deportation." *Wong Wing v. United States*, 163 U.S. 228, 237 (1896). Congress did just that when it enacted 8 U.S.C. § 1226(c)(1), requiring that the executive branch "shall take into custody any alien who" has been convicted of certain crimes "when the alien is released."

The United States contends (at 27–28) that even though the statute says DHS "shall take into custody any alien," it really means only those criminal aliens that DHS has decided in its unbridled discretion to remove. And even then, the United States argues (at 28–

29) that the statutory command to "take into custody" is merely a command to keep in custody those already detained. And the United States complains (at 29) that applying the statute as written would be "infeasible." But the historical development of Section 1226(c) confirms that it does indeed mean what it says—DHS must arrest and remove any criminal alien released from custody. And the United States' concerns about resource capacity—many of which are self-inflicted—do not alter the meaning of the statute.

A. Section 1226(c)'s text and history demonstrate that it requires the arrest and removal of criminal aliens.

Cementing Section 1226(c)'s already clear text, *see* Tex. Br. 24–25, the history of that law reflects that it imposes a mandatory duty to detain and remove criminal aliens.

In 1988, Congress passed a precursor to Section 1226(c), which provided that "[t]he Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, sec. 7343(a)(4), § 242(a)(2), 102 Stat. 4181, 4470 (then codified at 8 U.S.C. § 1252(a)(2) (1988)). Notably, that text is virtually identical to Section 1226(c) except that it applied to a narrower set of crimes—"aggravated felonies." The Department of Justice treated the 1988 statute as a mandate both to detain and remove aliens within its scope. When asked if prosecutors could promise not to remove an aggravated felon as part of a plea or witness agreement, the Immigration and Naturalization Service said no—DOJ was "statutorily precluded from

exercising discretion either to release [an alien convicted of an aggravated felony] . . . *or to refrain from instituting deportation proceedings*." Whether the DOJ Criminal Division May Make Promises Not to Deport a Criminal Defendant or Witness, U.S. Dep't of Just., I.N.S. Gen. Couns. Op. No. 93-80 (1993), 1993 WL 1504027, at *3 (emphasis added).

By 1996, Congress became concerned that the government was failing to remove many aliens who, because of criminal convictions, were eligible for removal. *See Demore*, 538 U.S. at 518 (citing *Criminal Aliens in the United States: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Gov'tal Affairs*, 103d Cong. (1993); S. Rep. No. 104-48, at 1 (1995)). Congress found that those failures had contributed to skyrocketing crime rates by criminal aliens. *See id.* So, finding a national consensus that "there is just no place in America for non-U.S. citizens who commit criminal acts," *see* S. Rep. No. 104-48, at 6 (1995), Congress enacted the current version of Section 1226(c). *See* Immigration Reform and Immigrant Responsibility Act of 1996 (IRIRA), Pub. L. No. 104-208, div. C, sec. 303(a), 110 Stat. 3009, 3009-546, 3009-585.

Congress carefully crafted that provision to impose on the Executive the obligation to detain and remove classes of aliens beyond the "aggravated felony" category recognized by its precursor in the 1988 legislation. The new law extended that obligation to many other classes of criminal aliens—aliens who, for example, commit human-trafficking crimes, crimes of moral turpitude, and controlled-substance offenses. *See* 8 U.S.C. §§ 1226(c)(1)(A), (B); §§ 1182(a)(2)(A)(i),

(H). But Congress retained the mandatory language of the 1988 statute, which DOJ had interpreted as imposing on it a nondiscretionary duty to arrest and remove the aliens covered by the statute. Congress's choice to use the same mandatory language, knowing DOJ's interpretation, shows that Congress intended the amended statute to impose the same mandatory duty. *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (concluding that Congress ratified an agency's interpretation of a statute by using identical language in a subsequent statute). And given Congress's frustrations with the executive branch's failure to remove aliens convicted of crimes, its decision to make enforcement against criminal aliens mandatory is no surprise.

