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

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

REPLY BRIEF FOR THE PETITIONERS

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To defend the judgment below, respondents must run a gauntlet of independent grounds for reversal. They cannot prevail on any, much less all, of them.

To begin, respondents lack standing. They assert that any State can challenge any federal policy that indirectly leads it to incur even a dollar's worth of increased expenditures. That premise is starkly incompatible with our constitutional structure and history, as evidenced by respondents' failure to identify a single case adopting their approach for more than two centuries after the Founding.

Respondents' claims also fail on the merits. Their assertion that Congress's bare use of "shall" overcomes deep-rooted principles of enforcement discretion contradicts statutory context, history, and decades of practice. Respondents' arbitrary-and-capricious arguments are unpersuasive. And respondents do not dispute that

requiring notice and comment would upset longstanding practice across the Executive Branch.

Respondents also cannot justify the district court's universal vacatur under 5 U.S.C. 706(2). Remedies under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 5 U.S.C. 701 *et seq.*, are instead the province of 5 U.S.C. 703—a provision that respondents fail even to mention. And even if Section 706(2) generally authorized vacatur, 8 U.S.C. 1252(f)(1) barred the court from granting that relief here. Respondents' assertion that vacatur is not coercive blinks reality and would thwart Congress's judgment that only this Court should have authority to grant programmatic relief altering the administration of the relevant provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*

Finally, the combined effect of respondents' arguments warrants emphasis. Congress has not appropriated the enormous resources that would be required to apprehend, detain, and remove every noncitizen described in Sections 1226(c) and 1231(a)(2)—not to mention all other provisions of the INA that use "shall." J.A. 130-131, 133, 417, 423-434. Accordingly, as it has done across 25 years and five presidential administrations, the Department of Homeland Security (DHS) exercised enforcement discretion to "use the resources [it] ha[s] in a way that accomplishes [its] enforcement mission most effectively." J.A. 113. The Guidelines do not "lessen [DHS's] commitment to enforce immigration law to the best of [its] ability," but instead "focus [DHS's] efforts on those who pose a threat to national security, public safety, and border security and thus threaten America's well-being." *Ibid.*

On respondents' view, however, any State that wants to second-guess DHS's enforcement priorities can challenge any policy that the State contends results in the presence of even one more—or one fewer—noncitizen within its borders. And respondents insist that if any one of the Nation's more than 670 district judges finds a flaw in DHS's work, the result is universal vacatur—even where, as here, other courts have already upheld the challenged policy. This Court should reject that destabilizing regime.

I. RESPONDENTS LACK ARTICLE III STANDING

Respondents lack Article III standing because the Guidelines' effects on them do not qualify as judicially cognizable injuries, because they lack a cognizable interest in the enforcement of the law against third parties, and because the district court's standing analysis was flawed on its own terms.

A. Respondents offer no limiting principle for their theory (Br. 17-23) that a federal policy's incidental effects on a State qualify as cognizable injuries. On respondents' theory, States could challenge virtually *any* federal policy because all federal policies regulating the people within a State have derivative effects on the State itself. Respondents make no serious effort to reconcile that result with "the proper—and properly limited—role of the courts in a democratic society." *Allen* v. *Wright*, 468 U.S. 737, 750 (1984) (citation omitted).

Respondents' limitless theory has no basis in history and tradition. Respondents and their amici fail to identify a single 18th-, 19th-, or even 20th-century case affording a State standing to sue the national government based on the incidental effects of a federal policy. Respondents conjecture (Br. 22) that, because of rules governing jurisdiction, sovereign immunity, and causes of

action, States had no mechanism to obtain judicial review of federal action until late in the 20th century. But federal courts have long used mandamus and other writs to ensure that executive officials comply with the law. See Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 947 (2017). And Congress granted general federal-question jurisdiction in 1875 and enacted the APA in 1946, yet the earliest cases that respondents cite (Br. 19) are from the 21st century. The incidental effects of federal policies on States thus have not been "traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2200 (2021).

