No. 22-40367

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

State of Texas; State of Louisiana,

Plaintiffs - Appellees,

v.

United States of America; Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security; United States Department of Homeland Security; Troy Miller, Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection, in his official capacity; United States Customs and Border Protection; Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, in his official capacity; United States Immigration and Customs Enforcement; Tracy Renaud, Senior Official Performing the Duties of the Director of the U.S. Citizenship and Immigration Services, in her official capacity; U.S. Citizenship and Immigration Services,

Defendants - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN OPPOSITION TO A STAY PENDING APPEAL

MATT A. CRAPO
CHRISTOPHER J. HAJEC
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590

Attorneys for *Amicus Curiae*

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1 and Fed. R. App. P. 26.1, *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

3) The following entity has an interest in the outcome of this case: Immigration Reform Law Institute.

DATED: June 22, 2022

Respectfully submitted,

/s/ Matt Crapo

Matt A. Crapo
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590

Attorney for *Amicus Curiae*

Movant Immigration Reform Law Institute ("IRLI") respectfully requests the Court's permission to file the attached brief as *amici curiae* in opposition to Defendants-Appellants' Emergency Motion for a Stay. Counsel for both Appellants and Appellees have stated in writing that they do not oppose this motion.

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and lawful permanent residents, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI participated as *amicus* in the district court proceedings below. *See* Br. of *Amici Curiae*, *Texas v. United States*, No. 6:21-cv-16, Dkt. 48, 120 (S.D. Tex.). IRLI seeks leave to file the attached brief to bring several relevant matters to the Court's attention:

- The purported jurisdictional bar in 8 U.S.C. § 1252(f)(1) does not reach non-alien parties with valid APA claims that are not subject to later review in individual immigration proceedings. Accordingly, *Garland v. Aleman Gonzalez*, No. 20-322 (U.S. June 13, 2022), is distinguishable and does not control this case.

- In any event, Plaintiff States would be entitled to judicial review in equity. Review is available to parties who lack any future alternate remedy for judicial review of unlawful agency action. *Leedom v. Kyne*, 358 U.S. 184, 188-90 (1958)

Because these issues are relevant to deciding the stay petition, the accompanying brief may aid the Court.

DATED: June 22, 2022

Respectfully submitted,

/s/ Matt Crapo

MATT A. CRAPO
CHRISTOPHER J. HAJEC
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590

Attorneys for *Amicus Curiae*

CERTIFICATE OF SERVICE

I certify that on June 22, 2022, I electronically filed the foregoing motion and attached *amicus* brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Matt Crapo
Matt A. Crapo

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/s/ Matt Crapo

Matt A. Crapo
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590

Attorney for *Amicus Curiae*

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The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens, and also to assisting courts in understanding and accurately applying federal immigration law. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 942 F.3d 504 (D.C. Cir. 2019); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

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

INTRODUCTION

The Court should reject Defendants-Appellants' argument that 8 U.S.C. § 1252(f)(1) strips the district court of jurisdiction to vacate the final enforcement guidance memorandum issued by the Secretary of the Department of Homeland Security ("DHS"). It has long been recognized that the power "to forbid the entrance of foreigners … or to admit them only in such cases and upon such conditions as it may see fit to prescribe" is an inherent sovereign prerogative entrusted exclusively in Congress. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *see also Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress . . . ."). Upon their admission to the Union, Plaintiff States Texas and Louisiana ceded this sovereign prerogative to control their respective borders to Congress, with the promise that the Executive Branch would faithfully execute those laws. *See* U.S. Const. art. II, § 3 ("[the President] shall take Care that the Laws be faithfully executed").

Congress has established certain mandatory enforcement requirements with respect to certain aliens. *See* 8 U.S.C. §§ 1226(c) (mandating detention of criminal aliens), 1231(a)(2) (mandating detention of certain aliens ordered removed). Where, as here, States challenge Executive action that runs contrary to such statutory directives, this Court should read statutes stripping courts of jurisdiction

narrowly to afford the various States a forum in which to challenge Executive action that runs afoul of congressional directives. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 518-20 (2007) (recognizing that States are not normal litigants for the purpose of invoking federal jurisdiction and are entitled to "special solicitude" in determining standing).

