No. 24A949

In the Supreme Court of the United States

KRISTI NOEM, SECRETARY OF HOMELAND SECURITY, ET AL., APPLICANTS

v.

KILMAR ARMANDO ABREGO GARCIA, ET AL.

REPLY IN SUPPORT OF APPLICATION TO VACATE THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

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A federal district judge ordered the United States not only to "facilitate," but to "*effectuate* the return of Plaintiffs Kilmar Armando Abrego Garcia to the United States by no later than 11:59 PM" last evening. Appl. App. 79a (emphasis added). To "effectuate" means to "accomplish" or "bring about" an end.* Thus, contrary to respondents' characterizations, the order does not merely ask the government to "facilitate" Abrego Garcia's return—a term that respondents' own cases use to mean merely removing some United States–side impediments that would prevent an alien otherwise able to come back to the United States from re-entering. Opp. 9-10; see Appl. 16-17. Rather, the court's order takes the remarkable and unprecedented step of compelling the United States to *succeed* by 11:59 p.m. yesterday in negotiating Abrego Garcia's release and return from El Salvador, or else face contempt.

* See *Webster's Third New International Dictionary* 724, 725 (1989) (defining "effectuate" by reference to the definition of "effect," that is, "to cause to come into being" or "to bring about esp. through successful use of factors contributory to the result"); 5 *Oxford English Dictionary* 81 (2d ed. 1989) ("To bring to pass (an event); to carry into effect, accomplish (an intention, desire).").

The April 7, 2025 administrative stay relieved the government of that deadline. But vacatur of the order is warranted to prevent the district court from again ordering diplomacy on an impossible deadline, commandeering core Article II foreign relations functions, and independently transgressing the Immigration and Nationality Act's jurisdictional bar on collaterally challenging grounds for removal.

A. The United States Is Likely To Succeed On The Merits

1. An injunction demanding the release and return of an alien from a foreign sovereign violates Article II

The district court in this case ordered the United States "to facilitate and effectuate the return of Plaintiff Kilmar Armando Abrego Garcia to the United States." Appl. App. 79a. There can be no question about what "effectuating" Abrego Garcia's "return" means: It means that the government must "return Abrego Garcia to the United States." *Ibid.* The court's order expressly "DIRECTS Defendants to return Abrego Garcia to the United States," *ibid.*, and "order[s] that Defendants return Abrego Garcia to the United States" by 11:59 PM last night, *id.* at 82a. That order thus requires the United States to successfully persuade or compel the Government of El Salvador to release a member of a designated foreign terrorist organization who is on foreign soil under foreign control—and to do so by the district court's impossible deadline.

Yet respondents now focus entirely on the "facilitat[ing]" while ignoring the "effectuat[ing]" and "return." They do not defend the requirement that "Defendants return Abrego Garcia to the United States," Appl. App. 82a—perhaps because respondents below disclaimed being able to seek such relief as contrary to El Salvador's sovereignty, see *id.* at 40a, 42a, 44a, 47a. And rightly so: Abrego Garcia is a citizen of El Salvador being detained in El Salvador by the Government of El Salvador. To demand Abrego Garcia's return is thus to demand that a foreign nation release one

of its own citizens from one of its own detention centers and return him to the United States. But, as respondents "admitted[]" below, the district court "has no jurisdiction over the Government of El Salvador and cannot force that sovereign nation to release Plaintiff Abrego Garcia from its prison." *Id.* at 42a, 44a.

Even worse, ordering Abrego Garcia's return offends the separation of powers, which forbids one branch from dictating to another how that branch should exercise its core and exclusive powers. Congress cannot order a court to enter a particular judgment, because Article III vests the "judicial Power" in the Judiciary alone. U.S. Const. Art. III, § 1; see *Patchak* v. *Zinke*, 583 U.S. 244, 250 (2018) (Congress cannot enact "a statute that says, 'In *Smith* v. *Jones*, *Smith* wins'"). Nor can courts order Congress to pass particular bills, because Article I vests "legislative Powers" in Congress alone. U.S. Const. Art. I, § 1; see *Franklin* v. *Massachusetts*, 505 U.S. 788, 827-829 (1992) (Scalia, J., concurring in part and concurring in the judgment).

