No. 21-1219

# In the Supreme Court of the United States

ESTELA MABEL ARGUETA ROMERO, PETITIONER

*v.*

ALEJANDRO N. MAYORKAS,
SECRETARY OF HOMELAND SECURITY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION


ELIZABETH B. PRELOGAR
*Solicitor General*
*Counsel of Record*
BRIAN M. BOYNTON
*Principal Deputy Assistant Attorney General*
WILLIAM C. PEACHEY
WILLIAM C. SILVIS
MICHELLE M. RAMUS
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

Whether a noncitizen who departs the United States before the issuance of a removal order is considered to have executed that order, precluding the government from executing the order again if the noncitizen later illegally reenters the country.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

# In the Supreme Court of the United States

No. 21-1219

ESTELA MABEL ARGUETA ROMERO, PETITIONER

*v.*

ALEJANDRO N. MAYORKAS,
SECRETARY OF HOMELAND SECURITY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 20 F.4th 1374. The order of the district court (Pet. App. 18a-22a) is not published in the Federal Supplement but is available at 2020 WL 12787977.

## JURISDICTION

The judgment of the court of appeals was entered on December 20, 2021. The petition for a writ of certiorari was filed on March 4, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In 1993, petitioner, a native and citizen of Guatemala, entered the United States unlawfully. Pet. App. 2a. In 1995, the federal government began re-

moval proceedings and issued a hearing notice. *Id.* at 2a-3a.[1] A week later, before the hearing could take place, petitioner voluntarily left the United States and returned to Guatemala. *Id.* at 3a. Three months later, an immigration judge held a hearing and ordered her removed *in absentia*. *Ibid.*

Petitioner illegally reentered the United States and, in 2016, applied for a stay of removal. Pet. App. 3a. Immigration and Customs Enforcement (ICE) temporarily approved the stay application and enrolled her in a supervision program. *Ibid.* In 2019, however, ICE denied petitioner's application to renew the stay of removal and ordered her to leave the United States pursuant to the 1995 removal order. *Ibid.*

2. Petitioner filed a petition for a writ of habeas corpus in federal district court. Pet. App. 18a. She argued that, because she had voluntarily left the United States three months before the issuance of the 1995 removal order, that order had already been executed. *Id.* at 19a-20a. She contended that, as a result, the government could not remove her until it either followed the procedures for reinstating the 1995 order or obtained a new removal order. *Id.* at 19a.

The district court concluded that it had jurisdiction over the petition for a writ of habeas corpus, Pet. App. 20a, but then denied the petition, *id.* at 20a-21a. The court determined that a noncitizen does not execute a removal order by leaving the country before the order

---

[1] Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, what were formerly known as "deportation" proceedings are now known as "removal" proceedings. See *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 33 n.1 (2006).

has even been issued. *Ibid.*[2] The court accordingly concluded that petitioner's 1995 removal order "was not executed by her voluntary departure from the United States, and therefore remains enforceable against her." *Id.* at 21a.

3. The court of appeals affirmed. Pet. App. 1a-17a.

The court of appeals began by rejecting three threshold objections to this suit. Pet. App. 5a-8a. First, the court acknowledged that, under 28 U.S.C. 2241(c), a federal court may grant a writ of habeas corpus only to a person who is "in custody." Pet. App. 5a (citation omitted). But the court concluded that petitioner was in custody because she had been subject to a supervision program while her removal was stayed. *Id.* at 6a. Second, the court acknowledged that, under 8 U.S.C. 1252(a)(5), a petition for review (not a petition for writ of habeas corpus) is the sole means of obtaining "judicial review of an order of removal." *Id.* at 6a (citation omitted). The court concluded, however, that Section 1252(a)(5) does not apply here because petitioner "doesn't seek review of an existing removal order but, rather, disputes that an operative order exists in the first place." *Id.* at 7a. Finally, the court acknowledged that, under this Court's decision in *Department of Homeland Security* v. *Thuraissigiam*, 140 S. Ct. 1959 (2020), habeas corpus provides a means of securing release, not a means of securing "additional administrative review." Pet. App. 8a n.4 (citation omitted). But the court concluded that the relief petitioner seeks—"release from her supervision conditions and

