No. 23-3396

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AL OTRO LADO, INC., *et al.*,
Plaintiffs-Appellants,
v.

ALEJANDRO MAYORKAS, Secretary of Homeland Security, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California, Case No. 3:23-cv-01367-AGS-BLM

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, ACLU OF SOUTHERN CALIFORNIA, AND ACLU OF NORTHERN CALIFORNIA IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici* state that they have no parent corporations. No publicly owned corporation holds ten percent or more of the stock of *amici*, as they do not issue any stock.

INTEREST OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization with approximately two million members dedicated to the principles of liberty and equality enshrined in the Constitution and the nation's civil rights laws. The ACLU, through its Immigrants' Rights Project ("IRP") and state affiliates, engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of noncitizens.

The American Civil Liberties Union of Southern California and the American Civil Liberties Union of Northern California are regional affiliates of the ACLU. They advance the civil rights and civil liberties of all Californians in state and federal courts, legislative and policy arenas, and the community.

Amici have significant expertise on 8 U.S.C. § 1252(f)(1), having litigated several cases in the Supreme Court and dozens of cases in the courts of appeals addressing the provision's scope. *See, e.g.*, *Garland v. Aleman Gonzalez*, 596 U.S. 543 (2022); *Nielsen v. Preap*, 139 S. Ct. 954 (2019); *Jennings v. Rodriguez*, 538 U.S. 281 (2018); *Gonzalez v. ICE*, 975 F.3d 788 (9th Cir. 2020).[1]

[1] No party or party's counsel authored this brief in whole or in part. No party, no party's counsel, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION

Amici submit this brief to address the meaning of 8 U.S.C. § 1252(f)(1) after the Supreme Court's decision in *Garland v. Aleman Gonzalez*, 596 U.S. 543 (2022), and in particular to explain why the government's broad view of the statute must be rejected. As the plaintiffs explain, this Court has held that an injunction's collateral effects on provisions covered by § 1252(f)(1) do not trigger its bar. *Amici* write to expand on why that is the correct rule, including after *Aleman*.

Section 1252(f)(1) bars injunctions against the operation of "the provisions of chapter 4 of title II [of the Immigration and Nationality Act (INA)]," which govern certain aspects of the inspection, detention, and removal process. *Moreno Galvez v. Jaddou*, 52 F.4th 821, 830 (9th Cir. 2022); *see* Pub. L. No. 104-208, div. C, § 306(a)(2), 110 Stat. 3009, 3009-611 (1996).[2] In *Aleman*, the Supreme Court held that § 1252(f)(1) barred not only injunctions against the operation of the covered provisions as properly interpreted, but also "the Government's efforts to enforce or

[2] A clarifying point: As this Court explained in *Moreno Galvez*, the text of the statute as enacted by Congress conflicts with the text later codified in the U.S. Code at § 1252(f)(1). The version Congress enacted applies the injunction bar to "chapter 4 of title II" of the INA, whereas the codified version refers to "part IV of this subchapter," meaning U.S. Code Title 8, chapter 12, subchapter II, part IV. These two sets of statutes—"chapter 4" and "part IV"—are not coextensive, but the differences are not material to the questions presented here. Because the enacted text trumps the "changed" version in the U.S. Code, *Moreno Galvez*, 52 F.4th at 830, *amici* refer to the INA provisions that § 1252(f)(1) covers as those in "chapter 4."

implement them" based on its own understanding of those provisions. 596 U.S. at 550-51.

Despite § 1252(f)(1)'s careful limitation to the specified provisions, in the district court the government offered a sweeping gloss on § 1252(f)(1)—namely that it bars any injunction that "*relates* to the operation of a covered provision." ER-27 (emphasis added); *see* ER-23. The government has advanced the same broad understanding in other litigation, including a parallel suit pending before this Court. *See* Govt. Br. 55, ECF No. 12, *Al Otro Lado v. Mayorkas*, No. 22-55988 (9th Cir. Dec. 20, 2022) ("Govt. *AOL I* Br.") (arguing that provision bars an injunction that "affects . . . removal proceedings") (quotation marks omitted).

