No. 20-___

IN THE

Supreme Court of the United States

DED RRANXBURGAJ,
Petitioner

v.

DAVID P. PEKOSKE, ACTING U.S. SECRETARY OF HOMELAND SECURITY, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

8 U.S.C. § 1252(g) provides that "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 Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." The question presented, on which the courts of appeal are divided, is:

Do legal determinations antecedent to agencies' discretionary decisions to commence proceedings, adjudicate cases, or execute removal orders "arise from" these decisions for purposes of 8 U.S.C. § 1252(g)?

PARTIES TO THE PROCEEDINGS

Petitioner is Ded Rranxburgaj. Respondents are Acting Secretary David P. Pekoske, United States Department of Homeland Security, Robert M. Wilkinson, Acting Attorney General of the United States, Rebecca Adducci, Detroit Field Office Director, Office of Detention and Removal Operations, and Thomas D. Homan, United States Immigration and Customs Enforcement.

RELATED PROCEEDINGS

Petitioner is not aware of any related proceedings.

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The opinion of the U.S. Court of Appeals for the Sixth Circuit (App., *infra*, 1a-11a) is available at 825 F. App'x 278 (6th Cir. 2020).

The U.S. District Court for the Eastern District of Michigan's opinion and order (App., *infra*, 12a-20a) is unreported and is available at 2019 U.S. Dist. LEXIS 155433 (E.D. Mich. Sept. 12, 2019).

JURISDICTION

The Sixth Circuit Court of Appeals issued its judgment on August 26, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

8 U.S.C. § 1252(g) states:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, 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 Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

INTRODUCTION

8 U.S.C. § 1252(g) bars judicial review of claims "arising from the decision or action by the Attorney General to [1] commence proceedings, [2] adjudicate cases, or [3] execute removal orders against any alien under this chapter." More than twenty years ago, in *Reno v. American-Arab Anti-Discrimination Committee* (*AADC*), this Court underscored that the provision was "narrow" and "directed against [the] particular evil" of imposing judicial constraints on the three enumerated categories, which it likened to exercises of prosecutorial discretion. 525 U.S. 471, 485 n.9, 487 (1999). But *AADC* did not address what types of claims can properly be deemed to "arise from" the three kinds of decisions or actions identified in the statute.

In the decades since *AADC*, the circuit courts have come to "disagree about how to interpret § 1252(g) . . . [and] there is no prevailing interpretation of the statute." Matthew Miyamoto, Comment, *Whether 8 USC § 1252(g) Precludes the Exercise of Federal Jurisdiction over Claims Brought by Wrongfully Removed Noncitizens*, 86 U. CHI. L. REV. 1655, 1672 (2019). In particular, these courts have split on whether § 1252(g) insulates from judicial review challenges to legal determinations that are antecedent to an agency's decision to "[1] commence proceedings, [2] adjudicate cases, or [3] execute removal orders." 8 U.S.C. § 1252(g). Some circuits hold that challenges to such antecedent determinations "arise from" the enumerated categories because they are "directly connected" to them. *E.g.*, *Silva v. United States*, 866 F.3d 938, 940 (8th Cir. 2017). Others have held that § 1252(g) does

not bar challenges that raise "purely legal question[s]" that "form[] the backdrop against which the Attorney General later will exercise discretionary authority." *E.g.*, *United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc).

In the pending case, to the detriment of petitioner Ded Rranxburgaj, the Sixth Circuit sided with the courts that have read "arising from" broadly. Mr. Rranxburgaj is an immigrant subject to an order of removal who "has raised his children here, legally worked and paid taxes, and committed no crime." App., *infra*, 11a. He sought a stay of removal so that he could remain with his wife, who is incapacitated by multiple sclerosis. *Id.* at 3a. After Immigration and Customs Enforcement (ICE) failed to respond to his stay application, Mr. Rranxburgaj took shelter with his wife in a church, *id.*, and missed his scheduled check-in with ICE for the first time in ten years. ICE immediately designated Mr. Rranxburgaj a "fugitive." *Id.* On that categorical basis alone, ICE chose to dismiss his stay application as "moot" rather than use its discretion to evaluate his application. *Id.* at 3a, 15a.

Because Mr. Rranxburgaj does not meet the legal standard for a "fugitive" established by federal case law, he brought suit challenging this designation. His challenge was not to ICE's decision to execute his removal, but rather to the legal error it committed in designating him a fugitive. Nevertheless, the Sixth Circuit read § 1252(g) broadly to bar jurisdiction over his claim, rejecting the narrower approach taken by the Ninth Circuit as "contrary to our precedent." App., *infra*, 9a n.4.