Nor do the recent cases that respondents invoke (Br. 18-19) support their theory. In *DHS* v. *Regents of the University of California*, 140 S. Ct. 1891 (2020), this Court considered a challenge to the rescission of the Deferred Action for Childhood Arrivals (DACA) program; because the plaintiffs included "individual DACA recipients," who unquestionably had standing, the Court had no occasion to consider the state plaintiffs' standing. *Id.* at 1903. In *Department of Commerce* v. *New York*, 139 S. Ct. 2551 (2019), this Court held that States had standing to challenge the conduct of the Census. But the Census directly affects the States in a way that the Guidelines do not; its very purpose is to determine how congressional seats and federal funds are distributed among the States. *Id.* at 2565. And in *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), the Court held only that a State had standing to challenge the denial of a rulemaking petition when the denial threatened to diminish its "sovereign territory" and the Clean Air Act vested it with specific procedural rights related to the subject

matter of the suit. *Id.* at 519. That analysis does not support the "boundless theory" that States may challenge any federal policy that imposes "peripheral costs" on them through a general APA action, *Arizona* v. *Biden*, 40 F.4th 375, 386 (6th Cir. 2022); indeed, most of the Court's analysis in *Massachusetts* would have been unnecessary on respondents' theory because federal climate-change policies have derivative financial effects on States.

Rejecting respondents' boundless theory would not make States "disfavored litigants." Br. 17 (emphasis omitted). When a State sues to vindicate a proprietary interest, it may proceed "on the same ground and to the same extent as a corporation or individual." *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518, 561 (1852). Distinctive principles apply only when a State asserts that a federal policy has affected its governmental activities, such as regulating, taxing, and spending. No private party could bring such a claim. And the limitation on such claims by States reflects a principle rooted in constitutional structure and confirmed by history: In our system of separate federal and state sovereigns, the indirect effects of a federal policy on a State's exercises of its own sovereign authorities do not suffice for Article III standing.

B. Respondents additionally lack standing to challenge the federal government's policies concerning immigration enforcement against third parties. Respondents disclaim an "interest in 'procuring enforcement of the immigration laws,'" yet assert an "interest in avoiding the harms caused" by federal enforcement policies. Br. 15 (citation omitted). But standing does not turn on whether a plaintiff frames its suit as an effort to obtain the benefits of enforcement or to avoid the conse-

quences of non-enforcement. Either way, decisions about "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law" fall "within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys)." *TransUnion*, 141 S. Ct. at 2207.

Respondents also distinguish (Br. 15) between challenging an "individual [non-enforcement] decision" and challenging an enforcement policy. But the "Court's prior decisions consistently hold that a citizen lacks standing to contest *the policies* of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973) (emphasis added). In *Linda R.S.*, for example, the Court held that a mother lacked standing to challenge a district attorney's general policy against prosecuting "fathers of illegitimate children" for failure to pay child support. *Id.* at 616.

C. Contrary to respondents' assertion (Br. 13), the district court's factual findings do not establish standing. Respondents emphasize the finding that U.S. Immigration and Customs Enforcement (ICE) "rescinded detainers on 170 criminal aliens" after January 20, 2021. *Ibid.* (quoting J.A. 311). But the Guidelines took effect in November 2021, not January, J.A. 119—and only 15 of those rescissions occurred under the Guidelines, J.A. 312. The rescission of 15 detainers does not show that overall immigration enforcement fell; it shows only that ICE focused its resources on other individuals. See J.A. 157 (emphasizing the "misconception" that, if DHS "prioritized enforcement in some different way," "a significantly greater number of people" would be removed).

Respondents also highlight the district court's finding that the "'number of convicted criminal aliens in

ICE custody per day'" has dropped since "January" 2021. Br. 14 (citation omitted). Again, the court focused on the wrong timeframe—and its own statistics showed that the number of criminal noncitizens in ICE custody remained unchanged after the Guidelines took effect. J.A. 314. The evidence in the record, in short, does not establish that the Guidelines caused a reduction in overall immigration enforcement—much less a reduction that imposed financial costs on Texas.

D. Finally, citing *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982), respondents assert (Br. 23) that they have *parens patriae* standing to protect the well-being of their residents. But respondents ignore that *Snapp* itself reaffirmed the long-settled rule that a "State does not have standing as *parens patriae* to bring an action against the Federal Government." 458 U.S. at 610 n.16.

II. RESPONDENTS CANNOT SHOW THAT THE GUIDELINES ARE UNLAWFUL

Respondents fail to rehabilitate the district court's erroneous holdings that the Guidelines are substantively and procedurally unlawful.