---

[2] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

planned deportation"—falls within the scope of habeas corpus. *Ibid.*

Turning to the merits, the court of appeals held that petitioner's 1995 removal order remains operative. Pet. App. 8a-16a. The court observed that, in 8 U.S.C. 1101(g), Congress provided that "any alien ordered deported or removed . . . who has left the United States, shall be considered to have been deported or removed in pursuance of law." *Id.* at 9a (citation omitted). The court concluded that the provision could plausibly be read in one of two ways. *Id.* at 9a-13a. It could be read to mean that a noncitizen is considered to have been removed if he has been ordered removed and he has left the United States, regardless of the order in which those two events occur. *Id.* at 9a. Alternatively, it could be read to mean that a noncitizen is considered removed if he was ordered removed and, after the entry of the order, left the United States. *Ibid.*

The court of appeals found the text of Section 1101(g) "genuinely ambiguous," but it concluded that two "tiebreakers" resolved the ambiguity in favor of the second reading. Pet. App. 12a-13a. First, the court invoked the rule of lenity. Another provision, 8 U.S.C. 1326(a), imposes criminal liability upon noncitizens who illegally reenter the United States after having been removed, and the court observed that petitioner's reading "would subject more aliens to potential criminal liability" under that provision. Pet. App. 13a-14a. Second, the court invoked deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). A federal regulation provides that a noncitizen "shall be considered to have been * * * removed" only if he departs the country

"while an order of * * * removal is outstanding," 8 C.F.R. 241.7; the court read that regulation to mean that a noncitizen cannot execute a removal order before the order has been issued. Pet. App. 15a-16a.

**ARGUMENT**

Petitioner renews her contention (Pet. 12-22) that she executed her 1995 removal order by leaving the United States before that order was issued, thus precluding the government from executing the order again without first reinstating it after she illegally reentered the United States. As an initial matter, threshold obstacles preclude this Court from reaching the merits of that contention in this case. In any event, the court of appeals correctly rejected that contention, and petitioner overstates the disagreement in the courts of appeals about an issue that has rarely arisen. The petition for a writ of certiorari should be denied.

1. Multiple obstacles stand in the way of petitioner's petition for a writ of habeas corpus.

First, under 8 U.S.C. 1252, the district court lacked jurisdiction over the petition for a writ of habeas corpus. Several provisions of Section 1252 require certain challenges to be brought in petitions for review rather than in petitions for writs of habeas corpus. Three of those provisions apply here: 8 U.S.C. 1252(a)(5), (b)(9), and (g).

The first provision, Section 1252(a)(5), provides that, notwithstanding any "habeas corpus provision," a petition for review filed under Section 1252 "shall be the sole and exclusive means for judicial review of an order of removal." 8 U.S.C. 1252(a)(5). That provision bars petitioner's habeas corpus petition because the petition challenges the continuing validity of "an order

of removal"—namely, the order entered against petitioner in 1995. *Ibid.* The second provision, Section 1252(b)(9), provides in pertinent part:

> Judicial review of all questions of law and fact * * * arising from any action taken * * * to remove an alien * * * shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus * * * to review * * * such questions of law or fact.

8 U.S.C. 1252(b)(9). That provision bars petitioner's habeas corpus petition because it challenges "any action taken * * * to remove an alien"—namely, ICE's actions to remove petitioner from the United States. *Ibid.* The third provision, Section 1252(g), provides that, except as provided elsewhere in Section 1252 and notwithstanding any "habeas corpus provision," "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary of Homeland Security] to * * * execute removal orders against any alien." 8 U.S.C. 1252(g). That provision, too, bars petitioner's habeas corpus petition, which arises from the government's "decision" to "execute" the 1995 removal order. *Ibid.*

Although the government relied on all three of those provisions in its brief below, see Gov't C.A. Br. 29-30, the court of appeals expressly addressed only Section 1252(a)(5), see Pet. App. 6a-8a. The court deemed Section 1252(a)(5) inapplicable because it believed that "a challenge to the *existence* of a removal order is different from a claim seeking judicial review of such an order." *Id.* at 7a. This case, however, does not concern the "existence" of a removal order; the government issued the 1995 removal order, leaving no

serious doubt that a removal order "exists." *Id.* at 2a. This case instead concerns the continuing legal effect of that order: Petitioner claims that, because she executed that order by leaving the United States before it was issued, the government may not execute the order without reinstating it. *Id.* at 8a. A challenge concerning the legal effect of a removal order qualifies as a request for "judicial review of an order of removal." 8 U.S.C. 1252(a)(5).