So too here, courts cannot order the Executive to conduct the country's foreign relations in a particular way, because under Article II, "the transaction of business with foreign nations is executive altogether." *Zivotofsky* v. *Kerry*, 576 U.S. 1, 39 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting Thomas Jefferson, Opinion on the Powers of the Senate (Apr. 24, 1790), in 5 *Writings of Thomas Jefferson* 161 (Paul Leicester Ford ed., 1895)); see, *e.g.*, *id.* at 32 (majority opinion) (holding that the power "to control recognition determinations" of foreign countries is an "exclusive power of the President"); *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (observing that foreign-policy decisions are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry"); *United States* v. *Curtiss-Wright*

Export Corp., 299 U.S. 304, 320 (1936) (describing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"). Just as a court could not order the Executive to secure Abrego Garcia's return by conducting a military operation, so, too, a court cannot order the Executive to secure Abrego Garcia's return by engaging in sensitive negotiations with a foreign power.

Against all this, respondents contend (Opp. 1) that the district court's injunction "does not implicate foreign policy" at all. But of course it does. Because Abrego Garcia is in the custody of a foreign sovereign, the only way the Executive could secure his return is by engaging in foreign relations with that other sovereign—the essence of "foreign policy." This Court has repeatedly admonished courts to "take[] care to avoid the danger of unwarranted judicial interference in the conduct of foreign policy," and to avoid "run[ning] interference in the delicate field of international relations." *Biden* v. *Texas*, 597 U.S. 785, 805 (2022) (brackets, citation, and internal quotation marks omitted).

Respondents maintain (Opp. 10) that because the government was able to swiftly remove respondent, it could "fly the same planes in the opposite direction." But there is a world of difference between removing an alien abroad and transferring him to the custody of a foreign sovereign; and reversing the process by entering foreign territory, obtaining the alien's release from a foreign sovereign, and extracting him from foreign soil—especially where, as here, that foreign sovereign may have its own compelling reasons to detain him. If the test were simply whether the United States could conceivably exercise all of its leverage or other diplomatic powers to return a particular alien, then the Executive Branch would be the Judiciary's junior diplomat, subject to apparent contempt proceedings if success is not assured.

Respondents (Opp. 10-11) cite statements by the attorney who was formerly representing the government in this case, who told the district court that he "ask[ed] my clients" why they could not return Abrego Garcia and felt that he had not "received * * * an answer that I find satisfactory." They likewise cite his statements that "the government made a choice here to produce no evidence" and that agencies "understand that the absence of evidence speaks for itself." Opp. 12 (citing SA120, SA128). Those inappropriate statements did not and do not reflect the position of the United States. Whether a particular line attorney is privy to sensitive information or feels that whoever he spoke with at client agencies gave him sufficient answers to satisfy whatever personal standard he was applying cannot possibly be the yardstick for measuring the propriety of this extraordinary injunction.

Respondents likewise err in relying on unsubstantiated news reports suggesting that the United States has control over El Salvador's detention arrangements. Opp. 11. For obvious reasons, the government cannot describe the details of its diplomatic arrangements with El Salvador. But this Office has been informed that El Salvador has its own legal rationales for detaining members of criminal associations and foreign terrorist groups like MS-13. Even what respondents seem to contemplate—requesting release by El Salvador—still requires negotiations with the foreign sovereign that is currently holding Abrego Garcia.