As this Court has correctly held, that is incorrect: "[C]ollateral effect[s]" do not trigger § 1252(f)(1). *Gonzales v. DHS*, 508 F.3d 1227, 1233 (9th Cir. 2007). The Supreme Court left this principle undisturbed in *Aleman*, where it expressly cited *Gonzales* and explained that its ruling did not address injunctions that have only "some collateral effect on the operation of a covered provision." 596 U.S. at 553 n.4.

Indeed, the government's view would expand § 1252(f)(1) far beyond its textual limits. For example, most of the INA can have some effect on the removal system, because every rule regarding eligibility, benefits, and other immigration matters can affect whether a person is ultimately removable. Applying § 1252(f)(1)

based on collateral effects would therefore mean that the bar would cover most provisions in the INA, erasing Congress's choice to limit the bar to "chapter 4" only. The government's position would effectively write those words out of the text.

The government's view also conflicts with how the Supreme Court has interpreted anti-injunction provisions in other contexts. In the tax context, where, like § 1252(f)(1), statutes bar injunctions that "enjoin" or "restrain" tax collection, the Court has held that "downstream" effects or "after-effect[s]" on tax collection do not trigger the jurisdictional bars. *CIC Servs., LLC v. IRS*, 141 S. Ct. 1582, 1589-91 (2021); *id.* at 1595-96 (Kavanaugh, J., concurring); *see Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 12-14 (2015). In contrast, when Congress wants to bar judicial involvement more broadly, it uses more expansive language, providing that courts may not order anything that even "affects" an agency's functions. *See, e.g.*, 12 U.S.C. § 1821(j).

Properly understood, § 1252(f)(1) only bars injunctions whose primary object—the main thing being enjoined—implements one of the covered statutes. That approach respects the statute's textual limits, adheres to this Court's prior precedents, and tracks the Supreme Court's approach in similar contexts.

Under these principles, the district court erred in holding that § 1252(f)(1) bars the injunction the plaintiffs seek in this case. The primary object of the plaintiffs' *Accardi* claim is not a policy that implements any covered statute. Rather, they

challenge a "system-wide practice" of immigration officers' *noncompliance* with the agency's own policy. Opening Br. 49. It would be surprising if the government were to suggest a pattern of noncompliance with its own policy represented the government's implementation of a covered provision—particularly where, as here, the violated policy does not itself rely on any covered provision. Rather, the government's complaint is that remedying such noncompliance could *affect* its implementation of a covered statute. But such collateral effects do not trigger § 1252(f)(1).

ARGUMENT

I. SECTION 1252(f)(1) DOES NOT BAR INJUNCTIONS WITH ONLY COLLATERAL EFFECTS ON THE COVERED PROVISIONS.

The Court should adhere to its precedent and reject the government's central claim that collateral effects on the inspection, removal, and detention system are enough to trigger § 1252(f)(1).

A. The Text Is Clear: Collateral Effects on the Covered Provisions Do Not Trigger § 1252(f)(1).

Section 1252(f)(1) provides that, with some exceptions, courts may not "enjoin or restrain the operation of" "the provisions of chapter 4 of title II [of the INA]." *Moreno Galvez*, 52 F.4th at 830 & n.7; *see supra* note 2. By its terms, this does not prevent courts from enjoining *any* immigration policies, only policies that implement the specified statutes: those found in "chapter 4," which provide the

procedures for the removal system, including inspection, detention, adjudication, and physical removal. *See, e.g.*, 8 U.S.C. §§ 1225 (inspection and expedited removal), 1226 (detention), 1229a (regular removal proceedings), 1231 (removal operations). In *Aleman*, the Supreme Court explained that "the 'operation of' the relevant statutes is best understood to refer to the Government's efforts to enforce or implement them." 596 U.S. at 550. Thus, § 1252(f)(1) bars certain classwide injunctions against policies that implement the inspection, detention, adjudication, and removal provisions in chapter 4 of title II of the INA.[3]

The INA contains many other provisions outside of chapter 4, to which § 1252(f)(1) does not apply. These include provisions governing immigrant visas, 8 U.S.C. § 1153, asylum, *id.* § 1158, grounds of inadmissibility, *id.* § 1182, temporary admission, *id.* §§ 1184, 1187, adjustment of status, *id.* § 1255, naturalization, *id.* §§ 1421-1427, and denaturalization, *id.* § 1481, and many other things.