Certiorari is warranted to address the existing circuit split and to resolve it in favor of the narrower

reading of § 1252(g). The approach taken by the Sixth Circuit reads "arising from" in tension with its plain meaning, ignores the long-established presumption in favor of judicial review, and encourages executive overreach. It gives ICE *carte blanche* to ignore federal common law, remove noncitizens in violation of court-ordered stays, and commit all kinds of other legal violations as long as it can claim some connection between its actions and the three enumerated categories. Certiorari should be granted because Mr. Rranxburgaj's case is an ideal vehicle for resolving an issue that has created an ever-deepening circuit split over the past two decades.

STATEMENT OF THE CASE

I. Legal Framework

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). That statute revised the judicial review scheme in the Immigration and Nationality Act (INA). Among other changes, Congress added 8 U.S.C. § 1252(g), titled "Exclusive jurisdiction." The provision states that, "[e]xcept as provided" elsewhere in § 1252, courts lack jurisdiction over "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders" in immigration proceedings. 8 U.S.C. § 1252(g).

Before IIRIRA's enactment, a group of noncitizens had challenged the government's decision to commence removal proceedings against them. *AADC*, 525 U.S. at 473. Upon the statute's passage—which

made only subsection (g) of § 1252 applicable to pending cases—the government argued that § 1252(g) stripped the federal courts of jurisdiction to hear the case. *Id.* at 480-82. More generally, the United States maintained that, unless jurisdiction was expressly provided for elsewhere in § 1252, subsection (g) operated as "a sort of 'zipper' clause" to bar judicial review of any and all deportation-related issues. *Id.* at 482.

This Court disagreed with this position. Writing for the Court, Justice Scalia rejected the broad interpretation urged by the government, favoring instead a "narrow reading" of § 1252(g). *Id.* at 487. The Court concluded that the provision "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to *commence* proceedings, *adjudicate* cases, or *execute* removal orders." *Id.* at 482 (quoting § 1252(g)) (emphasis added in original). Each of these three categories invoked the discretionary power of the Attorney General to withhold action, such as to "decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation." *Id.* at 484 (internal quotations omitted).

The Court explained that § 1252(g) was "directed against a particular evil" and specifically "attempts to impose judicial constraints upon prosecutorial discretion." *Id.* at 485 n.9. Because the case involved a selective prosecution claim that squarely attacked the Attorney General's decision to commence proceedings, the Court held that respondents' claim was unreviewable. *Id.* at 487. The Court acknowledged that this narrow reading might make the provision "redundant" with other aspects of § 1252, but concluded that the subsection's

application to pending cases "alone justifies its existence." *Id.* at 483.

Since *AADC*, courts of appeal have divided over the types of claims that "arise from" the three categories of agency action articulated in § 1252(g). *See infra* at 11-15. To date, however, this Court has not addressed the division. In the years since *AADC*, it has considered the scope of § 1252(g) directly only once (and briefly).[1] In *Department of Homeland Security v. Regents of the University of California*, this Court devoted four sentences to whether § 1252(g) barred it from reviewing an Administrative Procedure Act (APA) challenge to the rescission of a deferred action from deportation program. 140 S. Ct. 1891, 1907 (2020). Reiterating that § 1252(g) is "narrow," the Court concluded that "[t]he rescission, which revokes a deferred action program with associated benefits, is not a decision to 'commence proceedings,' much less to 'adjudicate' a case or 'execute' a removal order." *Id. Regents* did not engage with the broader confusion plaguing the lower courts over the scope of § 1252(g).

II. Factual History

Mr. Rranxburgaj, his wife, and their young son came to the United States from Albania in 2001. App., *infra*, 2a. The family unsuccessfully sought asylum

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[1] In the interim, as part of the REAL ID Act of 2005, Congress amended § 1252(g) to clarify that this provision also precluded jurisdiction over habeas claims that fell within its scope. *See* Pub. L. 109-13, § 106(a)(3), 119 Stat. 231, 311 (2005). Because Mr. Rranxburgaj does not bring a habeas claim, the REAL ID Act has no bearing on his case.

and became subject in 2009 to a final order of removal. *Id.* at 2a, 5a-6a.

In the interim, in 2007, Mr. Rranxburgaj's wife was diagnosed with multiple sclerosis, a progressive and incurable disease that attacks the central nervous system. App., *infra*, 2a-3a. Three years later, and one year after their removal order became final, ICE agreed to let the couple remain in the United States and placed them under an order of supervision. *Id.* at 2a, 15a. Their son similarly was permitted to remain. *Id.* at 15a. A second son, born several years before Mrs. Rranxburgaj's diagnosis, has U.S. citizenship.

In the years that followed, Mr. Rranxburgaj abided by all conditions of the order of supervision. App., *infra*, 14a. He "raised his children here, legally worked and paid taxes, and committed no crime." *Id.* at 11a. He also "demonstrated admirable devotion to his wife as she fights a terrible illness." *Id.* Because of how much his wife's multiple sclerosis had progressed, she was "entirely dependent" on Mr. Rranxburgaj "for everything, including the most basic needs." *Id.* at 3a (quotation marks omitted).