Confirming the otherwise mandatory character of those obligations, Congress in the 1996 legislation crafted discretionary, but carefully limited, exceptions. For instance, Congress gave the Attorney General discretionary authority to release an alien if necessary to protect a witness or cooperator, provided "that the alien will not pose a danger to the safety of other persons or of property." IRIRA sec. 303(a), § 236(c)(2), 110 Stat. 3009-585–86 (codified at 8 U.S.C. § 1226(c)(2)). Congress also incorporated into the statute other discretionary waivers of some of those detention obligations. *See id.* § 1226(c)(1)(A) (imposing the obligation on those aliens "inadmissible" under 8 U.S.C. § 1182(a)(2)); *id.* § 1182(h) (allowing waivers of those grounds of inadmissibility for certain low-level marijuana offenses).

Even more to the point, Congress created a broad, but temporary, exception to those obligations in anticipation of the reality that these expanded detention obligations would strain the Executive's resources. To aid in the transition, Congress created "Transition Period Custody Rules." *See* IRIRA sec. 303(b)(3), 110 Stat. 3009-586–87. Under those rules, the Attorney General could obtain a one-year reprieve from some of the requirements of Section 1226(c) by certifying to Congress that DOJ lacked sufficient detention space and immigration officials to meet the statute's demands. *Id.* sec. 303(b)(2), 110 Stat. 3009-586. The Attorney General could renew the transition period for an additional year, but after that, Section 1226 applied in full. *Id.* Aware that its duties under Section 1226(c) would otherwise be mandatory, DOJ took advantage of the Transition Period Custody Rules in both years they were authorized. *See* INS Issues Detention Guidelines After Expiration of TPCR, 75 Interpreter Releases 1508, 1508 (Nov. 2, 1998). And after expiration of the second year, DOJ lobbied Congress to extend the grace period, but Congress declined. *Id.*

In sum, Congress enacted Section 1226(c) because "it was concerned with detaining and removing *all* criminal aliens." *In re Rojas*, 23 I. & N. Dec. 117, 122 (BIA 2001) (en banc). Thus, Congress revoked the discretion the executive branch might otherwise enjoy and mandated the detention and removal of criminal aliens. Because DHS's enforcement guidelines allow officials to deprioritize the arrest and removal of many criminal aliens, the guidelines violate Section 1226(c).

B. The United States' contrary arguments lack merit.

The United States' arguments to the contrary do not overcome the force of that history.

1. The United States notes that Section 1226(a) "applies only during the pendency of removal proceedings," and then declares that it somehow "follows" that DHS is bound by Section 1226(c)'s command "only if DHS decides to initiate or maintain removal proceedings in the first place." U.S. Br. 27–28. But as this Court explained in *Preap*, what triggers the statute's command to "take into custody" is an alien's conviction for "the predicate offenses identified in subparagraphs (A)–(D)" of Section 1226(c)(1): "anyone who fits *their* description" is subject to mandatory detention under the statute. 139 S. Ct. at 965. The United States' premise that Section 1226(a) implicitly limits the mandatory detention obligation in Section 1226(c) would turn the statute on its head: It is "subsection (c)(1) [that] limits subsection (a)'s first sentence by curbing the discretion to arrest," *id.* at 966, not the other way around. And if Section 1226(c) were, as the United States contends (at 27–30), discretionary from the start, then there would have been no need for Congress to create those Transition Period Custody Rules or for DOJ to lobby (unsuccessfully) for their extension. *See supra* p. 9. Nor would Congress have found it necessary to carefully delineate discretionary waivers from Section 1226(c)'s obligations. *See supra* p. 8. But this Court does "not lightly conclude that a congressional enactment has no purpose or function." *Mercantile Nat'l Bank at Dall. v. Langdeau*, 371 U.S. 555, 560 (1963).