A. The Guidelines Do Not Violate Sections 1226 And 1231

1. As a threshold matter, respondents fail to refute that 8 U.S.C. 1226(e) precludes their Section 1226(c) claim. They invoke (Br. 26-27) precedents holding that Section 1226(e) does not bar habeas petitions challenging the legislative or regulatory framework governing detention. But that line of decisions rests on Section 1226(e)'s lack of the "particularly clear statement" needed to "bar habeas review." *Demore* v. *Kim*, 538 U.S. 510, 517 (2003). No comparable clear-statement rule applies here. The presumption in favor of judicial

review of administrative action, on which respondents rely (Br. 27), is not a clear-statement rule; it applies only "when a statute is silent," and it can be overcome by "text," "context," and "evidence 'drawn from the statutory scheme as a whole.'" *Patel* v. *Garland*, 142 S. Ct. 1614, 1627 (2022) (citation omitted). Here, the plain text of Section 1226(e)'s second sentence—"[n]o court may set aside any action or decision by the [Secretary] under this section regarding the detention or release of any alien"—overcomes any presumption of reviewability.

Respondents also have no persuasive response to 8 U.S.C. 1231(h), which precludes their Section 1231(a)(2) claim. They contend (Br. 28) that "[n]othing in this provision mentions, much less forecloses, judicial review." But the provision expressly precludes interpreting Section 1231 to create "legally enforceable" rights. 8 U.S.C. 1231(h). Respondents also say (Br. 29) that Section 1231(h) was intended to address suits by "aliens challenging a slow removal." But one arguable purpose inferred from legislative history cannot supersede the clear text, which unambiguously precludes "any party"—not just noncitizens—from judicially enforcing Section 1231.

2. On the merits, respondents argue (Br. 24-26, 29-32) that Section 1226(c)(1) imposes a judicially enforceable duty to arrest certain criminal noncitizens—even if the Secretary does not "intend to initiate removal proceedings" against them (Br. 29). That is wrong.

Respondents assert (Br. 29) that "[S]ection 1226(c)'s text does not contain [a] 'removal proceedings' limitation." But Section 1226(a) specifies that limit for all exercises of authority under Section 1226. 8 U.S.C. 1226(a); see *Nielsen* v. *Preap*, 139 S. Ct. 954, 966 (2019) (observing that Section 1226(c) does not "establish[ ] [a]

separate source[] of arrest and release authority," but instead "is simply a limit on the authority conferred by [Section 1226(a)]").

Although Section 1226(c)(1) provides that the Secretary "shall" take custody of criminal noncitizens, this Court has repeatedly held that even "seemingly mandatory" words such as "'shall'" do not supersede "deep-rooted" principles of law-enforcement discretion. *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 759, 761 (2005) (citations omitted); see Pet. Br. 28-29 (collecting cases). Respondents err in dismissing (Br. 30-31) those decisions on the ground that they involved challenges to "individual non-enforcement decisions" rather than to general policies. In fact, *Castle Rock* involved a challenge to an alleged "official policy or custom" of refusing to enforce restraining orders. 545 U.S. at 751. As *Castle Rock* illustrates—and as the Secretary's power to set "national immigration enforcement policies and priorities" confirms, 6 U.S.C. 202(5)—enforcement discretion includes the power to set general enforcement policies no less than the power to make individual enforcement decisions.

Respondents also overread (Br. 5, 24) this Court's precedents and the government's prior briefs, which have described Section 1226(c) as imposing a mandate to arrest and detain criminal noncitizens. Those cases involved noncitizens' claims challenging decisions to detain. See, *e.g.*, *Preap*, 139 S. Ct. at 966. In explaining that Section 1226(c) did not entitle those noncitizens to bond hearings or release, "the Court had no occasion to consider whether [Section 1226(c)] subject[s] [DHS] to a judicially enforceable mandate to arrest and remove all noncitizens covered by [that provision] in the first place." *Arizona*, 40 F.4th at 392. "That question comes

with complexities all its own, especially in the context of the light cast by the Executive Branch's traditional prosecutorial discretion and the reality of scarce resources." *Ibid.*