In any event, even if Section 1252(a)(5) does not apply, the other jurisdictional provisions on which the government relied—but which were not addressed by the court of appeals or by the petition for a writ of certiorari—still bar petitioner's resort to habeas corpus. Her habeas corpus petition challenges an "action taken * * * to remove an alien," 8 U.S.C. 1252(b)(9), and it arises from "the decision" of ICE to "execute removal orders against any alien," 8 U.S.C. 1252(g). See p. 6, *supra*.

Second, quite apart from the three separate provisions of Section 1252, Congress has also provided that a court may grant a writ of habeas corpus only to a "prisoner" who was "in custody" at the time of the filing of the petition. 28 U.S.C. 2241(c); see *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998). Petitioner, however, was not a "prisoner" who was "in custody" at the time she filed her habeas corpus petition; rather, she had been released into the community under an ICE supervision program. Pet. App. 3a. As this Court has remarked in a different context, it is textually "implausible" to describe a noncitizen who has been "'released on * * * supervised release'" as being "'in custody.'" *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 849 (2018) (citation omitted).

In concluding otherwise, the court of appeals relied on this Court's decision in *Jones* v. *Cunningham*, 371 U.S. 236 (1963), see Pet. App. 5a, but that decision does not establish that petitioner was in custody. In *Jones* and its follow-on cases, the Court determined that a person who has been convicted of a crime but who is not presently serving a prison sentence may still be in "custody" if he is subject to other "significant restraints on [his] liberty" as a result of the conviction. *Jones*, 371 U.S. at 242; see, *e.g.*, *ibid.* (parole); *Hensley* v. *Municipal Court*, 411 U.S. 345, 348-350 (1973) (release on bail or on one's own recognizance pending the commencement of a prison sentence). Those decisions rested, not on the ordinary meaning of the terms "prisoner" and "in custody" in Section 2241(c), but on the view that the scope of the habeas corpus statute "grow[s]" over time "to achieve its grand purpose." *Jones*, 371 U.S. at 243.

Entertaining the petition for a writ of habeas corpus in this case—which does not involve the imposition of restraints pursuant to a criminal conviction—would require a significant extension of *Jones*. This Court's cases do not require such an extension, which would go beyond any plausible understanding of the terms "prisoner" and "in custody" in Section 2241(c).

Third, in all events, the relief that petitioner seeks exceeds the proper scope of habeas corpus. This Court has explained that habeas corpus, at its core, concerns "release" from "unlawful executive detention." *Department of Homeland Security* v. *Thuraissigiam*, 140 S. Ct. 1959, 1970 (2020) (citation omitted). It does not cover "vacatur of [a] 'removal order.'" *Id.* at 1970-1971 (citation omitted). In this case, however, petitioner asked the district court to "[d]eclare that [she] execut-

ed her order of deportation," to "[s]tay [her] removal" and to ensure that she is "no longer under the threat of * * * removal." Compl. 11. Under this Court's decision in *Thuraissigiam*, that relief falls outside the proper scope of habeas corpus.

In reaching the contrary conclusion, the court of appeals reasoned that petitioner sought "release from her supervision conditions and planned deportation." Pet. App. 8a n.4. As just explained, however, petitioner's supervision conditions do not constitute "custody"; accordingly, relief from those conditions does not constitute "release." Further, *Thuraissigiam* establishes that "vacatur of [a] 'removal order'" falls outside the scope of habeas corpus, 140 S. Ct. at 1970; a noncitizen may not circumvent that principle by relabeling relief from a removal order as "release from * * * planned deportation," Pet. App. 8a n.4.