ARGUMENT

I. § 1252(f)(1) DOES NOT IMPOSE JURISDICTIONAL OR REMEDIAL LIMITS FOR PLAINTIFF STATES

In their motion for a stay, Defendants-Appellants suggest that the district court lacked jurisdiction to vacate DHS's final guidance memorandum. *See* Emergency Motion for a Stay Pending Appeal ("Stay Motion") at 11-12 (citing *Garland v. Aleman Gonzalez*, No. 20-322 (U.S. June 13, 2022)). *Aleman Gonzalez* is distinguishable, however.

By its terms, § 1252(f)(1) applies only to bar certain review and relief with respect to aliens by restricting such review to the Immigration and Nationality Act ("INA") proceeding for the individual alien:

> 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*.

8 U.S.C. § 1252(f)(1) (emphasis added). "It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231," but the "ban does not extend to individual cases." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999). In *Aleman Gonzalez*, the Court held that "classwide injunctive relief awarded" to a class of aliens detained under 8 U.S.C. § 1231(a)(6) was "unlawful." Slip op. at 11; *see also id.* at 6 ("injunctive relief on behalf of an entire class of aliens is not allowed"); *id.* at 7 ("the injunctions do not fall within the exception for individualized relief because the injunctions were entered on behalf of entire classes of aliens"). In short, *Aleman Gonzalez* involved relief awarded to a class of individual aliens who retained the right to seek individualized relief under § 1252(f)(1).

The INA's withholding of systemic review from classes of aliens does not withhold judicial review or even injunctive relief from everyone. Either on the "front end" or the "back end," interested parties other than the "individual alien" covered by § 1252(f)(1) can seek APA review and obtain injunctive relief as long as they have cognizable interests.

A. The INA does not bar the States' APA claims

On the front end of interpreting what review and relief § 1252(f)(1) actually bars, the States here are not a class of "individual alien[s]" covered by § 1252(f)(1). That distinction involves at least two relevant differences for the

effect of the INA's 1996 amendments on the ongoing viability of the States' APA action. Unlike the individual aliens comprising the classes barred by § 1252(f)(1), the States do not have a subsequent INA opportunity to review allegedly unlawful agency action. In addition, non-alien plaintiffs such as the States plainly had a right to judicial review before the 1996 INA amendments that added § 1252(f)(1). Both of these differences go to why non-alien plaintiffs such as the States retain their right to APA review, while classes of alien plaintiffs such as those in *Aleman Gonzalez* do not.

First, because the States lack an alternate remedy, the APA provides review: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704 (emphasis added). By contrast, the "individual alien[s]" comprising the classes barred by § 1252(f)(1) have an alternate remedy under the INA.

Second, given that the States had a pre-1996 right of review, the 1996 INA amendments cannot be read expansively because repeals by implication are disfavored. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (requiring "clear and manifest" legislative intent to repeal the prior authority). Indeed, "this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975). The APA, moreover, recognizes a

difference between systemic actions such as DHS's final guidance memorandum and the application of the immigration process to any individual alien:

> If there is in fact some specific order or regulation, applying some particular measure across the board to all individual classification terminations and withdrawal revocations, and if that order or regulation is final, and has become ripe for review …, it can of course be challenged under the APA by a person adversely affected[.]

Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 890 n.2 (1990). Under the APA, § 1252(f)(1) does not provide a "clear and manifest" indication of congressional intent to terminate systemic APA review by plaintiffs with no future INA proceeding in which to challenge an INA administrative action.