In October of 2017, after nearly a decade of Mr. Rranxburgaj's full compliance with his order of supervision, an ICE agent told him to leave the country by the end of January 2018. *See* App., *infra*, 2a; *cf.* Dep't of Homeland Sec., *Enforcement of the Immigration Laws to Serve the National Interests* (Feb. 20, 2017) (providing that "the Department no longer will exempt classes or categories of removable aliens from potential enforcement").[2]

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[2] DHS recently rescinded this enforcement policy. *See* Dep't of Homeland Sec., *Review of and Interim Revision to Civil*

Mr. Rranxburgaj's wife was not ordered to leave with him because her multiple sclerosis prevents her from traveling. App., *infra*, 14a. Consistent with the agent's instruction, Mr. Rranxburgaj purchased a plane ticket to Albania for a flight departing on January 25. *Id.* at 2a. He presented this itinerary at his November ICE check-in. *Id.*

On December 8, 2017, Mr. Rranxburgaj applied for a one-year stay of removal. App., *infra*, 2a-3a, 22a. Pursuant to 8 C.F.R. § 241.6, an ICE district director may grant such a stay "in his or her discretion and in consideration of factors listed in 8 C.F.R. § 212.5 and section 241(c)" of the INA. 8 C.F.R. § 241.6. The factors reference characteristics like the urgency of humanitarian interests and the propriety of removal. *See* 8 C.F.R. § 212.5(b); 8 U.S.C. § 1231(c)(2)(A). The stay regulation further provides that "[n]either the request nor failure to receive notice of disposition of the request shall . . . relieve the alien from strict compliance with any outstanding notice to surrender" for removal. 8 C.F.R. § 241.6.

Mr. Rranxburgaj's stay application explained that he needed to remain in the country to continue caring for his wife. App., *infra*, 3a, 21a. He emphasized that his deportation would be "a death sentence" for her because she cannot care for herself. *Id.* at 3a. The application included medical records evidencing his wife's declining health; tax returns for the past thirteen years; and more than eighty personal letters of support attesting to Mr. Rranxburgaj's critical role in tending to his wife and to her dependency on him. *Id.*

Immigration Enforcement and Removal Policies and Priorities (Jan. 20, 2021).

"Weeks passed, but ICE did not act on [Mr.] Rranxburgaj's application." App., *infra*, 3a. On January 9, 2018, Mr. Rranxburgaj attended another check-in. *Id.* at 22a. A final check-in was scheduled for January 17. *Id.* at 14a. The day before that check-in, the Rranxburgaj family openly took sanctuary in their Detroit church. *Id.* at 3a, 14a.

As a result, Mr. Rranxburgaj did not attend his scheduled January 17 ICE check-in. App., *infra*, 3a, 14a. With full knowledge of his whereabouts and without ever having ordered Mr. Rranxburgaj to surrender for removal, ICE dismissed Mr. Rranxburgaj's stay application as "moot" on that same day, stating that his "willful failure" to attend the meeting had made him a "fugitive." *Id.* at 14a, 22a. Mr. Rranxburgaj moved for reconsideration, pointing to an extensive body of case law holding that fugitive status does not attach where the person in question misses an appointment but remains in the jurisdiction and keeps ICE informed of his whereabouts. *Id.* at 3a, 14a. ICE denied Mr. Rranxburgaj's multiple requests for reconsideration. *Id.* at 3a.

III. Procedural History

In June of 2018, Mr. Rranxburgaj filed a complaint in the U.S. District Court for the Eastern District of Michigan. App., *infra*, 4a. He asserted that ICE violated the APA when it incorrectly applied the fugitive disentitlement doctrine to dismiss his stay application as moot. *Id.* at 4a, 16a. Mr. Rranxburgaj asked the trial court to set aside ICE's application of the fugitive disentitlement doctrine, clearing the path

for the agency to adjudicate his stay application on the merits. *Id.* at 16a.

The defendants sought dismissal, claiming that § 1252(g) prohibited judicial review of Mr. Rranxburgaj's claim. App., *infra*, 17a. The district court held that it lacked subject matter jurisdiction, prompting Mr. Rranxburgaj to appeal.[3] *Id.* at 19a.

The Sixth Circuit acknowledged this Court's admonition in *AADC* that § 1252(g) should be interpreted narrowly. App., *infra*, 6a. Nevertheless, the court held that it had no jurisdiction to hear Mr. Rranxburgaj's claims. *Id.* at 9a. In its view, Mr. "Rranxburgaj's challenge . . . goes directly to ICE's decision to execute an order of removal." *Id.* at 10a. Concluding that § 1252(g) stripped the federal courts of jurisdiction—even over legal issues antecedent to the agency's exercise of discretion—the Sixth Circuit did not address whether ICE had the legal authority to invoke the fugitive disentitlement doctrine with respect to Mr. Rranxburgaj. *Id.* at 11a. In finding no jurisdiction, it rejected Mr. Rranxburgaj's invocation of § 1252(g) case law from another circuit as "unpersuasive" and "contrary to our precedent." *Id.* at 9a n.4.

