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

REPLY BRIEF FOR THE PETITIONER

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In its brief in opposition, the government concedes that there is a circuit conflict regarding whether a noncitizen is considered "removed" when she departs after receiving a notice of removal proceedings, but before receiving a final removal order under 8 U.S.C. 1101(g). The government attempts to mitigate that concession by asserting that petitioner "overstates" the conflict and its importance; pointing to a slew of purported jurisdictional problems; and arguing about the merits. Those arguments are unavailing.

As to the circuit conflict: the government claims that the petition does not present a "square split" because the other cases arose in criminal rather than civil contexts. But the same statutory text applies in each case, and the

government cannot credibly claim that the same provision has different meaning in different contexts. The Court should not permit the government to continue taking inconsistent positions.

As to the importance of the question: the government suggests that the question will arise infrequently. But the Migrant Protection Protocols prove otherwise. Under that program, tens of thousands of immigrants left the United States before receiving final removal orders. Courts are already grappling with the application of Section 1101(g) to those circumstances, and this Court's guidance is sorely needed.

As to jurisdiction: the government makes a series of arguments, but none is plausible. Numerous courts of appeals have held that Section 1252 does not prevent a court from considering whether an operative removal order exists. And this Court has long recognized that restrictions on liberty—such as those petitioner faces—render a person "in custody," permitting the person to seek relief from those restrictions through habeas.

The government devotes the rest of its brief to the merits. But that discussion only highlights the substantiality of the question presented and the need for the Court's review. In any event, the government fails to establish that its view of the statute is supported by the text, context, or express purpose. The Court should grant review to resolve the circuit conflict and uphold the statute's plain meaning.

A. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals

Both the court of appeals and the government recognize the existence of a circuit conflict on the question presented.

The court of appeals concluded that it is "genuinely ambiguous" whether a noncitizen who departs prior to the issuance of a final removal order qualifies as an "alien ordered deported or removed * * * who has left the United States" under Section 1101(g). Pet. App. 12a. Applying the rule of lenity and *Chevron* deference, the court of appeals construed the statute's two conditions to "operate sequentially, not independently." *Id.* at 13a.

By contrast, as the court below recognized, two other courts of appeals "have concluded that § 1101(g) unambiguously entails two independent conditions." Pet. App. 13a n.5 (citing *United States* v. *Ramirez-Carcamo*, 559 F.3d 384, 389 (5th Cir.), cert. denied, 557 U.S. 928 (2009), and *United States* v. *Sanchez*, 604 F.3d 356, 359 (7th Cir. 2010)). The Fifth Circuit reasoned that Section 1101(g)'s plain language was "controlling" and that, "[n]o matter whether the removal order comes first and the [noncitizen] then departs, or, as here, the departure comes first and then removal is ordered *in absentia*," the noncitizen is "removed." *Ramirez-Carcamo*, 559 F.3d at 388-389. The Seventh Circuit agreed, explaining that noncitizens who depart "before their removal orders have been fully implemented" are considered removed pursuant to law. *Sanchez*, 604 F.3d at 359 (citing 8 U.S.C. 1101(g)).

The government grudgingly acknowledges that there is "disagreement" on the question presented, but it asserts that petitioner "overstates" the conflict. Br. in Opp. 12-13. That is incorrect.

The government first takes issue with the Fifth Circuit's decision in *Ramirez-Carcamo*, pointing out that the court failed to consider a Department of Homeland Security regulation that supports the government's position. See Br. in Opp. 12-13. But that simply underscores the conflict. Unlike the court of appeals here, the Fifth Cir-

cuit did not resort to agency regulations because it considered the statute's plain language "controlling." 559 F.3d at 388.

The government also notes that *Ramirez-Carcamo* was a criminal case that "considered the language of Section 1326," the illegal-reentry statute, "which is not directly at issue here." Br. in Opp. 13. But that is a distinction without a difference. In *Ramirez-Carcamo*, as here, the question was whether a noncitizen had been "removed," and in both cases, the court of appeals answered that question by looking to Section 1101(g). But urged on by a flip-flopping government, the courts of appeals have reached differing conclusions about that statute's meaning. See Pet. 13-16. The government cannot seriously argue that "removed" should mean something different in those two contexts. Section 1101 itself notes that the definitions contained therein apply throughout "th[e] chapter." The court of appeals in this case recognized as much when it considered the terms of the illegal-reentry statute in applying the rule of lenity. See Pet. App. 13a-15a. Yet in framing the conflict as "tension" that "does not rise to the level of a square conflict," Br. in Opp. 13, the government suggests that it has no qualms about continuing to take inconsistent positions on the meaning of Section 1101(g), depending on how it stands to benefit. The Court should not countenance that practice.