Respondents attempt to minimize the problems with the district court's injunction by suggesting that "[t]he Government 'can—and does—return wrongfully removed migrants as a matter of course.'" Opp. 1 (citation omitted). But despite characterizing the court's injunction as "routine" and "not novel," Opp. 1-2, respondents cite no order bearing any resemblance to this one, in which a district court directed the Executive to persuade a foreign nation to release one of its own citizens from one

of its own detention centers and return him to the United States—and succeed in one business day. Instead, the only cases respondents cite (Opp. 9-10) are lower-court decisions involving a U.S. Immigration and Customs Enforcement (ICE) policy directive about "facilitating" the return of certain lawfully removed aliens whose petitions for review are granted after their removal. ICE Policy Directive No. 11061.1, § 1, *Facilitating the Return to the United States of Certain Lawfully Removed Aliens* (Feb. 24, 2012) (ICE Policy Directive), perma.cc/95AT-VN72; see *Lopez-Sorto* v. *Garland*, 103 F.4th 242, 249 (4th Cir. 2024) (citing ICE Policy Directive); *Garcia* v. *Garland*, 73 F.4th 219, 234 (4th Cir. 2023) (same); *Nunez-Vasquez* v. *Barr*, 965 F.3d 272, 286 & n.10 (4th Cir. 2020) (same); *Gordon* v. *Barr*, 965 F.3d 252, 261 (4th Cir. 2020) (same); *Ramirez* v. *Sessions*, 887 F.3d 693, 706 (4th Cir. 2018) (same); *Orabi* v. *Attorney Gen.*, 738 F.3d 535, 538, 543 (3d Cir. 2014) (remanding with instructions that the government "be directed to return [the alien] to the United States in accordance with the ICE regulations cited," by which the court of appeals meant the ICE Policy Directive).

As our application explains (at 16-17), respondents' reliance on those lower-court decisions is misplaced. In the immigration context, "facilitate an alien's return" is a term of art, as reflected in the ICE Policy Directive's definition of the term. ICE Policy Directive § 3.1 (capitalization omitted). Under that definition, to "facilitate an alien's return" means "[t]o engage in activities which allow a lawfully removed alien to travel to the United States (such as by issuing a Boarding Letter to permit commercial air travel) and, if warranted, parole the alien into the United States upon his or her arrival at a U.S. port of entry." *Ibid.* (some capitalization omitted). Thus, the United States "facilitates an alien's return" by removing its own restrictions on travel and entry as barriers to the alien's return, or taking other United States–side steps

to remove obstacles that would otherwise impede an alien's ability to return. But as the policy directive makes clear, "facilitat[ing] an alien's return" does not require United States to aid the alien's return by taking any affirmative steps, such as "funding the alien's travel via commercial carrier to the United States or making flight arrangements for the alien." *Ibid.* Thus, the definition of "facilitat[ing] an alien's return" is a narrow one, and it does not require obtaining release from foreign sovereigns' custody or arranging (let alone financing) flights back into the United States. *Ibid.* And, of course, the ICE policy does not address aliens like respondent, who is a member of a designated Foreign Terrorist Organization, MS-13, and faces quite different and stricter restrictions under U.S. immigration law as a result—including ineligibility for statutory withholding of removal, see 8 U.S.C. 1231(b)(3)(B)(iv).

Not only do the cited cases involve very differently situated aliens who do not pose the danger to the community that Abrego Garcia does, but here, the district court went far beyond ordering the United States to "facilitate" Abrego Garcia's return pursuant to the narrow definition in the ICE Policy Directive. The court instead ordered the United States to "facilitate and effectuate" his return—which, again, means that the United States must *secure* his return, even if that entails going far beyond what the ICE Policy Directive on "facilitation" contemplates. Appl. App. 79a; see *Webster's Third* 724, 725; 5 *Oxford English Dictionary* 81. That order is both infeasible and unconstitutional.

2. Section 1252(g) of Title 8 deprives the district court of jurisdiction over respondents' claims

As our application explains (at 17-20), the district court's injunction should be vacated for an independent reason: Section 1252(g) of Title 8 deprives the district

court of jurisdiction over respondents' claims. Respondents' attempts (Opp. 13-14) to evade that jurisdictional bar lack merit.