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[3] In dismissing the case for lack of subject matter jurisdiction, the district court relied not on § 1252(g), but rather on two other subsections of § 1252. App., *infra*, 19a. On appeal, the parties "agree[d] that the district court was mistaken" in relying on these provisions and the Sixth Circuit held that Mr. Rranxburgaj's claims did "not fall within [their] ambit." *Id.* at 6a.

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeal Are Deeply Divided Over Whether § 1252(g) Prohibits Judicial Review of Legal Determinations Antecedent to an Agency's Exercise of Discretion

This Court has repeatedly emphasized the narrow scope of § 1252(g), but it has never analyzed what types of claims "arise from" the three categories of agency action listed in the provision. In the years since *AADC*, the courts of appeal have split over this issue—sometimes cleanly, at other times, fractured opinions from the circuits emerge. At least two circuits have concluded that only claims challenging an agency's discretionary authority can be said to "arise from" one of the three enumerated actions in § 1252(g). By contrast, at least two other circuits—now joined by the Sixth Circuit—have employed an expansive construction of "arising from," sweeping within the ambit of § 1252(g) not only challenges to an agency's discretionary authority but also challenges to the agency's antecedent legal determinations. Several circuits have mixed case law on this issue. In short, the "circuit courts disagree about how to interpret § 1252(g) . . . [and] there is no prevailing interpretation of the statute." Matthew Miyamoto, Comment, *Whether 8 USC § 1252(g) Precludes the Exercise of Federal Jurisdiction over Claims Brought by Wrongfully Removed Noncitizens*, 86 U. CHI. L. REV. 1655, 1672 (2019).

The Seventh and Ninth Circuits have interpreted the statutory phrase "arising from" to encompass only challenges to discretionary decisions made pursuant

to uncontested authority. These circuits have deemed claims that challenge antecedent legal determinations to fall outside § 1252(g)'s reach.

In *Fornalik v. Perryman*, the Seventh Circuit held that § 1252(g) did not bar review of an agency's denial of an adjustment of status application, which the noncitizen in question claimed was "incorrect as a matter of law." 223 F.3d 523, 531-32 (7th Cir. 2000). The court observed that, although the noncitizen "obviously want[ed] this court to stop the execution of a removal order, that fact [came] into the case only incidentally." *Id.* at 532. It went on to state that "[h]is claim is not that the Attorney General is unfairly executing a removal order, but rather that a prior, unrelated error makes his removal improper." *Id.*

The Ninth Circuit has consistently applied this reading of § 1252(g), including twice *en banc*. *See Cath. Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1150 (9th Cir. 2000) (en banc) (finding § 1252(g) applies only to discretionary decisions); *Hovsepian*, 359 F.3d at 1155 (same). For example, in *Barahona-Gomez v. Reno*, noncitizens sought a stay of removal to allow them to pursue their challenge to an agency directive that "order[ed] a halt to the issuance of decisions granting suspension of deportation . . . until further notice." 236 F.3d 1115, 1117 (9th Cir. 2001). Although the challenge could have been framed as one that arose from the "decision or action" to "adjudicate cases," the court held that § 1252(g) did not apply because the noncitizens' challenge was not directed at an exercise of agency discretion. *Id.* at 1118, 1120. Rather, their claims challenged a violation of an agency's "mandatory duties." *Id.* As another more recent example, the Ninth Circuit held in *Arce v. United States* that § 1252(g) did not preclude

jurisdiction to review a claim arguing that removal had been executed unlawfully in violation of a court-ordered stay. 899 F.3d 796, 800-01 (9th Cir. 2018) (citing, among other cases, *Hovsepian*, 359 F.3d at 1155).

In contrast, the Fifth and Eighth Circuits have read the "arising from" language in § 1252(g) far more broadly. These courts have defined "arising from" as "connected directly and immediately" to one of the three enumerated actions in the statute. *Silva*, 866 F.3d at 940 (quoting *Humphries v. Various Fed. USINS Emps.*, 164 F.3d 936, 943 (5th Cir. 1999)). As a result, they typically treat claims challenging an agency's antecedent legal authority as falling within the scope of § 1252(g). Both circuits have therefore held—in direct conflict with the Ninth Circuit—that they lack jurisdiction to review noncitizens' claims that removal was wrongly executed in violation of court-ordered stays. *Silva*, 886 F.3d at 940; *Foster v. Townsley*, 243 F.3d 210, 214-15 (5th Cir. 2001).[4]