The government next turns to the Seventh Circuit's decision in *Sanchez*. See Br. in Opp. 13. Addressing the Seventh Circuit's recognition that those who leave "before their removal orders have been fully implemented" are nonetheless considered removed pursuant to law, 604 F.3d at 359, the government claims that statement should be read to encompass "orders that have been entered but not executed by the government," not orders that have

not yet been issued. Br. in Opp. 13. But the Seventh Circuit's opinion belies that reading, as it states (citing *Ramirez-Carcamo* in support) that a noncitizen is considered removed "when he leaves on his own volition in the face of pending immigration proceedings." 604 F.3d at 359. The Seventh Circuit thus had precisely this circumstance in mind.

Notwithstanding the government's halfhearted efforts to paper over its prior inconsistent positions, the government ultimately agrees that there is a conflict on the question presented. That conflict is square and warrants the Court's review.

B. The Decision Below Is Erroneous

Given the conceded existence of a conflict, the government's merits arguments (Br. in Opp. 9-12) are largely irrelevant at this stage. It suffices to note that the parties' sharply contrasting views about the meaning of Section 1101(g) underscore the need for this Court's review. Just a few points bear addressing here.

1. The government fails to engage with petitioner's textual analysis, which demonstrated that Section 1101(g) describes two statuses a noncitizen must possess to be considered "removed" and not two actions that must be taken in sequential order. See Pet. 16-17. The government instead argues that the statute unambiguously requires that a noncitizen have been ordered removed before leaving the United States because "[t]he very concept of 'execution' implies the existence of the thing being executed." Br. in Opp. 10. But the government's focus on "execution" is puzzling, because that term appears nowhere in Section 1101(g). To be sure, the parties and the courts below referred to "self-execution" of the removal order as a useful shorthand. But the relevant question is whether petitioner is "considered to have been deported

or removed in pursuance of law." 8 U.S.C. 1101(g). Whatever one might say about the meaning of the word "execution" in the abstract, Section 1101(g)'s text does not require a removal order to predate the noncitizen's departure. See Pet. 16-17.

2. The government next attempts an analogy, comparing "any alien ordered deported or removed * * * who has left the United States" with "any baseball player ejected by an umpire who has left the field," and submitting that the latter phrase naturally refers to a player who is ejected and *then* leaves. Br. in Opp. 11. But that misapprehends the rules of baseball: umpires frequently eject hecklers from the dugouts. See, *e.g.*, Anthony DiComo, *Mad Max Gets Tossed . . . On His Day Off*, MLB News (May 3, 2022) <www.mlb.com/news/max-scherzer-ejected-from-mets-dugout>; see also NCAA, 2021 and 2022 Rules Book, Rule 2-26(d) (Oct. 2020) <tinyurl.com/NCAA21-22> (specifically providing that a player can be "ejected after removal from the game"). While the more common scenario may occur as the government suggests—in both baseball and removal—nothing in the statute *limits* removal to those circumstances. And as petitioner has explained, the statutory context and express purpose support the broader reading. See Pet. 17-19.

3. The government disputes that petitioner's reading is consistent with congressional purpose, claiming that Congress would not want to encourage "unauthorized departures" that would "create uncertainty" about whether the noncitizen had left. Br. in Opp. 12. But the government offers no support for the converse proposition that Congress wanted to incentivize a noncitizen who entered unlawfully to remain here until her removal hearing, which could take months or years—a proposition that even the court of appeals recognized as "more than a little

odd." Pet. App. 12a. Common sense and Congress's express purpose compel the opposite conclusion: Congress sought to place removable noncitizens who depart at their own expense on equal footing with those who are formally removed. See Pet. 17-19.