The language in Section 1226(a) connecting the detention of aliens to the pendency of removal proceedings instead demonstrates that DHS must not only detain, but also initiate removal proceedings against, the defined class of criminal aliens Congress has directed DHS to "take into custody" in Section 1226(c)(1). Again, the history of the statute confirms as much: Congress enacted the statute against the backdrop of the executive branch itself interpreting the materially identical language of Section 1226's predecessor to require the INS to institute removal proceedings. *See supra* pp. 6–7 (discussing 1993 INS opinion). Congress, moreover, enacted Section 1226(c)'s detention mandate not for its own sake, but because Congress was dissatisfied with the "INS's near-total inability to *remove* deportable criminal aliens." *Demore*, 538 U.S. at 518 (emphasis added). And the language limiting mandatory detention to the duration of removal proceedings also gives detention "a definite termination point"—when an alien is removed—and hence avoids the constitutional concerns this Court identified with an indefinite immigration-detention period in *Zadvydas v. Davis*, 533 U.S. 678 (2001). *Demore*, 538 U.S. at 529. The one thing that language does *not* do, however, is what the United States says it does: transform a mandatory duty into a discretionary one.

2. The United States also argues (at 30) that Section 1226(c) preserves discretion because when Congress said "shall," it really just meant "may." Its principal support for that idea is a case that involved Colorado law. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). But this Court has repeatedly construed "shall" in Section 1226(c)—the very provision

at issue here—to be mandatory. *See Preap*, 139 S. Ct. at 966 (explaining that Section 1226(c) provides that DHS "*must* arrest those aliens guilty of a predicate offense"); *Jennings v. Rodriguez*, 138 S. Ct. 830, 847 (2018) ("We hold that § 1226(c) mandates detention of any alien falling within its scope . . . ."). And the United States' attempt (at 30) to distinguish those and similar cases because they involved "release from custody" rather than "apprehension and removal" does not work at all: Section 1226(c)(1) mandates "tak[ing] *into* custody" the criminal aliens specified in that provision and therefore plainly covers "apprehension and removal" too.

Not to worry, says the United States (at 30): "Section 1226(c)(2) requires it to continue to detain covered noncitizens who are already in its custody." But that "requirement," as the United States understands it, turns out to be not much of one at all. The United States also thinks DHS has total discretion to release even an alien who is in custody simply by deciding to drop the removal proceeding. *See* U.S. Br. 28 (arguing that its detention obligations turn on whether it has decided to "institute *or maintain* removal proceedings in the first place" (emphasis added)). In other words, the United States asserts total discretion over both whether a criminal alien should be detained in the first place and whether a criminal alien should remain in custody once detained. That cannot be what the statute requires.

Considering Section 1226(c)'s plain text and the historical evidence, its mandatory nature has—until now—been uncontroversial. Before the government's recent about-face, multiple administrations had

acknowledged that Section 1226(c) imposes a mandatory duty to arrest and remove criminal aliens. For example, at oral argument in *United States v. Texas*, the United States explained that DHS could not grant deferred action to criminal aliens because "Congress has told DHS it has to prioritize the removal of criminal aliens." Oral Arg. Tr. 21:9–22, *United States v. Texas*, 579 U.S. 547 (2016) (No. 15-674). And in its briefing in *Preap*, the United States characterized Section 1226(c) as a "statutory command" and noted that the "duty to arrest is triggered" upon the criminal alien's release from custody. Reply Br. of Pet'rs 2, *Nielsen v. Preap*, 139 S. Ct. 954 (2019) (No. 16-1363).