2. Putting aside those threshold issues, the court of appeals correctly rejected petitioner's claim on the merits. The dispute in this case concerns whether petitioner's 1995 removal order has been executed. If it has been executed, the government may remove her only if it follows the process for reinstating a previous removal order, see 8 U.S.C. 1231(a)(5), or for obtaining a new removal order, see, *e.g.*, 8 U.S.C. 1229, 1229a. If it has not been executed, however, the government may simply remove her pursuant to the existing order.

Petitioner contends (Pet. 16-22) that she executed her 1995 order by leaving the United States while her removal proceedings were pending, before the order was even issued. That contention, however, conflicts with the applicable statutory provision, 8 U.S.C. 1101(g). Section 1101(g) provides that "any alien *ordered* * * * *removed* * * * who has left the United

States, shall be considered to have been * * * removed in pursuance of law." *Ibid.* (emphasis added). A noncitizen thus executes a removal order by leaving the country after having been "ordered * * * removed"—not by leaving while removal proceedings remain pending. *Ibid.*

That interpretation of Section 1101(g) accords with common sense. The very concept of "execution" implies the existence of the thing being executed. Just as the President cannot execute a law that has not yet been passed, and a court officer cannot execute a judgment that has not yet been entered, so too a noncitizen cannot execute a removal order that has not yet been issued.

Even assuming that Section 1101(g) is ambiguous, the court of appeals properly deferred to the Executive Branch's reading under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Pet. App. 15a-16a. A federal regulation that has been materially unchanged since 1964 provides that "[a]ny alien who has departed from the United States *while an order of * * * removal is outstanding* shall be considered to have been * * * removed." 8 C.F.R. 241.7 (emphasis added); see 29 Fed. Reg. 6484 (May 19, 1964). That regulation—which is entitled "Self-removal"—confirms that a noncitizen can execute a removal order only while that order "is outstanding," 8 C.F.R. 241.7; the noncitizen cannot do so before the order has even been issued.

Petitioner's contrary arguments lack merit. Petitioner contends (Pet. 16) that the "[n]othing in the text of Section 1101(g) suggests that the timing of the removal order is relevant" and that, as long as a noncitizen has been ordered removed (at any time) and has

left the United States (at any time), the noncitizen is deemed to have executed the removal order. But that argument conflicts with the most natural reading of Section 1101(g). The phrase "any baseball player ejected by an umpire who has left the field" most naturally refers to a player who leaves the field after he is ejected—not to someone who left the field during the previous inning or the previous game. So too, the phrase "any alien ordered * * * removed * * * who has left the United States" most naturally refers to a noncitizen who leaves the United States after being ordered removed. Petitioner's contrary view would lead to absurd results. For example, if a noncitizen who is placed in removal proceedings surreptitiously crosses the border into Mexico or Canada and then crosses back seconds later, the noncitizen's brief departure would be deemed to have executed any removal order that results from the proceedings. Petitioner purports to avoid that concern by saying (Pet. 21) that Section 1101(g) will be triggered only when a noncitizen is "ordered removed" and "absent from the United States *at the same time*." But her insertion of a "same time" requirement belies her basic contention that Congress was indifferent to the timing of the two events.

Petitioner also argues (Pet. 17) that her reading would promote the "statutory purpose" of encouraging noncitizens to execute their own removal orders and thus to "preserve government resources." But Congress enacted Section 1101(g) to encourage noncitizens *who have been ordered removed* to leave the country on their own. See *Mrvica* v. *Esperdy*, 376 U.S. 560, 563-564 (1964) (discussing Congress's response to concerns about instances in which "the Department of

Labor has, in many cases, *after* a warrant of deportation has been issued, refrained from executing the warrant * * * upon the condition that the alien voluntarily * * * leave the United States") (emphasis added; citation omitted); see also *Mansour* v. *Gonzales*, 470 F.3d 1194, 1198 (6th Cir. 2006) (citing *Mvrica* for the proposition that "[i]t is well settled that when an alien departs the United States while under a final order of deportation, he or she executes that order pursuant to the law."). Petitioner provides no reason to believe that Congress went further and sought to encourage unauthorized departures that would create uncertainty about whether noncitizens who had been ordered to appear for removal proceedings instead remained at large in the United States.