Respondents err in asserting (Br. 4) that "every Administration before this one" has read Section 1226(c) to mean that DHS has a judicially enforceable duty to arrest all criminal noncitizens covered by that provision. To the contrary, throughout "24 years and five presidential administrations, the agency has never * * * enforced § 1226(c)" in the way respondents propose. J.A. 425. Indeed, compliance with such an unyielding duty would be impossible. "DHS is not, and has never been, aware of all noncitizens in the United States who are described in one of the categories of mandatory detention under § 1226(c)." J.A. 421. And "[d]ue to the legal complexity of assessing certain grounds of removability based on state convictions," which frequently requires resource-intensive "investigation and analysis," *ibid.*, DHS historically has "determined whether the mandatory custody provisions of 8 U.S.C. § 1226(c) apply" only "*after* a noncitizen is arrested and booked into ICE custody." J.A. 420.*

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* In its brief in *Preap*, the government described Section 1226(c) as creating a "duty to arrest." Gov't Br. at 17, *Preap*, *supra* (No. 16-1363). That description—which was focused on the noncitizens' asserted statutory entitlement to bond hearings—was incomplete. As noted, Section 1226(c) applies only if the government is pursuing removal proceedings. And DHS has always implemented Section 1226(c) in light of the background principle that the Executive may exercise law-enforcement discretion and the reality that Congress has not granted the Executive unlimited resources. Indeed, the government explained in *Preap* that, "[a]s a matter of government resources, DHS may be unable to send agents to make an arrest," *id.* at 10—without suggesting that DHS would thereby violate any

Respondents' appeals (Br. 3, 24) to Section 1226(c)'s purpose are likewise misplaced. This Court has explained that Congress enacted Section 1226(c) to curtail the Executive's "discretion to conduct individualized bond hearings and to *release* criminal aliens from custody during their removal proceedings." *Demore*, 538 U.S. at 519 (emphasis added). DHS acknowledges that Section 1226(c)(2)'s specific limits on release are binding, and the Guidelines do not address "release determinations" at all. J.A. 415; see Pet. Br. 4. The question is whether Congress intended to go further and create a judicially enforceable mandate requiring DHS to identify, apprehend, and seek to remove all noncitizens described in Section 1226(c) in the first place. Respondents offer no indication that Congress did so—much less that it spoke with the clarity required to overcome deeply rooted principles of enforcement discretion.

3. Respondents also argue (Br. 26) that Section 1231(a)(2) requires the Secretary to apprehend noncitizens with final removal orders. That, too, is wrong.

Section 1231(a)(2) provides that the Secretary shall "detain" noncitizens with final removal orders, not that he shall "apprehend" them. Respondents find it "strange" that Congress would have addressed the detention of noncitizens without mandating their apprehension. Br. 32 (citation omitted). But there is a "'vast difference'" between directing the Executive to detain someone already in its custody and requiring it to seek out and apprehend someone who "is not actually present" and whose "whereabouts are unknown." *Castle*

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judicially enforceable duty. See *Preap*, 139 S. Ct. at 969 & n.6 (distinguishing between "textual evidence that Congress *expects* the Executive to meet a deadline" and "proof that Congress wanted the deadline *enforced by courts*").

Rock, 545 U.S. at 762 (citation omitted). There are "[n]early 1.2 million noncitizens with final orders of removal [who are] non-detained" and ICE has approximately "6,000 immigration officers nationwide" focused on interior enforcement. J.A. 411, 425. It is understandable that Congress did not impose a duty to apprehend that "would be completely open-ended as to priority, duration and intensity." *Castle Rock*, 545 U.S. at 762 (citation omitted).

Respondents also cannot explain the contrast between Section 1231(a)(2)'s first sentence, which provides that the Secretary "shall" detain noncitizens with final removal orders, and its second sentence, which provides that "[u]nder no circumstance" may the Secretary release noncitizens with final removal orders who are removable on certain grounds. 8 U.S.C. 1231(a)(2). Respondents acknowledge (Br. 33-34) that, if they were correct that the first sentence requires the detention of all noncitizens with final removal orders, the second sentence would do no work at all. Respondents suggest (Br. 33) that such surplusage is "not atypical," but "[i]t cannot be presumed that any clause * * * is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it." *Marbury* v. *Madison*, 1 Cranch 137, 174 (1803).