3. The United States also argues (at 29–30) that it must be free to treat Section 1226(c) as discretionary because it lacks the resources to arrest and remove all criminal aliens. But Congress specifically accounted for that concern in enacting Section 1226(c) by giving the executive branch two years of temporary reprieve from those obligations if it certified that it lacked sufficient detention space. *See supra* p. 9. Congress also knew that resource limitations would be an ongoing concern when it enacted Section 1226(c), which explains why it still requires the Executive to report every six months on the amount of detention space needed to comply with the statute. *See* 8 U.S.C. § 1368(b)(1)(A). The mandates in Section 1226(c), in other words, reflect Congress's specific judgment that a lack of detention space is no excuse for the Executive's failure to strive for compliance.

As for the Judiciary's part, "it can do no more than declare the law as it exists." *N. Pac. R.R. Co. v. Traill*

Cnty., 115 U.S. 600, 611 (1885). And the law here imposes a nondiscretionary duty on the executive branch to arrest criminal aliens and detain them pending removal. DHS's enforcement guidelines conflict with that statutory command and are thus unlawful regardless of any resource constraints. Even if DHS cannot detain and remove all aliens subject to Section 1226(c), at the very least the statute obligates DHS to prioritize such aliens, which the current enforcement guidelines plainly do not do.

And if the executive branch lacks sufficient resources to comply with the obligations Congress has imposed on it, the solution would be to ask Congress for more resources to do so in the appropriations process. Yet DHS is doing just the opposite. In its budget request for Fiscal Year 2022, for example, DHS asked Congress to *reduce* its detention capacity by 1,500 beds. U.S. Dep't of Homeland Sec., *FY 2022 Budget in Brief* at 35 (2021), https://tinyurl.com/437fcy2n. The next year, DHS asked Congress to reduce its detention capacity by another 7,500 beds. U.S. Dep't of Homeland Sec., *FY 2023 Budget in Brief* at 3 (2022), https://tinyurl.com/sf5cxypn. In making those requests, DHS assured Congress that the reduction in detention capacity would not impede its ability to carry out its duties—including the removal of "priority individuals." U.S. Dep't of Homeland Sec., *U.S. Immigration and Custom Enforcement, Operations and Support: Fiscal Year 2022 Congressional Justification* at 17–18 (2021), https://tinyurl.com/2bbdzc9e (assuring that DHS would still be able "to carry out its mission"); U.S. Dep't of Homeland Sec., *U.S. Immigration and Custom Enforcement, Operations and Support: Fiscal Year 2023 Congressional Justification* at 19–20

(2022), https://tinyurl.com/53ksw9fj (assuring that the requested reduction in detention capacity was "appropriate" and would provide DHS with "time and flexibility . . . to remove priority individuals").

The executive branch cannot purposefully reduce its resources and then rely on its lack of resources to evade its statutory responsibilities. Nor can the executive branch tell Congress that it has more resources than it needs to fulfill its statutory duties yet tell this Court the opposite. If the Executive's hands are tied, it tied them itself.

II. THE DISTRICT COURT PROPERLY VACATED DHS'S UNLAWFUL ENFORCEMENT GUIDELINES UNDER SECTION 706(2) OF THE APA.

Turning to the appropriate remedy, neither 5 U.S.C. § 706(2) nor 8 U.S.C. § 1252(f)(1) insulates the guidelines from vacatur.

A. Section 706(2) of the APA authorizes vacatur of unlawful agency action.

Section 706(2) of the Administrative Procedure Act empowers federal courts to "hold unlawful and set aside agency action, findings, and conclusions found to be" unlawful. 5 U.S.C. § 706(2). After concluding that DHS's issuance of unlawful enforcement guidelines constituted unlawful agency action, the district court properly vacated—or "set aside"—the guidelines. But the United States argues (at 40) that Section 706(2) does not authorize the district court's remedy because Section 706 "does not pertain to remedies at all." As the United States sees it, 5 U.S.C. § 703 is the source of remedies under the APA, and Section 706(2) is merely "a rule of decision directing the

reviewing court to disregard unlawful 'agency action, findings, and conclusions' in resolving the case before it." U.S. Br. 40.