Respondents contend (Opp. 13) that Section 1252(g)'s jurisdictional bar applies only to claims arising from the execution of "a *lawful* order of removal." According to respondents (*ibid.*), the order of removal here was not lawful because Abrego Garcia was removed to El Salvador, a country to which he was granted withholding of removal. But that argument conflates the removal order with its execution. Contrary to respondents' suggestion (*ibid.*), there is nothing unlawful about the removal order itself. Abrego Garcia conceded that he was removable "as charged," Appl. App. 7a, and respondents acknowledge that he could have been removed "to any *other* country on earth," *id.* at 46a. What respondents challenge is not *the fact* that Abrego Garcia was removed, but *where*—a question that goes to the execution of the order, not the order itself. See *Johnson* v. *Guzman Chavez*, 594 U.S. 523, 536 (2021) (explaining that withholding of removal "relates to *where* an alien may be removed"). Because the gravamen of respondents' complaint is that the government made an administrative error in executing Abrego Garcia's removal order by removing him to El Salvador—the country to which he had been granted withholding of removal—respondents' claims fall squarely within the scope of Section 1252(g)'s jurisdictional bar, which deprives courts of jurisdiction over any claim "arising from the decision or action" to "execute" a "removal order[]." 8 U.S.C. 1252(g).

Respondents' other attempt to evade Section 1252(g)'s jurisdictional bar fares no better. Respondents contend (Opp. 14) that the bar applies only to so-called "discretionary" decisions. But as our application explains (at 20), the issue is the subject of a circuit split, and the circuits that have held that Section 1252(g) "makes no distinction between discretionary and nondiscretionary decisions" are both correct and

faithful to the statute's plain meaning. *Silva* v. *United States*, 866 F.3d 938, 940 (8th Cir. 2017); see *Foster* v. *Townsley*, 243 F.3d 210, 214 (5th Cir. 2001) (similar). Respondents note (Opp. 14) that neither *Silva* nor *Foster* involved a grant of withholding of removal. But that misses the point. Both *Silva* and *Foster* held, as a matter of statutory interpretation, that the scope of Section 1252(g)'s jurisdictional bar is not limited to discretionary decisions.

In any event, the decision to execute Abrego Garcia's removal order was a discretionary decision. This Court has repeatedly recognized that the Executive Branch has "discretion over whether to remove a noncitizen from the United States." *United States* v. *Texas*, 599 U.S. 670, 679 (2023); see *Arizona* v. *United States*, 567 U. S. 387, 396 (2012) ("Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all."). Respondents' claims "challeng[ing] Abrego's *removal*," Opp. 15, fall within Section 1252(g)'s jurisdictional bar because they "aris[e] from the decision" to "execute" his "removal order[]," 8 U.S.C. 1252(g). For their part, two of the judges on the Fourth Circuit panel seemed to think that Section 1252(g)'s jurisdictional bar applies only to exercises of "*lawful* discretion." 2025 WL 1021113, at *2 (Thacker, J., concurring). But if the applicability of the jurisdictional bar turns on whether the government's actions in executing a removal order have already been adjudicated to be lawful, then the jurisdictional bar would have no practical application—its application would reduce to a merits determination.

3. At a minimum, the district court erred in ordering Abrego Garcia's return to the United States

As our application explains (at 21), this Court should vacate the district court's injunction at least insofar as it orders the government to return Abrego Garcia to *the United States*, because he has no entitlement to be here. Respondents have no re-

sponse to that argument. Indeed, they do not dispute that Abrego Garcia's removal order "remains in full force, and DHS retains the authority to remove him to any other country authorized by the statute." *Ibid.* (brackets and citation omitted).

B. The Other Factors Favor Vacating The Injunction

1. The questions presented by this case plainly warrant this Court's review

Respondents assert (Opp. 18) that this case does not warrant this Court's review because "[t]he government fails to identify any favorable authority supporting its position." But the government's position finds support in the Constitution and 8 U.S.C. 1252(g)—not to mention respondents' own concession that the district court "has no jurisdiction" to "force" the Government of El Salvador "to release Plaintiff Abrego Garcia from its prison." Appl. App. 42a, 44a. Respondents also contend (Opp. 19) that the district court's grant of what they describe as "routine relief" is not certworthy. But as explained above, there is nothing "routine" about directing the United States to persuade a foreign nation to release one of its own citizens from one of its own detention centers and return him to the United States, especially when that foreign nation may have its own compelling reasons to detain him. See pp. 2-7, *supra*. That is an important question of federal law that warrants this Court's review.