Cases from other circuit courts similarly demonstrate the existence of widespread confusion over the scope of § 1252(g). The Third Circuit, for example, has held that § 1252(g) does not bar challenges to antecedent legal issues based on the

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[4] An unpublished opinion from the Tenth Circuit reaches a similar interpretation of § 1252(g). In *Namgyal Tsering v. U.S. Immigration & Customs Enforcement*, the court considered an immigrant's claim that ICE lacked legal authority to use false documents in effectuating his removal. 403 F. App'x 339, 341 (10th Cir. 2010). The court held that § 1252(g) barred review, concluding that § 1252(g) does not "appl[y] only to review of discretionary decisions by the Attorney General in these [three] areas," but also "to review of non-discretionary decisions." *Id.* (quoting *Foster*, 243 F.3d at 214).

INA—such as a claim that the agency lacks power under the statute of limitations to commence proceedings—but does bar challenges based on the Constitution or the APA. *Garcia v. Att'y Gen.*, 553 F.3d 724, 729 (3d Cir. 2009); *Tazu v. Att'y Gen.*, 975 F.3d 292, 298 (3d Cir. 2020).[5]

The Sixth Circuit's approach to § 1252(g)'s "arising from" language aligns with the Fifth and Eighth Circuits. The Sixth Circuit concluded that any claim related to a stay of execution would be one "arising from" ICE's decision to execute removal—regardless of whether the claim challenged the agency's exercise of its discretion or instead an antecedent legal determination made by it. App., *infra*, 11a ("[W]e discern no principled difference between the denial of an application for a stay of removal on the merits and a denial on procedural grounds."). The Sixth Circuit viewed some of the Ninth Circuit precedents described above as "unpersuasive," "distinguishable,"

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[5] A fractured approach to § 1252(g) also occurs in the case law of the Eleventh Circuit, which has cases pointing in different directions on the interpretation of "arising from." *Compare, e.g., Gupta v. McGahey*, 709. F.3d 1062, 1064 (11th Cir. 2013) (holding that § 1252(g) bars review of allegations of mistreatment related to the commencement of proceedings because "[s]ecuring an alien while awaiting a removal determination constitutes an action taken to commence proceedings"), *with Madu v. Att'y General*, 470 F.3d 1362, 1368 (11th Cir. 2006) (concluding that while § 1252(g) "bars courts from reviewing certain exercises of discretion . . . it does not proscribe substantive review of the underlying legal bases for those discretionary decisions and actions"), *and Canal A Media Holding, LLC v. U.S. Citizenship & Immigr. Servs.*, 964 F.3d 1250, 1255 (11th Cir. 2020) (holding, in concluding that § 1252(g) did not bar review, that a court must "focus on the action being challenged" rather than on whether it has "practical effect[s]" for one of the three challenged categories).

or "contrary to our precedent." *Id.* at 9a n.4, 10a-11a (describing *Arce*, 899 F.3d 796, as involving a different factual situation and rejecting the approach taken in *Hovsepian*, 359 F.3d at 1144). In so doing, the Sixth Circuit construed § 1252(g) far too broadly.

II. The Sixth Circuit Erred in Its Broad Reading of § 1252(g), Which Only Bars Review of Claims "Arising From" Certain Discretionary Agency Decisions

The plain meaning of "arising from," the well-settled presumption in favor of judicial review, and this Court's prior cases involving § 1252(g) require that it be read narrowly. Yet the government has persuaded several circuits to take a broad view of claims said to "arise from" certain agency actions. The result is: important legal determinations by executive agencies are now shielded from federal court review, as long as the claims challenging them are connected—somehow—to the commencement of proceedings, adjudication of cases, or execution of removal. Mr. Rranxburgaj's case illustrates the problematic nature of this approach. To correct it, granting certiorari here is warranted.

A. Core Canons of Statutory Construction Require a Narrow Reading of "Arising From"

This Court has repeatedly emphasized that § 1252(g) is narrow. *AADC*, 525 U.S. at 487; *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (plurality opinion). Indeed, this Court's precedents have instructed that § 1252(g) "applies *only* to [the]

three discrete" discretionary decisions or actions to which it is limited: the commencement of proceedings, the adjudication of cases, and the execution of removal orders. *AADC*, 525 U.S. at 482 (emphasis added); *see also Jennings*, 138 S. Ct. at 841. This approach accords with the "well-settled" and "strong presumption" in favor of judicial review of administrative action. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496, 498 (1991). This presumption has been "consistently applied" to immigration statutes, including, most recently, during this Court's last term. *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (internal citation omitted).

The Court's admonitions for a narrow construction of § 1252(g) and the strong presumption in favor of judicial review offer important implications for the textual requirement that claims "arise from" an agency's discretionary decision to initiate action with respect to one of the provision's three categories. This textual requirement sets independent limits on the reach of § 1252(g).