The practice of noncompliance with the announced policy at issue in this case does not purport to implement any of the covered statutes. *See infra* Part II. Yet, as noted, the government's position in this case has been that § 1252(f)(1) still applies

[3] The Court need not, and should not, decide whether § 1252(f)(1) bars all injunctions against such policies; for example, 8 U.S.C. § 1252(e)(3) specifically authorizes "system[ic]" review of expedited removal policies and procedures, and barring systemic relief in such cases would frustrate Congress's purpose in establishing that unusual review scheme.

because the requested injunction would affect who ends up being processed at ports. The government has likewise taken the position that § 1252(f)(1) bars injunctions of asylum policies, because even though the asylum statute is outside the covered provisions, *see* 8 U.S.C. § 1158(a)(1), asylum rules can be applied in removal proceedings. Govt. *AOL I* Br. 53-56 (asylum rule "operates" within the removal system).

That position would eviscerate the careful limit that Congress wrote into the statute, because most immigration policies have some effect on removal proceedings. Removal can be defeated by a valid visa, or derivative citizenship, or adjustment of status, or asylum; immigration judges regularly apply admissibility rules of all kinds; the list goes on. An injunction of any visa, inadmissibility, adjustment, naturalization, or asylum policy could therefore affect removal cases. If the government were correct, then these statutes and more would be subject to § 1252(f)(1) because of their collateral effects on the removal system. *See infra* Part I.B (detailing examples).

If Congress meant what the government says, it could have erased "chapter 4" and written that courts could not "enjoin or restrain the operation of the provisions of ~~chapter 4 of~~ title II" of the INA, since title II contains most immigration rules. *See Advoc. Health Care Network v. Stapleton*, 581 U.S. 468, 477-78 (2017) (refusing to interpret statute "as if it were missing [] two words"). Indeed, other INA

provisions, including in the very same statutory section as § 1252(f)(1), refer more generally to the "provisions of this title." INA § 242(e)(3)(A)(ii), codified at 8 U.S.C. § 1252(e)(3)(A)(ii); *see* INA § 221(f), codified at 8 U.S.C. § 1201(f); INA § 264(b), codified at 8 U.S.C. § 1304(b).[4]

Nor is the logic of the government's position limited even to title II of the INA—on its view, § 1252(f)(1) would apply to a policy implementing the immigration-status categories in title I, or the naturalization rules in title III, or the border-management authorities in the Homeland Security Act, since all of those could obviously affect removal proceedings in some manner. That alters the statute even further, so that it could have simply said "enjoin or restrain the operation of the provisions of this Act" or simply "the immigration laws." Again, Congress knows how to do that, and multiple parts of the INA refer to the "provisions of this Act." *See, e.g.*, INA § 101(a)(16), codified at 8 U.S.C. § 1101(a)(16); INA § 103(a)(3), codified at 8 U.S.C.§ 1103(a)(3); INA § 246(a), codified at 8 U.S.C. § 1256(a).

Nor were those the only options to achieve the government's proposed reading. Congress could have prohibited courts from enjoining the operation of "the immigration system" or some other general phrase. "The short answer is that Congress did not write the statute that way." *Corley v. United States*, 556 U.S. 303,

[4] For a cross-reference of INA and U.S. Code sections, *see* Ira J. Kurzban, IMMIGRATION LAW SOURCEBOOK 2982 (18th Ed. 2022).

315 (2009) (cleaned up). Instead, it carefully tailored § 1252(f)(1) to address only the inspection, detention, and removal statutes in chapter 4 that were enacted or amended along with § 1252(f)(1). *See* H.R. Rep. 104-469 at 161 (Mar. 4, 1996) (describing intention to address injunctions of "the new removal procedures established in this legislation").