That gets things exactly backwards. Section 706 is plainly about remedies. Section 706(1) provides that a reviewing court "shall . . . compel agency action unlawfully withheld or unreasonably delayed," an unambiguous authorization of a remedy. That remedy is immediately followed by a second—Section 706(2)—which states that courts "shall . . . hold unlawful and set aside agency action, findings, and conclusions" that are, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §§ 706(2), (2)(A). Those two subsections operate in parallel—Section 706(1) affords a remedy when agency action is unlawfully withheld, and Section 706(2) affords a remedy when agency action is unlawfully imposed. Confirming the point, the immediately preceding section, Section 705, authorizes in preliminary form what Section 706(2) authorizes in final form: it permits a court to "postpone the effective date of an agency action" pending the conclusion of review proceedings—a remedy.

By contrast, Section 703 has nothing to do with remedies. It discusses the "form and venue of proceeding[s]" under the APA. The "form" of an action is the "legal and procedural device associated with a particular writ." *Form of action*, *Black's Law Dictionary* (11th ed. 2019). Similarly, "venue" simply refers to the geographical jurisdiction in which a suit may be brought. *See* 28 U.S.C. § 1390. Section 703 thus simply specifies where and how one should seek judicial review of agency action, not the available remedies.

The broader structure of the APA confirms that reading. The order of the APA's five judicial-review provisions replicates the natural order of a lawsuit. Section 702 creates the right of action. Section 703 establishes where and how suits can be filed. Section 704 specifies the types of agency actions that are subject to review. Section 705 authorizes preliminary relief. And Section 706 authorizes final relief. Because permanent remedies are the conclusion to a successful lawsuit, Section 706 naturally falls at the end of this sequence of provisions. In contrast, interpreting Section 703 to concern remedies and Section 706 rules of decision would upend that logical progression. *See* Ronald M. Levin & Mila Sohoni*, Universal Remedies, Section 706, and the APA*, Y. J. Reg.: Notice & Comment (July 19, 2020), https://tinyurl.com/3ukeassz; Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1163 n.222 (2020).

The United States' argument is also contrary to the plain meaning of "set aside," which refers to vacating an unlawful agency decision. *See* Tex. Br. 41. In arguing otherwise, the United States starts off on the right foot in conceding that this phrasing "can refer to vacating an order," as when an "appellate court 'sets aside' a lower-court judgment." U.S. Br. 40. Although the United States then urges (at 40–41) that those words possess a different meaning, in fact, the appellate-review model *was* the model for the APA. *See* Sohini, *supra*, at 1133; Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939, 940–43 (2011). In other words, the APA treats a reviewing court like an appellate court, which

confirms that "set aside" straightforwardly means "vacate."

Not surprisingly, then, Congress has consistently used the phrase "set aside" in the administrative-law context to refer to a reviewing entity's ability to vacate or nullify a particular action. Take the Commodity Futures Trading Commission, which is authorized to consider appeals of sanctions issued by a registered futures association and to "set aside" any sanction found to be improper. 7 U.S.C. § 21(i)(1)(B). That appeals process would serve no purpose if "setting aside" the inappropriate sanction did not mean vacating it. Similarly, any party harmed by an order of the Board of Governors of the Federal Reserve may petition a court of appeals "to affirm, set aside, or modify" the offending order. 12 U.S.C. § 1848. And courts have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain final orders, rules, and regulations under the Hobbs Act. 28 U.S.C. § 2342. In each of these contexts, "setting aside" is a function of appellate review. The purpose of seeking an appeal is to undo—or vacate—the action reviewed. Thus, when Congress uses "set aside" in the administrative context, it generally contemplates the remedy of vacatur or nullification. *See, e.g.*, Charles H. Koch & Richard Murphy, *Administrative Law and Practice* § 8.31 (3d ed., Feb. 2022 Update). That established "legal meaning" will ordinarily control. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 615–616 (2001) (Scalia, J., concurring).