"Arising from" requires more than just a connection between the claims and the discretionary agency decision or action; rather, the claims must *originate* from that decision or action. *See* Webster's Third New International Dictionary 117 (1961) (defining "arise" as "originate from a specified source"). That is, the discretionary decision or action must be the heart of the claim—it is not enough for one to be merely linked to the other. Moreover, it bears emphasizing that it is the legal *claims*, not the challenged action motivating the suit, that must "arise from" the agency action to execute removal (or commence proceedings or adjudicate cases). 8 U.S.C.

§ 1252(g); *see also Fornalik*, 223 F.3d at 531-32 (observing that, analogous to the statute giving rise to federal question jurisdiction, "§ 1252(g) is applicable only where the alien's well-pleaded complaint is based on one of [the] three listed factors"). Read with the strong presumption in favor of judicial review, the limiting power of this language is even more compelling.

Notably, a plurality of this Court recently held that the phrase "arising from" in a neighboring provision to § 1252(g) must be narrowly interpreted and excludes pure questions of law that are not integral to the actions named in that provision. *Jennings*, 138 S. Ct. at 840-41 (2018). *Jennings* considered the scope of 8 U.S.C. § 1252(b)(9), which provides that judicial review of all claims "arising from any action taken . . . to remove an alien from the United States . . . shall be available only in judicial review of a final order [of removal]." The Court held that this provision did not strip the federal courts of jurisdiction over a challenge to long-lasting detention pending removal. *Jennings*, 138 S. Ct. at 840; *see also id.* at 876 (Breyer, J. dissenting) (reaching the same result). Writing for the plurality, Justice Alito accepted that the detention amounted to "action[s] taken to remove [plaintiffs] from the United States." *Id.* at 840. But he nonetheless concluded that the "questions of law" raised by the plaintiffs in challenging their detention did not "arise from" these actions. *Id.* "The question is not whether *detention* is an action taken to remove an alien, but whether *the legal questions* in this case arise from such an action." *Id.* at 841 n.3. Justice Alito explained that "th[e] legal questions [in the case] are too remote from the actions

taken to fall within the scope" of the statutory provision. *Id.*

Similar reasoning underlies the approach of those circuits that have interpreted § 1252(g) not to prohibit judicial review of challenges to an agency's legal determinations that are antecedent to exercises of discretion with respect to the provision's three enumerated categories. Unlike challenges to discretionary actions, challenges to antecedent legal determinations are typically one or more steps removed from the commencement of proceedings, adjudication of cases, or execution of removal orders. Put differently, challenging the wisdom of ordering chicken over steak is a step removed from a challenge to the person's ability to order anything in the first place. A claim that an agency has established an unlawful policy of suspending deportations or violated a court-ordered stay may be said to be "connected to" the three enumerated decisions or actions, but such claims do not "arise from" them and thus do not impede ordinary agency discretion.

In fact, the agency's *own regulations* recognize a place for federal court jurisdiction over certain claims that prevent the execution of removal. 8 C.F.R. § 241.3 provides that the "filing of . . . a petition or action in a Federal court seeking review of the . . . execution of an order of removal shall not delay execution of the Warrant of Removal except upon an affirmative order of the court." This regulation is reconcilable with § 1252(g) only if there is a category of claims that can address the execution of removal yet not "arise from" it; otherwise, there would be no basis upon which a court could issue an affirmative order delaying execution of an order of removal.

By contrast, interpreting "arising from" to sweep in legal determinations antecedent to an agency's discretionary decision to commence proceedings, adjudicate cases, or execute removal orders is a result that "no sensible person could have intended." *Jennings*, 138 S. Ct. at 840 (internal quotations and citations omitted). This approach reads § 1252(g) broadly rather than narrowly. It ignores the well-settled presumption in favor of judicial review. And it goes far beyond § 1252(g)'s purpose, as recognized in *AADC*, of protecting against "attempts to impose judicial constraints upon prosecutorial discretion." 525 U.S. at 485 n.9. Indeed, under the broad reading of "arising from" now adopted by several circuits, ICE can now do what prosecutors may not: it can flout court-imposed stays of execution while evading accountability for its actions. *Silva*, 866 F.3d at 940; *Foster*, 243 F.3d at 212. Such an interpretation transforms the limited carve-out from judicial review set out by Congress into a blanket invitation for executive overreach.

B. Mr. Rranxburgaj's Claims Do Not "Arise From" ICE's Decision to Execute His Removal

Contrary to the broad reading of § 1252(g) adopted by the Sixth Circuit, Mr. Rranxburgaj's claims under the APA do not "arise from" ICE's decision to execute his removal. It is true that the decision to execute his removal was the backdrop against which his claims emerged, and his underlying objective is to remain with his severely ill wife. Yet like other challenges to an agency's antecedent legal determinations, Mr. Rranxburgaj's claim does not flow from ICE's

discretionary actions. *His challenge is not to ICE's decision to execute his removal, but rather to the legal error it committed in designating him a fugitive.* Rolling back this designation will not stop ICE from making discretionary decisions regarding the execution of his removal. What it will do is enable ICE to consider his stay application in line with the discretionary parameters laid out in 8 C.F.R. § 241.6.