B. The Government's Position Would Expand § 1252(f)(1) to Cover Statutes Throughout the INA and Beyond.

The government's position would have sweeping consequences because different parts of the immigration system are often linked. Chapter 4 of the INA provides the procedures for handling people's removal cases, including inspection, detention, adjudication, and physical removal. But most of the INA's substantive rules come from outside chapter 4. These rules are independent of the removal process and are applied in a number of contexts, like visa processing, benefit applications, and affirmative asylum applications. But because the INA's substantive provisions can also be enforced in the removal process, nearly every INA provision can have some eventual effect on removal—and so an injunction of almost any immigration policy or practice could have a collateral effect on chapter 4.

For example, 8 U.S.C. § 1182(a)(4) provides that an immigrant who is or is likely to become a "public charge" is inadmissible. The provision is in chapter 2. The government implements this provision by issuing rules that interpret who counts as a public charge. *See City & Cnty. of San Francisco v. USCIS*, 981 F.3d 742, 751-

53 (9th Cir. 2020) (describing these policies). Even though public-charge policies implement a provision in chapter 2, not chapter 4, the government's theory would mean that § 1252(f)(1) applies to all public-charge policies, because immigration judges apply them to determine admissibility during removal proceedings. In the government's words, an injunction of a public-charge policy would be improper because it would "prohibit[] immigration judges" from finding people inadmissible on that basis. Govt. *AOL I* Br. 56. The same logic would apply to every policy that implements any ground of inadmissibility in § 1182, even though Congress excluded § 1182 from § 1252(f)(1)'s coverage.

The same is true for adjustment of status, which is governed by 8 U.S.C. § 1255 in chapter 5. Adjustment of status can be raised as a form of relief in removal proceedings, so an injunction of an adjustment-of-status policy would naturally affect people's removal cases. *See Gonzales*, 508 F.3d at 1233 (describing injunction of adjustment policy that prevented government "from executing final orders of removal" where adjustment "had been rejected because of the unlawful . . . policy"). According to the government, that should mean that § 1252(f)(1) applies to § 1255, because an injunction of an adjustment policy might "require[] the Government to disturb determinations that have already been made under" the removal statutes. Govt. *AOL I* Br. 54. This Court has rightly rejected that argument in the adjustment context multiple times. In *Catholic Social Services, Inc. v. INS*,

the Court upheld an injunction of an adjustment policy that explicitly prevented the government from executing removal orders that were issued because of the policy. 232 F.3d 1139, 1145, 1149-50 (9th Cir. 2000) (en banc). And in *Gonzales*, the Court explained that such "collateral effect[s]" do not trigger § 1252(f)(1) when the injunction only "directly implicates" a statute outside of chapter 4, by blocking the "unlawful application" of that non-covered statute. 508 F.3d at 1233.

Asylum further illustrates the startling reach of the government's position. As mentioned, the substantive rules for asylum come from 8 U.S.C. § 1158, in chapter 1. These rules are applied not just in removal proceedings but also in affirmative applications for asylum filed by people who are not in removal proceedings. *See* 8 U.S.C. § 1158(d). Yet on the government's theory, every substantive rule in § 1158 is covered by § 1252(f)(1), because every rule can "operate[]" in expedited or regular removal proceedings, and every rule could be the basis to deny asylum and trigger detention and removal. Govt. *AOL I* Br. 55. Thus, an unlawful policy interpreting the refugee definition, 8 U.S.C. § 1158(b)(1)(B)(i), could not be enjoined because doing so would prevent "asylum officers from entering negative credible-fear determinations in expedited removal" based on the unlawful policy, Govt. *AOL I* Br. 53. An unlawful policy to terminate people's asylum status could not be enjoined, 8 U.S.C. § 1158(c)(2), because that might require the government "to 'reopen or reconsider'" removal orders that were based on the unlawful termination, Govt. *AOL*

I Br. 54. And courts could not enjoin policies that introduce new asylum bars of any kind, 8 U.S.C. §§ 1158(b)(2)(C), 1158(b)(2)(B)(ii), since those bars are applied in removal proceedings.