Indeed, the relative order of the APA's and INA's enactment provides further assurance that the States retain their APA cause of action. Although the APA—as enacted—did not override any pre-APA statute that expressly or impliedly denied review, 5 U.S.C. § 702 ("[n]othing herein … confers authority to grant relief if any other statute that grants consent to suit expressly *or impliedly* forbids the relief which is sought") (emphasis added), post-APA statutes must deny review *expressly*. 5 U.S.C. § 559 (a "[s]ubsequent statute may not be held to supersede or modify this subchapter …, except to the extent that it does so expressly"); *see, e.g.*, *Director, Office of Workmen's Compensation Program, etc. v. Alabama By-Products Corp.*, 560 F.2d 710, 719-720 (5th Cir. 1977) (holding that appropriation acts do no contravene § 559 "[b]ecause the language of the

relevant paragraph of the appropriation acts expressly modifies the administrative law judge requirement of 5 U.S.C. § 3105").

Since § 1252(f)(1) is a post-APA statute, for it to preclude APA review, it would have to do so expressly, but it does not. Accordingly, a party with Article III standing and an APA claim within the INA's zone of interests would keep any APA claim that it had prior to the 1996 amendments adding § 1252(f)(1). 5 U.S.C. § 559. For alien plaintiffs such as those in *Aleman Gonzalez*, § 1252(f)(1) provides "clear and manifest" legislative intent to bar review other than that under the INA. For non-alien plaintiffs such as the States, there is no such "clear and manifest" legislative intent. *See Aleman Gonzalez*, slip op. at 17 ("In fairness, the Court's decision is not without limits. For instance, the Court does not purport to hold that § 1252(f)(1) affects courts' ability to 'hold unlawful and set aside agency action, findings, and conclusions' under the Administrative Procedure Act. 5 U. S. C. §706(2).") (Sotomayor, J., dissenting).

B. The INA does not bar the States' equitable claims

On the back end, even if this Court finds that 8 U.S.C. § 1252(f)(1) displaces APA review for all plaintiffs, without regard to whether the plaintiff has an INA claim for relief, plaintiffs without future INA review such as Plaintiff States would have judicial review in equity. Review is available to parties who lack any future alternate remedy for judicial review of unlawful agency action. *Leedom v. Kyne*,

358 U.S. 184, 188-90 (1958). The extraordinary relief available to the States under *Kyne* is unavailable where—as in *Aleman Gonzalez*—review is available in future enforcement proceedings:

> The cases before us today are entirely different from *Kyne* because FISA expressly provides MCorp with a meaningful and adequate opportunity for judicial review of the validity of the source of strength regulation. If and when the Board finds that MCorp has violated that regulation, MCorp will have, in the Court of Appeals, an unquestioned right to review of both the regulation and its application.

Board of Governors of the Federal Reserve System v. MCorp Financial, 502 U.S. 32, 43-44 (1991). The decisions in *Kyne* and *MCorp* thus require differential treatment of the *Aleman Gonzalez* plaintiffs and the State plaintiffs here. For the States, no future INA action provides an opportunity for judicial review of the allegedly unlawful agency action. Thus, *Kyne* allows review in equity, and *MCorp* poses no barrier to that review.

II. THIS COURT HAS A DUTY TO REACH THE MERITS

Because § 1252(f)(1) imposes no jurisdictional bar to the Plaintiff States' challenge, this Court has no reason to avoid reaching the important issues presented here. Indeed, federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them" by reaching the merits. *Colorado River Water Conserv. Dist. v. U.S.*, 424 U.S. 800, 817 (1976). And the issues presented here are extraordinarily important.

Although this suit is between the Plaintiff States and the federal government, the real conflict is between the current Administration's preferred enforcement policies and those established by Congress in the INA. The INA and the APA conditionally delegate to the Executive Branch matters that the Constitution entrusts to the Legislative Branch. *See* U.S. CONST. art. 1 §§ 1, 8, cl. 4. This case thus requires the Judiciary to exercise its vital constitutional function of refereeing interactions between the other two branches of the federal government—a function it has no cause to abstain from here.

CONCLUSION

For the forgoing reasons, the Court should deny Defendants-Appellants' motion for a stay pending appeal.

DATED: June 22, 2022

Respectfully submitted,

/s/ Matt Crapo

Matt A. Crapo
Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590

Attorneys for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with Fed. R. App. P. 27(d)(2)(A) because it contains 2,040 words, as measured by Microsoft Word software. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, Roman-style typeface of 14 points or more.

DATED: June 22, 2022

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