Consistent with the generally accepted understanding of "set aside" in administrative law, decades

of this Court's precedent have recognized vacatur as an appropriate remedy under Section 706(2). *See Abbot Labs. v. Gardner*, 387 U.S. 136, 154 (1967) (indicating that the legal deficiencies in a set-aside regulation would have to be "revise[d]" before the regulated entities would be "bound by the decree"); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901 (2020) (concluding "that the Acting Secretary did violate the APA, and that the rescission must be vacated"). Congress has continued to legislate against that backdrop without ever suggesting that the Court has it wrong. For example, Congress amended the APA less than a decade after *Abbot Labs* but declined to alter its remedial provisions. *See* Sohoni, *supra*, at 1175 discussing Congress's ratification of universal vacatur through the 1976 amendments to the APA).

In the face of this clear text, context, and practice, the United States claims that its reading is nonetheless required to "align[] ordinary judicial review of agency action with judicial review of legislation." U.S. Br. 41. The APA, however, "establishes a unique form of judicial review that differs from judicial review of statutes." Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 950, 1012–16 (2018). That distinctiveness is rooted in the APA's text. For example, Section 705's provision of temporary remedies authorizes courts to "postpone the effective date of an agency action," which—unlike a preliminary injunction barring a party from enforcing an unconstitutional statute—directly prevents the action from going into effect. *Id.* at 950–51, 1016; *see also West Virginia v. EPA*, 142 S. Ct. 2587, 2604 (2022) (noting that this Court "granted a stay" of an unlawful EPA rule

under Section 705, "preventing the rule from taking effect"). APA vacatur under Section 706(2) operates on the same principle but as a permanent remedy. The court "holds unlawful and sets aside" the unlawful agency action, stripping it of legal effect and rendering it void altogether rather than simply enjoining its enforcement. Mitchell, *supra*, at 1012–13, 1015. Because the APA creates a distinctive form of judicial review and specifically authorizes vacatur, it need not be "aligned" with judicial review of legislation.

Finally, the United States attempts (at 43–44) to lump vacatur into the ongoing controversy over nationwide injunctions. But vacatur is not the same as a nationwide injunction. As explained in further detail below, an injunction is a prospective remedy that operates on the parties, ordering one party to act or refrain from acting in relation to another party. Vacatur, in contrast, operates not on the parties, but on a completed agency action, denying it legal effect. Mitchell, *supra*, at 1012–13. Although vacatur voids the agency's action—here, the issuance of enforcement guidelines—it does not prospectively order the agency to take or refrain from taking any action. And the APA expressly authorizes vacatur. General arguments about the validity of nationwide injunctions are therefore not relevant to the availability of vacatur under the APA.

B. Section 1252(f)(1) does not bar vacatur of the guidelines.

Section 1252(f)(1) similarly does not shield the United States from vacatur of DHS's unlawful guidelines. That provision states that "no court (other than

the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of" certain provisions of the INA, including Section 1226. As the United States acknowledges (at 44), whatever Section 1252(f)(1)'s scope, it does not apply to this Court. So even if Section 1252(f)(1) applied to APA vacatur, it would not prevent this Court from vacating the enforcement guidelines as unlawful under 8 U.S.C. § 1226(c). The Court therefore need not reach the question whether Section 1252(f)(1) would prevent a lower court from vacating the guidelines. *See Biden v. Texas*, 142 S. Ct. 2528, 2538–40 (2022) (holding that even if the lower court granted a remedy in violation of Section 1252(f), this Court still has jurisdiction).