The implications of the government's position extend further still, as it would apply equally to the citizenship and naturalization policies in title III of the INA, all of which could impact inspection, detention, and removal proceedings. *See, e.g.*, 8 U.S.C. §§ 1421-1427 (naturalization); *id.* § 1481 (denaturalization); *id.* § 1431 (derivative citizenship). A person's citizenship is a decisive factor in whether they can be subject to detention, adjudication, and removal under chapter 4. And these provisions are implemented by agency policies. *See, e.g.*, USCIS Policy Manual, Vol. 12 ("Citizenship and Naturalization"). For example, if a court enjoined an illegal denaturalization policy, immigration judges could no longer rely on the policy to determine that a person was not a U.S. citizen. These provisions are far afield from the provisions § 1252(f)(1) identifies, yet on the government's read all would be covered by § 1252(f)(1).

The government's interpretation of § 1252(f)(1) would sweep in these rules and more, in blatant disregard of Congress's explicit choice to make § 1252(f)(1) cover "chapter 4" only. "[A]s between one interpretation that would render statutory text superfluous and another that would render it meaningful yet limited," the limited interpretation is "more faithful to the statute Congress wrote." *Clark v.*

Rameker, 573 U.S. 122, 133 (2014); *cf. Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) ("It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings.").

C. The Supreme Court's Interpretation of Similar Statutes Underscores that Collateral Effects Cannot Trigger § 1252(f)(1).

Congress has enacted a number of other statutes that bar injunctions of certain covered activities. Some of their language is similar to § 1252(f)(1), and the Supreme Court has held that these are not triggered by collateral effects on the covered activities. In other statutes, Congress has used notably broader language to show that collateral effects *do* trigger the statute. This contrast further erodes the government's argument that collateral effects trigger § 1252(f)(1). *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 494 (1991) (relying on the fact that Congress "could easily have used broader statutory language" but did not); *United States v. Barone*, 71 F.3d 1442, 1445 (9th Cir. 1995) (same).

For instance, Congress has provided that "no court may take any action . . . to restrain *or affect* the exercise of powers or functions of the [Federal Deposit Insurance Corporation] as a conservator or a receiver." 12 U.S.C. § 1821(j) (emphasis added). By prohibiting courts from even *affecting* the FDIC's functions, and not limiting the ban to any specific agency functions, this language "effect[s] a sweeping ouster of courts' power to grant equitable remedies." *Freeman v. FDIC*,

56 F.3d 1394, 1399 (D.C. Cir. 1995). Courts have accordingly held that they may not issue orders that have even collateral effects on the relevant FDIC functions. *See Hindes v. FDIC*, 137 F.3d 148, 160 (3d Cir. 1998) ("an action can 'affect' the exercise of powers by an agency without being aimed directly at it"); *Dittmer Properties, L.P. v. FDIC*, 708 F.3d 1011, 1017-18 (8th Cir. 2013) (collecting cases). Numerous statutes contain similarly expansive language. *See, e.g.*, 12 U.S.C. § 4617(f) (same "restrain or affect" language); 28 U.S.C. § 1342 (similar).

Section 1252(f)(1), by contrast, uses more limited language in two critical ways.

First, § 1252(f)(1) only prohibits orders that directly "enjoin or restrain" the operation of the covered provisions, not orders that merely "affect" them. The simple fact of excluding "effects" from the text of the statute is good evidence that Congress did not mean for § 1252(f)(1) to be triggered by collateral effects on chapter 4. Indeed, the Supreme Court has held that similar language in other statutes is too narrow to encompass downstream effects. The Tax Injunction Act provides that courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." 28 U.S.C. § 1341. The Supreme Court has held that this language—"enjoin, suspend or restrain"—refers only to court orders that "stop" tax collection directly, not orders that "merely inhibit" tax collection as a

downstream consequence. *Direct Marketing*, 575 U.S. at 12-13 (upholding injunction of notice provision that facilitated tax collection).