4. Respondents err in suggesting (Br. 31) that the United States claims authority to "re-write congressional commands." The word "shall" bears the same meaning in Sections 1226(c) and 1231(a)(2) that it bore in *Castle Rock*: It exhorts the Executive Branch to apprehend or detain the specified individuals, but it does not displace background principles of law-enforcement discretion. See 545 U.S. at 760-761. Thus, while "shall" signals a congressional preference, it does not deprive

the Executive Branch of its traditional authority to decide how best to deploy its limited law-enforcement resources and fulfill its competing responsibilities.

Respondents do not seriously dispute that Congress has not given DHS the resources to identify, apprehend, detain, and remove all of the noncitizens subject to Sections 1226(c) and 1231(a), see Pet. Br. 29—to say nothing of the additional noncitizens subject to other "shall be detained" provisions, such as 8 U.S.C. 1225(b)(2)(A). See J.A. 130-131, 133, 417, 423-434. In a context like this one, interpreting "seemingly mandatory legislative commands" to accommodate background norms of enforcement discretion recognizes "[t]he practical necessity for discretion." *Castle Rock*, 545 U.S. at 761-762; see *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985) (observing that "[a]n agency generally cannot" respond to every "violation of [a] statute" given resource constraints). Respondents' contrary reading violates the principle that courts should "strongly disfavor any interpretation that would make statutory commands unfulfillable." *Finnbin, LLC* v. *CPSC*, 45 F.4th 127, 134 (D.C. Cir. 2022); see, *e.g.*, *American Hosp. Ass'n* v. *Price*, 867 F.3d 160, 161 (D.C. Cir. 2017) ("*Ought* implies *can*.").

Adopting respondents' interpretation could not and would not lead to enforcement against all of the noncitizens covered by those provisions. Instead, it would simply mire courts in litigation superintending the Secretary's efforts to deploy DHS's limited resources to best fulfill its many competing responsibilities in the face of on-the-ground immigration realities. That result would deprive the Secretary of any meaningful ability to set "national immigration enforcement policies and priorities," 6 U.S.C. 202(5), by forcing DHS to devote its

available personnel and resources to the first covered noncitizens it happens to encounter—even when others pose greater threats to our Nation's security. Congress did not compel that illogical result.

B. The Guidelines Are Not Arbitrary And Capricious

The district court found the Guidelines arbitrary and capricious because it believed DHS failed adequately to consider recidivism or the interests of the States. J.A. 376, 380. Respondents' defense of that holding is unpersuasive.

Respondents effectively abandon the first rationale. They neither dispute that the Guidelines provide for officers to determine whether a noncitizen poses a "meaningful risk of recidivism," J.A. 146, nor challenge the data "show[ing] that 'reconviction rates drop off significantly for' certain individuals," Resp. Br. 34-35 (quoting J.A. 147). DHS properly "exercised its expert judgment and experience to identify those factors that make an offender particularly more likely or less likely to recidivate," thereby focusing its limited "resources towards apprehending and removing those individuals who are likely to present the greatest risks to public safety." J.A. 146-147. Respondents criticize (Br. 34) the Guidelines for "requir[ing] that immigration officers weigh these factors *at all* instead of following Congress's mandates." But that merely repackages their statutory argument.

As for the second rationale, respondents fault DHS for noting that estimating potential costs to the States is "uniquely difficult," Br. 35 (quoting J.A. 151), but they cite no data that would facilitate such an analysis. A demand for nonexistent data cannot sustain an arbitrary-and-capricious challenge. See *FCC* v. *Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021). And respond-

ents ignore that "[w]ithout a dramatic change in the level of resources, most noncitizens who are removable will likely remain in the country," such that prioritizing those who are threats to public safety, national security, and border security "could have a net positive effect" on States. J.A. 153. DHS reasonably concluded that the Guidelines' benefits outweigh any potential costs. J.A. 150. Making that cost-benefit determination "was the agency's job"—not the district court's. *Regents*, 140 S. Ct. at 1914.

C. The Guidelines Did Not Require Notice And Comment

Like comparable documents that DHS and other agencies have issued for decades, the Guidelines are exempt from notice and comment as either a general statement of policy or a rule of agency organization, procedure, or practice. 5 U.S.C. 553(b)(A).