The heart of Mr. Rranxburgaj's complaint is that ICE lacked the authority to designate him a fugitive.[6] There is a well-developed (though not uniform) body of case law in the federal courts about the circumstances under which ICE can apply this designation and thus trigger the fugitive disentitlement doctrine. Although the Sixth Circuit has not addressed this issue, several circuits have held as a matter of law that this doctrine cannot disentitle an immigrant from seeking relief when his whereabouts are known to authorities, as Mr. Rranxburgaj's were here. *Sun v. Mukasey*, 555 F.3d 802, 805 (9th Cir. 2009); *see also Zhou v. Att'y Gen.*, 290 F. App'x 278, 281 (11th Cir. 2008); *Nnebedum v. Gonzales*, 205 F. App'x 479, 480-81 (8th Cir. 2006). And even those circuits that have held that the fugitive disentitlement doctrine can apply where an individual's whereabouts are known, none have applied it simply for a missed check-in. *Bright v. Holder*, 649 F.3d 397, 399-400 (5th Cir. 2011) (applying the doctrine where the individual failed to

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[6] ICE made clear that Mr. Rranxburgaj's stay application was moot because it deemed him a "fugitive" under the fugitive disentitlement doctrine. *See* Brief of the United States at 17, *Rranxburgaj v. Wolf*, 825 F. App'x 278 (6th Cir. 2020) (No. 19-2148) (arguing that ICE's "application of the doctrine" was justified).

comply with an order to surrender); *Sapoundjiev v. Ashcroft*, 376 F.3d 727, 729-30 (7th Cir. 2004) (same).

In designating Mr. Rranxburgaj a fugitive, ICE erroneously applied the fugitive disentitlement doctrine, deciding a legal question that the Sixth Circuit had not yet decided, and on which other circuits disagree. Mr. Rranxburgaj now seeks review of this determination. His rejected stay application has a connection to the execution of his removal, in that his ultimate goal is not to have removal executed (although, pursuant to 8 C.F.R. § 241.6, stay applications can be filed any time after a final order of removal is entered and regardless of whether ICE has decided to execute removal). But his *claim*—the legal question he raises for federal court review—does not "arise from" the execution of his removal. Indeed, the Sixth Circuit decision underscored that Mr. Rranxburgaj's stay application "did not challenge the validity of his final removal order." App, *infra*, 6a. Like claims raising a violation of a statute of limitations or disregard of a court-ordered stay, Mr. Rranxburgaj challenges an antecedent legal determination: the federal common law standard for defining a fugitive. His claim "does not challenge the Attorney General's discretionary authority, even if the answer to that legal question—a description of the relevant law—forms the backdrop against which the Attorney General later will exercise discretionary authority." *Hovsepian*, 359 F.3d at 1155.

ICE's erroneous designation of Mr. Rranxburgaj as a fugitive prevented his stay application from ever receiving review on the merits pursuant to the mandate of 8 C.F.R. § 241.6. Thus Mr. Rranxburgaj's claims, rather than "arising from" the execution of the removal order, instead contest the agency's very

authority to erroneously designate him a fugitive. ICE's regulation on stay applications—which it must follow as a matter of obligation[7]—provides that the district director may grant the stay "in his or her discretion *and* in consideration of factors listed in 8 C.F.R. § 212.5 and [8 U.S.C. § 1231(c)]," which in turn refer to factors like humanitarian considerations. 8 C.F.R. § 241.6 (emphasis added). By improperly designating Mr. Rranxburgaj a fugitive and thereby dismissing his application as "moot," ICE failed to follow its own process for reviewing stay applications, including considering any of the requisite factors regarding the adjudication of stay applications delineated in 8 C.F.R. § 241.6.

In seeking review of ICE's determination that he is a fugitive, Mr. Rranxburgaj raises an issue that comes up in many areas of immigration law. The scope of the fugitive disentitlement doctrine has been litigated in a myriad of immigration contexts, not just in connection to the commencement of proceedings, the adjudication of cases, or the execution of removal orders. *See, e.g.*, *Sun v. Mukasey*, 555 F.3d at 805 (rejecting application of the fugitive disentitlement doctrine in a case pursuing the reopening of removal proceedings); *Zhou*, 290 F. App'x at 281 (rejecting application of the fugitive disentitlement doctrine in a petition for review of the BIA's denial of an asylum

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[7] An agency's obligation to follow its own procedures is a long-standing principle of administrative law, including in the immigration context, at least where the procedures implicate individual rights. *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954), *abrogated on other grounds as recognized in Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1980 (2020) (holding that the Board of Immigration Appeals lacked the discretionary authority to act in contravention of its own promulgated regulations).

application). A holding that Mr. Rranxburgaj's challenge to his fugitive status "arises from" the execution of his removal would transform a narrow limitation on judicial review into an authorization to disregard general legal rules for immigration law established by the federal courts.