3. Petitioner contends (Pet. 13-16) that the decision below conflicts with the Fifth Circuit's decision in *United States* v. *Ramirez-Carcamo*, 559 F.3d 384, cert. denied, 557 U.S. 928 (2009), and the Seventh Circuit's decision in *United States* v. *Sanchez*, 604 F.3d 356 (2010). Petitioner, however, overstates the extent of the disagreement.

In *Ramirez-Carcamo*, the Fifth Circuit determined that, if a noncitizen leaves the United States while removal proceedings are pending, is ordered removed *in absentia*, and later unlawfully reenters the country, he is subject to prosecution under 8 U.S.C. 1326 for illegal reentry. See 559 F.3d at 387-390. Although *Ramirez-Carcamo* and this case both concern noncitizens who left the United States during the pendency of removal proceedings, they address slightly different questions: *Ramirez-Carcamo* concerns whether such a noncitizen later becomes subject to prosecution for illegal reentry, while this case concerns whether the govern-

ment retains the ability to execute the original removal order. In addition, although *Ramirez-Carcamo*, like the decision below, considered the meaning of Section 1101(g), see *id.* at 388-389, it also considered the language of Section 1326, which is not directly at issue here, see *id.* at 387. Furthermore, *Ramirez-Carcamo* did not cite or discuss 8 C.F.R. 241.7, the regulation on which the court of appeals relied here. Any tension between *Ramirez-Carcamo* and the decision below thus does not rise to the level of a square circuit conflict.

In *Sanchez*, the Seventh Circuit affirmed a noncitizen's conviction under Section 1326 for illegal reentry. 604 F.3d at 360. Although the noncitizen had indisputably been removed pursuant to a removal order, the Seventh Circuit stated in passing that, "under our immigration laws, even aliens who elect to leave the United States to go any place before their removal orders have been fully implemented are 'considered to have been deported or removed in pursuance of law.'" *Id.* at 359 (citation omitted). As petitioner concedes and as the court of appeals recognized in the decision below, that remark was dictum. See Pet. 15; Pet. App. 13a n.5. It thus does not establish a circuit conflict with the decision below. Moreover, it does not even squarely address the relevant circumstance, since its reference to removal orders that have not "been fully implemented" more naturally encompasses orders that have been entered but not executed by the government than it does orders that do not yet exist.

At a minimum, any conflict regarding the question presented is shallow, and petitioner offers no sound reason to conclude that the question has arisen with sufficient frequency to warrant this Court's review.

Petitioner contends (Pet. 22-25) that the question could arise frequently in the context of noncitizens who have been returned to Mexico under the Migrant Protection Protocols (MPP). But petitioner identifies no specific case in which the question has arisen in the context of MPP; she simply speculates (Pet. 24) that the question could arise if individuals who have been returned to Mexico under MPP have removal orders entered against them *in absentia* and then reenter the United States.[3] In addition, a noncitizen's return to Mexico *by the federal government* differs from a voluntary departure of the kind at issue here. See *Mendez* v. *INS*, 563 F.2d 956, 958 (9th Cir. 1977) (concluding that Section 1101(g) distinguishes between voluntary and involuntary departures). If a square circuit conflict develops in the context of MPP, this Court could grant review at that time and in that context, but no basis exists to grant review now.

In all events, this case would be a poor vehicle for addressing the question presented. As explained above, multiple threshold obstacles would preclude this Court from reaching the merits of petitioner's contentions. See pp. 5-9, *supra*.

---

[3] A question about the applicability of Section 1101(g) to some MPP participants arose in *EJRO* v. *McLane*, No. 20-cv-1157, 2020 WL 7342664 (W.D. Tex. Dec. 14, 2020), but the plaintiffs in that case argued that "by operation of law, they were removed when immigration officials returned them to Mexico under [MPP] after they received their removal orders." *Id.* at *2. The district court concluded merely that a noncitizen "has executed" a removal order when she "departs the United States while under a removal order" that "had not yet become final." *Id.* at *4.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
*Solicitor General*
BRIAN M. BOYNTON
*Principal Deputy Assistant Attorney General*
WILLIAM C. PEACHEY
WILLIAM C. SILVIS
MICHELLE M. RAMUS
*Attorneys*

MAY 2022