But in no event does Section 1252(f)(1) apply to APA vacatur. The statute's text and this Court's precedent confirm that Section 1252(f)(1) limits only the authority of lower courts to issue coercive relief—such as an injunction—that directly orders a party to take or refrain from taking a specific action.[1]

1. Starting with the text, Section 1252(f)(1) prohibits lower courts from "enjoin[ing] or restrain[ing] the operation" of certain provisions of the INA. Courts throughout history have used the terms "enjoin" and "restrain" together to refer to coercive injunctive relief. *See, e.g.*, *Missouri v. Iowa*, 48 U.S. 660, 679 (1849) ("And it is further adjudged and decreed, that the State of Missouri be, and she is hereby, perpetually *enjoined and restrained* from exercising jurisdiction north of the boundary aforesaid dividing the States

[1] While injunctions and temporary restraining orders are the most common forms of coercive relief, there are other forms of coercive relief such as writs of mandamus.

. . . ." (emphasis added)); *Shelley v. Kraemer*, 334 U.S. 1, 7 (1948) ("Petitioners were further *enjoined and restrained* from using or occupying the premises in the future." (emphasis added)); *Nebraska v. Wyoming*, 534 U.S. 40, 50 (2001) ("The [parties] are hereby *enjoined and restrained* from diversion or use contrary to this apportionment . . . ." (emphasis added)). And Congress also sometimes uses two words in conjunction to convey a single concept. For example, in the same sentence in which Section 1252(f)(1) uses the phrase "enjoin or restrain," it states that lower courts lack "jurisdiction or authority" to provide the specified relief. The words "jurisdiction" and "authority" in that context do not by themselves carry distinct meanings but instead operate together to convey that lower courts lack power to issue the specified relief. *See Biden*, 142 S. Ct. at 2538–40 (concluding that even though Section 1252(f)(1) says "jurisdiction or authority," it does not deprive lower courts of subject-matter jurisdiction—just power to issue the specified relief). Similarly, this Court has suggested that the meaning of the phrase "enjoin or restrain" comes from the terms operating together rather than in isolation. *See Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2065 (2022) (discerning the meaning of Section 1252(f)(1) by "putting ['enjoin' and 'restrain'] together"). So interpreted, the Court held that Section 1252(f)(1) prevents lower courts from issuing orders that directly compel or prohibit specific actions. *See id.* ("Putting ['enjoin' and 'restrain'] together, § 1252(f)(1) generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions . . . ."). The United States' concerns (at 47) about any perceived superfluity are therefore misplaced.

Section 1252(f)'s heading—"limit on injunctive relief"—further cements the statute's focus on limiting coercive, injunctive relief. *See Alemendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (noting that the heading of a statutory section can inform the statute's meaning). As this Court noted in *Biden v. Texas*, Section 1252(f)'s heading, which focuses on "injunctive relief," "makes clear the narrowness of its scope." 142 S. Ct. at 2539.

Based on those textual clues, this Court has repeatedly characterized Section 1252(f)(1) as limiting lower courts' authority to issue orders that directly compel or prohibit action in the manner of an injunction. In *Reno v. American-Arab Anti-Discrimination Committee*, the Court stressed that Section 1252(f)(1) "is nothing more or less than a limit on injunctive relief." 525 U.S. 471, 481 (1999). In *Aleman Gonzalez*, the Court noted that "Section 1252(f)(1) generally prohibits lower courts from entering injunctions." 142 S. Ct. at 2065. And in *Biden v. Texas*, this Court again emphasized that Section 1252(f)(1) prohibits lower-court injunctions. 142 S. Ct. at 2538 (quoting *Aleman Gonzalez*, 142 S. Ct. at 2065).

2. The United States argues (at 45–46) that vacatur under the APA is "functionally equivalent" to a coercive remedy. But that argument overlooks the meaningful distinctions between enjoining a party and vacating an action. Vacating DHS's unlawful enforcement guidelines, unlike an injunction, does not order DHS to take or refrain from taking any future action under the relevant statutes—it simply voids the guidelines. *See Vacate*, *Black's Law Dictionary*

(11th ed. 2019) ("To nullify or cancel; make void; invalidate"). The district court's remedy does not, for example, order DHS to detain any classes of aliens under Section 1226(c). Vacating those guidelines would simply result in a reversion to the obligations that Congress provided for in the statute. An injunction, by contrast, operates by direct compulsion on a party and is "a drastic and extraordinary remedy" that courts do not routinely grant. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). But vacatur is "a less drastic remedy" and a preferable alternative to injunctive relief. *Monsanto*, 561 U.S. at 165–66.