4. Finally on the merits, the government repeats the court of appeals' flawed contention that petitioner's interpretation would allow a noncitizen to step across the border for 10 seconds and thereby execute a removal order issued years later. See Br. in Opp. 11. But as petitioner has explained, Section 1101(g) is best read to require that the noncitizen *simultaneously* possess both statuses—that she is both ordered removed and absent from the United States. See Pet. 21. Recognizing that the two must coincide in no way suggests that the order in which they occur is also relevant.

* * * * *

The government's arguments cannot overcome Section 1101(g)'s plain text, context, and express purpose—all of which point to the conclusion that a noncitizen may be considered "removed" when her final order of removal issues after she leaves the United States. The court of appeals' erroneous interpretation warrants the Court's review.

C. The Question Presented Is Important And Warrants Review In This Case

The government attempts to distract from the circuit conflict by claiming that the question arises infrequently and that there are numerous jurisdictional issues that the court of appeals ignored or incorrectly decided. See Br. in Opp. 5-9, 13-14. But the government cannot reasonably dispute that the question presented has significant implications for the tens of thousands of noncitizens who have been returned to Mexico before receiving final orders of

removal. And each of the government's purported jurisdictional issues is baseless.

1. Under the Migrant Protection Protocols (MPP), the government returns noncitizens to Mexico to await removal proceedings, with the expectation that they will be permitted to reenter the United States to attend their removal hearings. Yet a significant number never appear at their hearings and are thus removed in absentia. Even those who are ordered removed when attending their hearings are returned to Mexico before their removal orders become final. The government's interpretation of Section 1101(g) means that all of those removal orders remain unexecuted. See Pet. 22-23.

The government fails to distinguish the MPP context from the circumstances presented here. The government claims (Br. in Opp. 14) that Section 1101(g) somehow distinguishes between voluntary and involuntary departures. But the text of the statute does the opposite, treating any noncitizen who "has left the United States" identically regardless of whether the government effectuated her transportation or she left on her own. Nor does *Mendez* v. *INS*, 563 F.2d 956 (9th Cir. 1977), support the government's view. In that case, the Ninth Circuit recognized an atextual limitation on Section 1101(g), concluding that it does not cover "illegally executed departures effected by the government." *Id.* at 959. The government has not suggested that MPP operates illegally, so that analysis does not apply.

The government faults petitioner for failing to identify a "specific case in which the question has arisen in the context of MPP," Br. in Opp. 14, but petitioner cited just such a case: *A.M.P.V.* v. *Barr*, Civ. No. 20-913, 2020 WL 2079433 (D.D.C. Apr. 30, 2020). See Pet. 23. There, the district court concluded that the plaintiff was not removed

when she returned to Mexico at the conclusion of her removal hearing because the removal order was not final. See *A.M.P.V.*, 2020 WL 2079433, at *5. The court thus held that the plaintiff remained subject to the removal order when she reentered the United States. See *ibid.*

Indeed, the government's suggestion that this issue has not arisen in the MPP context is puzzling, given its own citation of *EJRO* v. *McLane*, Civ. No. 20-1157, 2020 WL 7342664 (W.D. Tex. Dec. 14, 2020). There, the district court considered a noncitizen who had been returned to Mexico under MPP. See *id.* at *4. Citing the Fifth Circuit's analysis in *Ramirez-Carcamo*, the district court recognized that a noncitizen who was "returned to Mexico under an order of removal that had not yet become final" had nonetheless "executed that order pursuant to law." *Ibid.*

As those cases show, the question here is undoubtedly relevant to the tens of thousands of noncitizens that the government has returned to Mexico. This case presents an ideal opportunity to provide needed guidance on an important and already recurring question.

2. The government's efforts to erect various jurisdictional barriers are unavailing.

a. The government first contends (Br. in Opp. 5-7) that three provisions of 8 U.S.C. 1252 deprive the Court of jurisdiction. Remarkably, the government fails to cite any authority that supports that contention, and petitioner is aware of none.