2. The district court's injunction causes irreparable harm to the government and public

As our application explains (at 22-23), the district court's injunction irreparably harms the government by placing the conduct of foreign relations under judicial superintendence, and it threatens irreparable harm to the public by directing the return of a member of foreign terrorist organization to the United States. In response, respondents assert (Opp. 14) that the government failed to argue in its Fourth Circuit stay motion that it would suffer irreparable harm. That is incorrect. The

government argued below, as it does here, that the court's injunction "represents an 'unwarranted judicial interference in the conduct of foreign policy' to the highest degree." Gov't C.A. Stay Mot. 19 (citation omitted); see *id.* at 10-11.

Respondents further assert (Opp. 15) that the government faces no harm because the court's injunction "is consistent with" lower-court decisions directing the government to "facilitate the return" of "wrongly removed individuals." But as explained above, each of those decisions directed the government to facilitate an alien's return pursuant to the ICE Policy Directive, which defines "facilitat[ion]" to encompass only the removal of barriers entirely within the United States' control. ICE Policy Directive § 3.1; see pp. 5-7, *supra.*

With respect to irreparable harm on the public, respondents contend that "the Government has conceded that Abrego Garcia 'should not have been removed.'" Opp. 15 (citation omitted). But what the government has acknowledged is that Abrego Garcia should not have been removed *to El Salvador*. Appl. App. 60a. That does not mean that Abrego Garcia should have remained in the United States. Abrego Garcia is "a verified member of MS-13," a designated foreign terrorist organization. *Id.* at 2a; see Appl. 22-23. A "'past, proven, and reliable source of information' verified [his] gang membership, rank, and gang name," Appl. App. 3a, and an IJ and the Board of Immigration Appeals considered and rejected Abrego Garcia's arguments that he is now making about the lack of evidence of his MS-13 connections, *id.* at 2a-3a, 4a-5a. Respondents contend (Opp. 3) that a different IJ "found [Abrego Garcia] to be credible, and concluded that he was the *victim* of gang violence in El Salvador." But none of that undermines the finding—also made by an IJ—that Abrego Garcia is "a verified member of MS-13." Appl. App. 2a. The United States has a compelling interest in not having a member of a foreign terrorist organization on U.S. soil, and the public

interest strongly favors the exclusion of foreign terrorists from the United States.

3. The balance of the equities favors vacating the injunction

On the other side of the ledger, vacating the injunction would not substantially or irreparably harm respondents. Respondents contend (Opp. 17) that Abrego Garcia faces irreparable harm from being detained in CECOT. But as the United States has reiterated, it would not have removed any alien to El Salvador for detention in CECOT if doing so would violate its obligations under the Convention Against Torture. Appl. 24.

Respondents also contend (Opp. 16) that the wrongfulness of Abrego Garcia's removal to El Salvador is itself harmful. But respondents do not dispute that Abrego Garcia's membership in a designated foreign terrorist organization would render him ineligible for withholding of removal to El Salvador if the issue arose today. Appl. 24-25. And respondents acknowledge (Opp. 16) that if Abrego Garcia had not been removed, the government could reopen his removal proceedings and "challenge the withholding of removal" based on his membership in MS-13. Any harm from the wrongfulness of Abrego Garcia's removal to El Salvador is thus substantially diminished in this case. And in any event, any such harm is outweighed by the harm that the district court's injunction threatens to cause the government and the public.

* * * * *

For the foregoing reasons and those stated in the government's application, this Court should vacate the district court's injunction.

Respectfully submitted.

D. JOHN SAUER
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