III. This Case Presents an Important Question and Is the Ideal Vehicle for Addressing It

A. The Jurisdiction of the Federal Courts to Review Agency Action Is a Matter of Exceptional Importance

The Sixth Circuit's broad interpretation of § 1252(g) has significant consequences for the balance of power between federal courts and executive agencies. By bringing within the scope of § 1252(g) not only challenges to an agency's discretionary decisions but also challenges to antecedent legal determinations, the Sixth Circuit insulates a wide range of agency action from judicial review. The interpretation of § 1252(g) is therefore a question of exceptional importance, as the answer will determine the extent to which courts across the country may review allegations of executive overreach.

Judicial review provides an important "check" that maintains the separation of powers between the nation's three equal branches of government. *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 76 (2015) (citing *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 124 (2015) (Thomas, J.)). Indeed, the notion of a robust separation of powers "was not simply an abstract generalization in the minds of the Framers." *INS v. Chadha*, 462 U.S. 919, 946 (1983) (citing *Buckley v.*

Valeo, 424 U.S. 1, 124 (1976) (per curiam)). Rather, separating powers among the three equal branches is foundationally important to the nation's system of governance. As James Madison explained in Federalist No. 47, "the legislative, executive, and judiciary powers ought to be kept as separate from, and independent of, each other as the nature of a free government will admit; or as is consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of unity . . ." The Federalist No. 47 (James Madison).

To this end, "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Garner*, 387 U.S. 136, 141 (1967) (internal citations omitted). The importance of judicial review is particularly salient in situations such as Mr. Rranxburgaj's, where agencies wield what is traditionally a judicial power: the right to make individualized determinations. This further reinforces the need to interpret jurisdiction-stripping statutes narrowly, as "we simply cannot compromise when it comes to our Government's structure." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2219 (2020) (Thomas, J., dissenting); *see also id.* at 2216 ("[Congress] cannot authorize the use of judicial power by officers acting outside of the bounds of Article III" (citation omitted)).

The "need to divide and disperse power in order to protect liberty" has long animated the Court's approach to separation of powers in the immigration context. *Chadha*, 462 U.S. at 950. The Court has thus "consistently applied" the presumption in favor of judicial review to immigration statutes, even emphasizing its importance last term in *Guerrero-*

Lasprilla. 140 S. Ct. at 1069. It therefore defies this Court's precedent to construe § 1252(g) so broadly as to wholly eliminate judicial review for challenges to an agency's very authority. Indeed, a broad reading of § 1252(g) strips federal courts of their ability to provide a "check" on executive power and authority in an area of the law that not only touches many lives but is also ripe for abuse of executive power. *DOT*, 575 U.S. at 76.

Under the broad reading of § 1252(g) adopted by several circuits, none of ICE's actions and decisions connected to the provision's three enumerated categories are reviewable—even where these actions and decisions stemmed from erroneous antecedent legal determinations, including but not limited to a misapplication of federal common law (as is the case here) or the use of falsified records (as in *Tsering*, 403 F. App'x at 341). Such a broad reading gives executive agencies too much untrammeled power. It would shield ICE from judicial oversight when it establishes an unlawful policy of suspending grants of relief from removal. It would shield ICE from judicial oversight when it violates a court-ordered stay. And, as here, it would shield ICE from judicial oversight when it erroneously makes a legal determination that belongs to the federal judiciary. A narrow reading of § 1252(g), by contrast, would properly adhere to the plain meaning of "arising from" and limit the potential for such agency abuses.

B. This Case Is an Excellent Vehicle for Determining the Scope of § 1252(g)

For several reasons, this case is an ideal vehicle to address the scope of § 1252(g). First, the case raises

the legal question cleanly, as the facts are clear and uncontested. Second, this question was fully presented and addressed below, with the Sixth Circuit concluding that even challenges to an agency's antecedent legal determinations can be said to "arise from" a discretionary decision to execute removal. Third, given that this issue has reached—and vexed—many circuit courts in the twenty-plus years since this Court last considered § 1252(g) at length, the question is ripe for consideration.

Granting this petition would allow this Court to firmly establish the distinction between challenges to an agency's discretionary decisions and challenges to its antecedent legal determinations. In doing so, the Court would ensure that judicial review is available for noncitizens who otherwise could have no remedy for many kinds of lawless agency action. The time is ripe for this Court to address this question, establish precedent for the lower courts, and allow Mr. Rranxburgaj's claim to proceed to the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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