The Guidelines are a general statement of policy because they explain how DHS will exercise its prosecutorial discretion. See *Lincoln* v. *Vigil*, 508 U.S. 182, 197 (1993). Respondents do not contest that the Guidelines authorize officers to make enforcement decisions on a case-by-case basis. Instead, they complain (Br. 38) that the Guidelines "bind[ ]" officers to "consider[ ]" certain "factors." But requiring officers to *consider* general factors is not the kind of "binding" effect with which the APA is concerned. See *Professionals & Patients for Customized Care* v. *Shalala*, 56 F.3d 592, 596, 600 (5th Cir. 1995).

More fundamentally, respondents err in asking whether a policy binds lower-level officials. The Secretary is not required to go through notice and comment to give binding instructions to his subordinates; indeed, guiding those officials is a central purpose of general statements of policy. Pet. Br. 37-38; see Admin. Law

Professors Amici Br. 12-19. Instead, the question is whether the policy statement binds "regulated entities," *National Min. Ass'n* v. *McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (Kavanaugh, J.), or the agency itself, see *The Wilderness Soc'y* v. *Norton*, 434 F.3d 584, 596 (D.C. Cir. 2006) (observing that "the agency's top administrators clearly reserved for themselves unlimited discretion"). The Guidelines do neither. Pet. Br. 37-38.

Alternatively, the Guidelines qualify as a rule of practice or procedure because they guide the agency's own behavior without changing the substantive rights of third parties. See *Mendoza* v. *Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014). Respondents do not address that exemption except to assert (Br. 38-39) that the Guidelines bind line officers. But it is hornbook law that rules of practice and procedure "can be binding." 1 Kristin E. Hickman & Richard J. Pierce, *Administrative Law Treatise* § 4.6, at 491 (6th ed. 2019).

III. THE DISTRICT COURT'S REMEDY WAS UNLAWFUL

The district court's vacatur of the Guidelines was not authorized by Section 706(2), and was in any event barred by the INA.

A. Section 706(2) Does Not Authorize Vacatur

Section 706(2) authorizes a reviewing court to "hold unlawful and set aside" agency actions that are arbitrary and capricious or contrary to law. 5 U.S.C. 706(2). That language does not authorize any particular remedy, but rather establishes a rule of decision directing the reviewing court to disregard unlawful agency actions when resolving the case before it.

1. Respondents observe that one definition of "set aside" is "to cancel, annul, or revoke." Br. 40 (quoting

Black's Law Dictionary 1612 (3d ed. 1933), which described setting aside a judgment, decree, or award). But the government has never denied that point, and respondents ignore that the phrase also means to "put to one side" or "reject from consideration." *Webster's New International Dictionary of the English Language* 2291 (2d ed. 1958). The latter meaning is consistent with the courts' use of "set aside" when reviewing the constitutionality of legislation. See Pet. Br. 41.

Statutory context confirms that Section 706(2) does not use "set aside" to mean "vacate." Because Section 706(2) provides the substantive standard for assessing the lawfulness of agency action, it must be capable of application in all the specified forms of action. 5 U.S.C. 703. Respondents do not explain how, for example, a court hearing a "habeas corpus" petition could vacate a regulation. *Ibid.*

Respondents' contrary contextual cues are unpersuasive. They find it "illogical for the APA to allow a court to 'postpone the effective date of an agency action' during litigation, but [not] to terminate that action if the court concludes the action is 'unlawful.'" Br. 40 (quoting 5 U.S.C. 705, 706(2)). But Section 705 (like Section 706) did not create new remedies. Section 705 "was primarily intended to reflect existing law," not "to fashion new rules of intervention for District Courts." *Sampson* v. *Murray*, 415 U.S. 61, 68 n.15 (1974). By authorizing a stay only when "necessary and appropriate," Section 705 codified pre-APA equitable principles under which reviewing courts could temporarily stay certain agency orders challenged in special statutory review proceedings. See *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 16-17 (1942).

Respondents also invoke (Br. 40) 5 U.S.C. 706(1), which authorizes a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." In their view, that language creates a remedy, so Section 706(2) should be read to do the same. But Section 706(1) simply authorizes a court to find that the agency erred by failing to act, just as Section 706(2) authorizes the court to find that the agency erred by acting. Any remedy compelling agency action is authorized by Section 703.