That is why the standard for obtaining compulsory remedies, such as an injunction or a writ of mandamus, is significantly more onerous than that for vacatur under the APA. Obtaining an injunction requires not only succeeding on the merits of the dispute, but also showing that the absence of an injunction will cause irreparable harm, that the harm without the injunction outweighs any harm that the injunction will cause, and that the injunction serves the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Vacating an agency action, conversely, requires showing only that the agency action was unlawful for one of the reasons listed in Section 706(2). *See Regents*, 140 S. Ct. at 1901 (concluding that the agency action must be vacated upon a finding that it violated the APA). The difference between these standards reflects the difference between the remedies. Because an injunction is compulsory, plaintiffs face a heavy burden to prove its necessity and that it will not cause undue harm. But vacatur does not carry with it the same concerns because it compels nothing.

A plaintiff seeking vacatur therefore need only prevail on the merits.

The United States argues (at 45) that vacatur is "practically equivalent" to injunctive compulsion because the practical effect of vacatur is to prevent DHS from relying on its unlawful guidelines. That theory cannot be reconciled with its concession (at 48) that Section 1252(f)(1) would not bar a lower court from issuing a declaratory judgment declaring the guidelines unlawful. *See Preap*, 139 S. Ct. at 962 (opinion of Alito, J.) (stating that Section 1252(f)(1) does not bar lower courts from issuing declaratory relief); *Jennings*, 138 S. Ct. at 875 (Breyer, J., dissenting) (same). Vacatur and declaratory judgments are similar in that they do not directly compel or prohibit action, and both are therefore considered milder forms of relief than a coercive injunction. *See Monsanto*, 561 U.S. at 165–66; *Steffel v. Thompson*, 415 U.S. 452, 471 (1974). But a declaratory judgment would declare the guidelines unlawful with "the force and effect of a final judgment." *Steffel*, 415 U.S. at 471. And failure to comply with such a judgment would be "inappropriate." *Id.* The courts have also "long presumed that officials of the Executive Branch will adhere to the law as declared by the court." *Comm. on Judiciary of U.S. House of Reps. v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam). So a final judgment declaring the guidelines to be unlawful would surely affect DHS's reliance on them. But even so, Section 1252(f)(1) does not apply to declaratory judgments because they do not directly compel officials to take or refrain from taking any action. It does not apply to APA vacatur for the same reason.

3. Any doubt about whether Section 1252(f)(1) bars relief here should be resolved in favor of APA review. Under 5 U.S.C. § 559, a subsequent statute cannot supersede the judicial-review provisions of the APA "except to the extent that it does so expressly." Precluding application of the APA therefore requires "clear and convincing evidence" of congressional intent to do so. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986).

Yet Section 1252(f)(1) does not expressly supersede the authority of lower courts under the APA to set aside unlawful agency action, nor has the United States cited clear and convincing evidence that Congress intended to supersede Section 706(2). Congress was of course aware of the APA when it enacted Section 1252(f) in 1996. *See* IRIRA sec. 306(a)(2), § 242(f), 110 Stat. 3009-611–12. If Congress wanted to divest lower courts of their authority under the APA to set aside unlawful agency action, it could have said so. *See Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) ("Congress legislates against the backdrop of existing law.") (citation omitted). Instead, Congress focused on compulsory relief like injunctions. Because Section 1252(f)(1) applies only to coercive relief that directly mandates or prohibits prospective action, it does not bar lower courts from vacating unlawful agency action under the APA.

CONCLUSION

The judgment of the district court should be affirmed.

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