Second, the verbs "enjoin or restrain" in § 1252(f)(1) operate on a specified list of agency functions—"chapter 4"—not the plenary set of "powers or functions of the [agency]" in the FDIC statute and similar statutes discussed above. Here, too, the Supreme Court has found evidence of a narrowed statutory scope. The Tax Injunction Act's verbs similarly "act[] on a carefully selected list of technical terms—'assessment, levy, collection'—not on an all-encompassing term, like 'taxation.'" *Direct Marketing*, 575 U.S. at 13. Here, as in *Direct Marketing*, "the broad meaning" the government advocates would "defeat the precision of that list, as virtually any court action related to any phase of [immigration] might be said to 'hold back' [the removal system]." *Id*.[5]

The Supreme Court has rejected the relevance of collateral effects even more explicitly when interpreting the Anti-Injunction Act, another tax-related statute that bars any "suit for the purpose of restraining the assessment or collection of any [federal] tax." 26 U.S.C. § 7421(a). This provision, like § 1252(f)(1), prohibits suits

[5] Notably, the government itself "analogized" between the Tax Injunction Act and § 1252(f)(1) in *Aleman*. *See* 596 U.S. at 551 n.2. Now, however, it suggests a far more sweeping interpretation of § 1252(f)(1) than the Supreme Court has provided as to the Tax Injunction Act. But the Tax Injunction Act is in fact broader than § 1252(f)(1) given, *inter alia*, its additional prohibition on "suspen[sion]" of taxation. *See* Br. of *Amicus* ACLU 10-11, *Biden v. Texas*, No. 21-954 (U.S. May 9, 2022).

that would "restrain[]" tax collection, but not those that merely "affect" tax collection. The Court has held that § 7421(a) is not triggered by a suit's "downstream" effects on tax collection, only by suits seeking to directly enjoin the collection process. *CIC*, 141 S. Ct. at 1588, 1590; *see id.* at 1595-96 (Kavanaugh, J., concurring) ("the Anti-Injunction Act is best read as directing courts to look at the stated *object* of a suit rather than the suit's downstream effects."); *id.* (noting the Court's abrogation of earlier cases). The Act therefore does not prevent a court from enjoining an IRS reporting requirement, even when the requirement is enforced through a tax, and when the reported information would be used to assess and collect taxes. *Id.* at 1590-91.[6] Other courts have even held that, despite the Anti-Injunction Act, a court could order the IRS to *expunge* records that would have formed the basis for a tax assessment because the primary target of the suit was information reporting, not its downstream effect on taxes. *Harper v. Rettig*, 46 F.4th 1, 8 (1st Cir. 2022).

Collateral effects do not trigger the Anti-Injunction Act despite some notably broad language in the statute, which bars suits "in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a); *compare* 8 U.S.C. § 1252(f)(1) (similarly barring injunctions

[6] The reference in the Anti-Injunction Act to the suit's "purpose" does not set it apart from § 1252(f)(1) by establishing a subjective inquiry. That provision directs the court to "inquire not into a taxpayer's subjective motive, but into the action's objective aim—essentially, the relief the suit requests." *Id*. at 1589.

"[r]egardless of the nature of the action or claim or of the identity of the party or parties bringing the action"). In the tax cases, as here, this language is simply not enough to bar the entire universe of injunctions that might ultimately affect taxation or removal. Congress uses broader language to achieve that kind of goal, and it has not done so in § 1252(f)(1).

D. Courts Routinely Distinguish Between an Injunction's Primary Target and Its Collateral Effects.

Properly understood, § 1252(f)(1)'s application turns on whether the injunction primarily operates against the implementation of a covered provision. If the injunction primarily operates by barring a policy that implements a non-covered statute, or a policy or practice that does not implement any particular statute, then § 1252(f)(1) does not apply.

Courts apply this approach in the context of other anti-injunction statutes. For instance, under the Anti-Injunction Act, the Supreme Court has "looked to the 'relief requested'—the thing sought to be enjoined," and asks whether "the legal rule at issue is a tax provision." *CIC*, 141 S. Ct. at 1590, 1593; *see, e.g.*, *Harper*, 46 F.4th at 9 ("the dispute is not about a tax rule") (cleaned up). For § 1252(f)(1), the equivalent question is whether the challenged policy implements any of the "inspection, apprehension, examination, and removal" statutes set out in chapter 4. *Aleman*, 596 U.S. at 549-50. As in *Aleman*, such a policy will typically be based on

a covered statute, will cite that statute as authority, and will set out how the government intends to "carry out the specified statutory provisions." *Id.* at 550.