Finally, respondents contend (Br. 41) that the government's reading "makes section 706(2)'s 'hold unlawful' command superfluous." That is wrong. Section 706(2) specifies a two-step process. The court first determines whether an agency action, finding, or conclusion is unlawful under the listed categories, see 5 U.S.C. 706(2)(A)-(F), and may then disregard the unlawful action, finding, or conclusion when resolving the case.

2. Section 703, not Section 706, governs remedies under the APA. In the absence of a "special statutory review proceeding" authorizing a court to act directly upon an agency order, Section 703 remits plaintiffs to traditional remedies like "declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus." 5 U.S.C. 703. Remarkably, although Section 703 is the linchpin of the government's APA remedial argument, see Pet. Br. 42, respondents never mention it. Nor do they demonstrate any pre-APA tradition of district courts vacating rules.

Respondents argue that the APA's scheme of judicial review was "modeled on appellate review of trial court judgments." Br. 40 (citation omitted). To the extent that characterization is correct, but see *Garland* v. *Ming Dai*, 141 S. Ct. 1669, 1678 (2021) (explaining that

"collateral judicial review of executive action" like that available under "5 U.S.C. §§ 702-703" is not "an 'appeal' akin to that taken from the district court to the court of appeals"), Congress was focused on issues like the record rule and the standard of review—not remedies. See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939, 940 (2011). Congress did not intend to adopt any new remedies when it enacted Section 706, much less to depart drastically from traditional principles of equity and create a novel remedy of universal vacatur. See Pet. Br. 42-44.

3. Respondents argue that courts have long interpreted Section 706 to authorize vacatur. But they identify only one decision vacating agency action in the period shortly after the APA's enactment. See Resp. Br. 40 (citing *Cream Wipt Food Prods. Co.* v. *Federal Sec. Adm'r*, 187 F.2d 789, 790 (3d Cir. 1951)). And that case involved a "special statutory review proceeding," 5 U.S.C. 703, permitting a court of appeals to review an agency order and "affirm the order" or "set it aside in whole or in part, temporarily or permanently." *Cream Wipt*, 187 F.2d at 790 (quoting 21 U.S.C. 371(f)(3) (1946)). The government acknowledges that such special review provisions can authorize courts to vacate a rule. But the fact that Congress has enacted statutes authorizing courts to enter such relief in specific contexts further undermines respondents' assertion that Section 706(2) implicitly authorizes every district court in the country to grant universal vacatur with respect to every agency action. See John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 Yale J. on Reg. Bull. 37, 39-40 (2020).

Pointing to more recent cases, respondents assert (Br. 42) that the availability of vacatur has been well-established "[f]or more than 30 years." They cite *Lujan* v. *National Wildlife Federation*, 497 U.S. 871 (1990), for the proposition that an "entire" agency program can be "affected" when a discrete agency action is "challenged under the APA." *Id.* at 890 n.2. Saying that a program can be "affected" by an APA challenge, however, is a far cry from saying that a court may vacate an entire program universally. Respondents also invoke circuit precedent, see Br. 42, but cases postdating the APA by more than four decades are hardly probative of the Act's original meaning. Those opinions did not attempt to reconcile universal vacatur with the APA's text, structure, and history; instead, they uncritically transplanted the practice from other contexts (like special statutory review proceedings in the courts of appeals). And as respondents elsewhere emphasize, "there is no 'adverse possession' rule of administrative law that would legitimize a longstanding" usurpation of remedial authority by the lower courts. Br. 39 (citation omitted).

B. Section 1252(f)(1) Barred Vacatur Of The Guidelines

Even if Section 706(2) generally authorized universal vacatur, 8 U.S.C. 1252(f)(1) barred the district court from granting that remedy here.

1. Respondents contend (Br. 43) that Section 1252(f)(1) is limited to injunctions. But respondents ignore that vacatur shares the attribute of an injunction that Congress deemed relevant under Section 1252(f)(1): Vacatur requires federal officials "to take or to refrain from taking actions to enforce, implement, or otherwise carry out" the law. *Garland* v. *Aleman Gonzalez*, 142 S. Ct. 2057, 2065 (2022).