As the court of appeals correctly explained, Section 1252(a)(5) does not preclude habeas review here. See Pet. App. 7a-8a. Under that provision, a "petition for review" is the "sole and exclusive means for judicial review of *an order of removal*." 8 U.S.C. 1252(a)(5) (emphasis added). The statute thus establishes an exclusive forum for judicial review of an extant removal order. It does not apply

to the antecedent question of whether an operative removal order exists, as multiple courts of appeals have recognized. See *Madu* v. *Attorney General*, 470 F.3d 1362, 1366-1367 (11th Cir. 2006); *Kumarasamy* v. *Attorney General*, 453 F.3d 169, 172 (3d Cir. 2006); see also *Singh* v. *Gonzales*, 499 F.3d 969, 978 (9th Cir. 2007).

The same analysis applies to Sections 1252(b)(9) and 1252(g). Section 1252(b) applies "[w]ith respect to review of a[] [final] order of removal under subsection (a)(1)." 8 U.S.C. 1252(b); see *Chehazeh* v. *Attorney General*, 666 F.3d 118, 132 (3d Cir. 2012); *Singh*, 499 F.3d at 978; *Madu*, 470 F.3d at 1367. Indeed, this Court recently recognized that Section 1252(a)-(b) governs judicial review of "final orders of removal." *Nasrallah* v. *Barr*, 140 S. Ct. 1683, 1690 (2020). And Section 1252(g) provides that courts lack jurisdiction over claims that arise from conduct to "execute removal orders." The government cannot "execute" a removal order that "does not exist." *Camarena* v. *Director, ICE*, 988 F.3d 1268, 1273 (11th Cir. 2021) (citing *Madu*, 470 F.3d at 1367-1368). Because petitioner's suit challenges the very existence of an operative removal order, nothing in Section 1252 deprives the Court of jurisdiction.

b. The government next contends (Br. in Opp. 7-8) that petitioner is not in "custody" as required for habeas jurisdiction under 28 U.S.C. 2241(c). But this Court has already established that a habeas petitioner is in "custody" even when not confined where the petitioner is subject to restrictions that "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do." *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963).

The government's attempts to cast doubt on that long-settled standard or limit it to the criminal context lack any

basis in precedent. Numerous courts of appeals have determined that noncitizens are in "custody" when they face immigration-related restrictions and impending removal, as does petitioner here. See *Gonzalez-Alarcon* v. *Macias*, 884 F.3d 1266, 1275 n.4 (10th Cir. 2018); *Kolkevich* v. *Attorney General*, 501 F.3d 323, 334 n.6 (3d Cir. 2007); *Simmonds* v. *INS*, 326 F.3d 351, 356 (2d Cir. 2003); *Mustata* v. *Department of Justice*, 179 F.3d 1017, 1021 n.4 (6th Cir. 1999); *Nakaranurack* v. *United States*, 68 F.3d 290, 293 (9th Cir. 1995); *United States ex rel. Marcello* v. *District Director of INS*, 634 F.2d 964, 971 & n.11 (5th Cir. 1981).

c. Finally, as the court of appeals recognized (Pet. App. 8a n.4), the relief petitioner seeks is consistent with *Department of Homeland Security* v. *Thuraissigiam*, 140 S. Ct. 1959 (2020). There, this Court rejected a migrant's effort to use habeas to "obtain additional administrative review" of his asylum claim—that is, to secure "the opportunity to remain lawfully in the United States." *Id.* at 1963, 1971. This Court held that habeas is a means of obtaining "simple release" from "unlawful executive detention," *id.* at 1970-1971, and is not a proper vehicle for "further review of [an] asylum claim," *id.* at 1972. At the same time, the Court recognized that release from custody may have the "collateral consequence" of affording a noncitizen the "opportunity to remain in the country if the immigration laws permit." *Id.* at 1974.

Here, petitioner seeks release from unlawful custody. The government cannot properly subject her to removal or to an order of supervision when she is not subject to an operative removal order. That her success in this case would require the government to follow reinstatement procedures to effectuate her removal is simply a collateral consequence. Petitioner's claim is therefore permissible under *Thuraissigiam*.

* * * * *

The courts of appeals are divided on a question of considerable significance. The Court should reject the government's feeble efforts to downplay that division and to erect jurisdictional hurdles. The conflict is real; the jurisdictional issues are not. The Court should grant certiorari to ensure uniformity on an important question of immigration law.

Respectfully submitted.

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