Courts applying anti-injunction statutes must often distinguish between the suit's primary object and its collateral effects. Here, too, the difference is clear. An effect on the inspection and removal system is collateral if it follows from an injunction of some *other* policy. This collateral effect will often be implicit, such as when a court enjoins an asylum or inadmissibility rule that, as a result, can no longer be applied in removal proceedings. Other times, to ensure compliance with an injunction, courts must order those collateral effects explicitly. For instance, in *Catholic Social Services*, the primary target of the injunction was an illegal policy regarding inadmissibility waivers and adjustment of status—both outside chapter 4. *See* 8 U.S.C. §§ 1255(i), 1182(a)(9)(C)(ii). The district court also enjoined removals, but not because there was anything independently illegal about the removal process, only because the removal orders resulted from the illegal adjustment policy. Likewise, while the injunction in *Gonzales* also directly addressed inadmissibility waivers and adjustment of status, it barred the government from giving "legal effect" to wrongful denials, including in reinstatement of removal proceedings. 508 F.3d at 1232-33. As the Court explained, § 1252(f)(1) posed no barrier to that order because the "injunction's effect on reinstatement proceedings is one step removed from the relief sought by Plaintiffs." *Id.* at 1233 (quotation marks

omitted). Courts apply the same distinction in the tax context, and ask whether an injunction's effect on taxation constitutes "the suit's after-effect" or its "substance." *CIC*, 141 S. Ct. at 1591.

Abiding by the narrow text of § 1252(f)(1) thus yields a clear distinction. Courts typically cannot issue classwide injunctions aimed at the policies that implement the removal procedures in chapter 4. Otherwise, the injunction bar does not apply.

II. SECTION 1252(f)(1) DOES NOT BAR AN INJUNCTION IN THIS CASE.

Section 1252(f)(1) does not apply to the injunction the plaintiffs seek in this case. Here, "the thing sought to be enjoined," *CIC*, 141 S. Ct. at 1590, is not a policy implementing any covered provision. Rather, plaintiffs seek to enjoin a system-wide practice of noncompliance with the agency's own policy. *See* Opening Br. 49. Such a noncompliance practice does not *itself* implement the agency's statutory responsibilities. Rather, if anything, it is the agency's stated policy which implements the agency's understanding of those responsibilities—and the injunction would enforce, not restrain, that policy. *Id.* at 42-45. Thus, even were the Court to view the underlying policy as itself implementing a covered provision, the relief sought against the noncompliance practice is at least "one step removed from" relief potentially barred by § 1252(f)(1). *Gonzales*, 508 F.3d at 1233.

In any event, as plaintiffs note, the underlying policy (which is violated by the challenged practice) itself implicates a range of statutes and authorities outside of chapter 4—and, indeed, cites only the government's general powers. *See* Opening Br. 31 (policy is based on executive order which relies on general authorities only); 8 U.S.C. § 1103(a)(1), 6 U.S.C. § 211. The inferential chain required to support the district court's judgment is therefore notably attenuated—that § 1252(f)(1), which is keyed to operation of specific provisions, bars the injunction of a practice of noncompliance with a policy which in turn may primarily implement noncovered statutes, or, perhaps, no statutes at all. *See Church of Scientology of Cal. v. United States*, 920 F.2d 1481, 1487 (9th Cir. 1990) (discussing *Accardi* claim to enforce an agency's "internal operating procedures" not tied to any particular statute).

Thus, the government's position ultimately must be—as it stated below—that this injunction is barred because it may have some *effect* on the covered provisions. But for all the reasons given, that is not and cannot be correct given Congress's limited language in § 1252(f)(1).

CONCLUSION

The Court should reverse the district court's order denying Plaintiffs' motions for preliminary injunction and hold that collateral effects on covered provisions do not trigger § 1252(f)(1).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the limitation set forth in Federal Rules of Appellate Procedure 29(b)(4) and Ninth Circuit Rule 29-2(c)(2) because it contains 5,377 words, exclusive of the portions of the brief that are exempted by Rule 32(f). I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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December 12, 2023

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2023, I electronically filed the foregoing Brief of *Amici Curiae* with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

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