Respondents observe (Br. 45-46) that vacatur is formally distinct from injunctive relief because the latter operates *in personam* and requires additional showings, such as irreparable injury. But respondents do not explain why those distinctions matter. Vacatur is practically equivalent to an injunction compelling the agency to rescind or stop implementing the challenged action. See, *e.g.*, *NRDC, Inc.* v. *Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (ordering an agency to "[r]evoke and rescind" the challenged regulation).

Respondents protest (Br. 45-46) that vacatur is not coercive because it does not directly instruct officials "to do * * * anything," and instead "operates against a challenged action." But that argument simply restates their point that vacatur is not *in personam*, which is distinct from the question whether vacatur is coercive. Respondents cannot deny that the district court's vacatur coercively requires DHS to "refrain" from implementing the Guidelines. *Aleman Gonzalez*, 142 S. Ct. at 2065. The district court itself said as much: Its vacatur means that DHS "no longer ha[s] nationwide immigration enforcement guidance." J.A. 395.

Respondents' hypertechnical approach to the term "enjoin" is inconsistent with this Court's decision in *Aberdeen & Rockfish R.R.* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289 (1975). There, the Court construed a statute conferring jurisdiction over appeals from certain "*injunction*[*s*]," 28 U.S.C. 1253 (emphasis added), to cover "appeals from orders * * * not cast in injunctive language but which by their terms simply 'set aside' or declined to 'set aside' [agency] orders" because such orders have "as coercive an effect on the [agency]." *SCRAP*, 422 U.S. at 307-308 & n.11 (citation omitted).

2. In any event, Section 1252(f)(1) uses the term "restrain" as well as "enjoin." 8 U.S.C. 1252(f)(1). Respondents argue that "restrain" is superfluous, contending that "'restrain and enjoin'" are "'common doublets'" that "are often used as 'coupled synonyms.'" Br. 43 (quoting *Garner's Dictionary of Legal Usage* 295-296 (3d ed. 2011) (Garner)). But respondents' source acknowledges that such an interpretation conflicts with the rule against "surplusage," and that the use of related words may be intended to add "meaning." Garner 296-297. And respondents' contention that the rule against surplusage can be "discounted" when drafters "repeat themselves" assumes the conclusion. Br. 44-45 (citations omitted).

Here, context indicates that "restrain" is not mere surplusage. The adjoining subsection uses the term "enjoin" alone, 8 U.S.C. 1252(f)(2), and this Court presumes that "Congress acts intentionally and purposely" when it includes language in one provision and omits it from another, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted). Contravening that presumption, respondents contend (Br. 45) that Congress used differing phrases to say the same thing in adjacent subsections. Respondents cannot expiate their first interpretive sin (surplusage) by committing another.

In addition, interpreting Section 1252(f)(1) to exclude vacatur would deprive that provision of practical significance by permitting district courts to enter injunctive-style relief under a different name. See Pet. Br. 48-49. Tellingly, respondents offer no answer.

3. Respondents invoke (Br. 46-47) the presumption in favor of judicial review to urge interpreting Section 1252(f)(1) narrowly. But Section 1252(f)(1) "does not deprive lower courts of all subject matter jurisdiction"

over covered claims. *Biden* v. *Texas*, 142 S. Ct. 2528, 2539 (2022). For that reason, the Court did not mention the presumption in *Biden* or *Aleman Gonzalez*, when it found that relief was barred by Section 1252(f)(1).

4. Respondents contend (Br. 47) that, if Section 1252(f)(1) precludes the relief granted below, this Court should itself "vacate" the Guidelines or "permanently enjoin" the government's "implementation and enforcement of the" Guidelines. Although Section 1252(f)(1) does not bar the "Supreme Court" from granting any remedy, 8 U.S.C. 1252(f)(1), the Court should decline respondents' request. Section 706 of the APA does not authorize *any* court to grant vacatur, and injunctive relief is unwarranted. The speculative financial injuries that respondents assert would not justify the serious intrusion of an injunction mandating that the Executive Branch allocate its finite resources in a particular way in conflict with the politically accountable Secretary's judgment about how best to protect the Nation's security and borders. See *Winter* v. *NRDC, Inc.*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion" and must be informed by "the balance of equities and consideration of the public interest.").

* * * * *

The judgment of the district court should be reversed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

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